UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIRST STUDENT, INC.

and

Cases 8-CA-62611
8-CA-64827

TEAMSTERS LOCAL UNION NO. 413
A/W INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Sharlee Carrion-Cendrosky and *Rudra Choudury, Esqs.,*
for the Acting General Counsel.

Raymond Walther, Thomas Secrest and *Melissa Hailey Esqs.,*
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Marysville, Ohio on April 30 and May 1, 2, and 3, 2012. The Teamsters Local Union No. 413 a/w International Brotherhood of Teamsters (the Union) filed the charge in Case 8-CA-62611 on August 15, 2011, and filed an amended charge on October 28, 2011. [1] The Union filed a charge in Case 8-CA-6 4827 on September 20, 2011, and filed an amended charge on October 26, 2011. The General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing complaint on March 29, 2012.

The complaint alleges that the Respondent, by Nicole George, at the Respondent's Marysville, Ohio facility engaged in the following conduct violative of Section 8(a)(1) of the Act by: on or about June 7, 2011, coercively informing employees, and thereby adopting an unlawfully broad and discriminatory rule, that she did not want to hear anymore talk about the Union; in the middle of July, 2011, creating the impression that an employee's union activity was under surveillance; on or about July 27, 2011, telling an employee, and thereby adopting an unlawfully broad and discriminatory rule, that she was not permitted to talk with anyone from the Union; on or about July 27, 2011, impliedly threatening employees with unspecified reprisals and adopting an unlawfully broad and discriminatory rule by instructing employees to keep quiet about union business and that they were not permitted to talk with union representatives; and impliedly threatening employees with unspecified reprisals by informing them that she did not want them to engage with the Union because Union County would cancel its contract with

[1] All dates are in 2011 unless otherwise indicated.

the Respondent; on or about July 27, 2011, threatening employees with job loss by stating to employees that they were not permitted to talk about the Union and that employees would be fired if they did so; and on or about July 27, 2011, coercively instructing employees to remain on the Respondent's property between routes to discourage them from talking with union representatives engaged in handbilling.

The complaint was amended at the hearing to allege that Theresa Ritchie, in a conference call on July 27, 2011, violated Section 8(a)(1) of the Act by informing employees that they were not permitted to talk to the Union.[2]

The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by: on or about June 13, 2011, disciplining Claire Houdashelt; on or about June 15, 2011, demoting Houdashelt from the position of on bus instructor (OBI); on September 29, 2011, issuing Houdashelt a 3-day suspension; and on September 30, 2011, terminating Houdashelt. The complaint also alleges that on or about July 25, 2011, the Respondent violated Section 8(a) (3) and (1) by terminating employee Pennie Ingram. Finally the complaint alleges that on or about July 27, 2011, the Respondent discriminatorily selected and prevented employee Gary Warnick from working at the Respondent's Marysville, Ohio facility.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, has an office and place of business in Marysville, Ohio, where it is engaged in transportation services. Annually, the Respondent, in conducting its business operations, derives gross revenues in excess of $500,000 and purchases and receives at its Marysville, Ohio facility goods in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in

[2] At the hearing, the Respondent objected to the amendment on due process grounds. In granting the motion to amend the complaint, I note that Section 102.17 of the Boards Rules and Regulations permit complaint amendments "upon [terms that] may seem just" and that an administrative law judge has wide discretion in permitting complaint amendments. *Empire State Weeklies, Inc*., 354 NLRB No. 91 at sl. op. p.2 (2009). The amendment was made during the Acting General Counsel's case in chief before the Respondent presented any witnesses. In addition, I gave the Respondent additional time to prepare its defense to this amendment. While the Respondent objected to the substantive allegation of the amendment, it admitted that Ritchie is a supervisor within the meaning of the Act.

[3] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probability the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950) rev'd on other grounds 340 U.S. 474 (1951); J. *Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007).

commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent operates bus transportation services throughout the United States for local government entities. In Ohio the Respondent provides bus services in seven locations, including the Marysville facility. The Respondent's largest operation in Ohio is in Cincinnati where it employs approximately 600 employees in providing school bus transportation. In Columbus, Ohio, the Respondent employs approximately 300 employees in providing transportation to the Columbus public schools. In October 2011, the Respondent became signatory to a collective-bargaining agreement with Teamsters Local 413 at its Columbus facility. The Respondent's employees at its Cincinnati facility are also represented by the Teamsters Union.

At the Marysville facility, the Respondent has a contract with the Union County Board of Developmental Disabilities (UCBDD) to provide two forms of transportation services. The Respondent provides bus transportation to special-needs preschool students attending the Harold Lewis School. In addition, the Respondent transports disabled employees through the use of specially equipped vans to U-Co. Industries, which is operated by UCBDD. There are approximately 20 employees employed at the Marysville facility.

The Respondent’s freedom of association policy dated February 2, 2011 (GC Exh. 27, App. C) states that the Respondent will "[r]efrain from management conduct, whether written or verbal which is intended to influence an employee's view or choice with regard to labor union representation. In particular during union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management."

In June 2011, the Respondent and the International Teamsters Union executed a national master agreement covering over 240 of the Respondent’s facilities nationwide which is effective by its terms from June 1, 2011, through March 31, 2015. This agreement sets forth many of the basic terms and conditions of employment at facilities where employees are represented by the Teamsters Union. The freedom of association policy is attached to this agreement as an appendix. The Respondent also bargains about local issues at each individual facility and enters into local supplemental agreements.

Nicole George has been the location manager of the Respondent's Marysville, Ohio facility since March 2011, and is the only statutory supervisor at the site. Area General Manager Scott Turney is responsible for the Respondent's Ohio operations and is George's direct supervisor. UCBDD Service Director Rick Morris is responsible for coordinating transportation services with George. His office is located on the same grounds as the Respondent's facility and the Harold Lewis School.

The Union Campaign Begins

Union Representative Keith Pennington credibly testified that in December 2010 he called Marysville employee Claire Houdashelt to inform her that the Union had an active organizing campaign going on at the Columbus facility and to find out if there was any interest at the Marysville facility regarding the Union. Pennington had received Houdashelt's name from her son-in-law, who was a driver at the Respondent's facility in Columbus. Houdashelt testified that she recalled speaking with Pennington by phone at some point but could not remember when it occurred. She did not testify regarding any specifics of the conversation and there is no evidence that she took any action regarding the Union at that time.

In May 2011 employee Pennie Ingram developed an interest in having a union represent the employees at the Marysville facility.[4] Ingram had a conversation with her brother-in-law who mentioned that she may wish to contact Teamsters Local 413 (the Union). In late May, Ingram spoke to Houdashelt by telephone regarding union representation and Houdashelt was supportive of the idea. Also in late May, Ingram spoke to fellow employees Ben Kirkendall and Brenda Cox about whether they would have any interest in having union representation at the Marysville facility. These two conversations occurred at the Marysville facility during a break period. Both employees indicated they had interest in the idea. Ingram also sent a text message to another employee regarding obtaining union representation but that employee never responded.

In late June 2011, Ingram looked at the Union's website to see who in the Union she should contact about obtaining information regarding union representation. On June 28 Ingram sent an email to Bud Raver, the Union's organizing director, seeking information regarding obtaining union representation at the Marysville facility. (GC Exh. 18.) On approximately July 9 or 10, Ingram spoke to Kirkendall while they were at the Marysville facility and told him she was trying to arrange a meeting with the union representative and asked him if he would be interested in attending. Kirkendall indicated that he would be interested in coming. During the same time period Ingram also spoke to employees Brenda Cox, Amy Hamby, and Amy Endsley about their interest in attending a union meeting and all three indicated that they would be interested in doing so. These conversations occurred at the Marysville facility during breaktime. On approximately July 12, Raver called Ingram and they arranged for a meeting to be held on July 15 at the Big Boy restaurant in Marysville for employees who were interested in organizing a union. After scheduling the meeting with Raver, Ingram spoke to Kirkendall, Cox, and Endsley at work to advise them of the time and place of the meeting. Ingram informed Houdashelt at the time and place of the meeting by telephone, as Houdashelt was on medical leave.

On July 15, Ingram and Houdashelt met with Raver and two other union representatives, Keith Pennington and Dave Daniels, at the Big Boy restaurant in Marysville to discuss organizing the Marysville facility. None of the other employees that Ingram had spoken to attended the meeting. Both Ingram and Houdashelt signed a union authorization card at this meeting. Both employees were given blank authorization cards and union literature to give to

[4] My findings regarding the beginning of the union campaign are based primarily on the uncontroverted testimony of Ingram, who I find to be a credible witness. She testified in a sincere and forthright manner on both direct and cross-examination and the detail in which she recalled events establishes that it is reliable testimony.

other employees if they were interested. The meeting concluded at approximately 11 a.m. At the conclusion of the meeting, the union representatives drove their van to the Marysville facility to observe physical layout in order to determine an appropriate place to handbill. The van had "Teamsters Local 413" painted on the side in large print along with the Teamster emblem. The names of the local officers were also painted on the side of the van. The union agents drove into the YMCA parking lot next to the Respondent's facility and circled around it in order to observe the Respondent's facility. As they drove past, they came within 100 feet of George as she was sitting outside of the Respondent's facility at a picnic table located by the door.

At the Marysville facility on July 18, Ingram spoke to Kirkendall, Cox, Endsley, and Marra Eastman about the Union. When Ingram asked Kirkendall why he had not attended the meeting, he indicated that he had to perform some household repairs. When Ingram asked Endsley why she had not come to the meeting, Endsley replied that she was not going to talk about the Union. Cox was leaving the facility when Ingram spoke to her and told Ingram that she would speak to her about the Union later. When Ingram asked Eastman if she would be interested in having a union at Marysville, Eastman said that she was interested and that she would like to get some literature and sign an authorization card. Ingram told Eastman that she had authorization cards and union literature in her car and asked Eastman if they could meet after work. Eastman agreed to do so. After work Ingram and Eastman went to Ingram's car in the parking lot at the Marysville facility, where Ingram gave Eastman some union literature and Eastman signed an authorization card.

The Initial 8(a)(1) Allegations

Paragraph 8(A) of the complaint alleges that on or about June 7, 2011, the Respondent, through Nicole George, violated Section 8(a (1) of the Act by coercively informing employees that she did not want to hear anymore talk about the Union and thereby adopted an unlawfully broad and discriminatory rule regarding discussion about the Union.

In support of this allegation, the Acting General Counsel relies solely on the testimony of Houdashelt. In this connection, Houdashelt testified that on June 9 she was in the breakroom at the Respondent's Marysville facility along with employees Ingram, Albert Hornsley, Amy Hamby, and Betty White. Houdashelt testified that the employees were discussing problems they had regarding some working conditions and began to discuss getting a union to represent them. Houdashelt indicated that this was the first discussion that employees had regarding a union at work. According to Houdashelt, George walked into the breakroom said that the employees were not allowed to be talking about a union "in the building." Houdashelt testified that none of the employees responded and they ceased their discussion regarding a union. At the hearing, George denied that she had told Houdashelt and other employees in June 2011 to not speak about a union. Importantly, in my view, Ingram did not testify about this alleged statement by George, although according to Houdashelt, Ingram was present in the breakroom when George made her statement. In fact, Ingram testified that she never heard George say anything about a union prior to Ingram's termination on July 25 (Tr. 278).

Since I find Ingram to be a credible witness, I am convinced that if she was present when George instructed employees not to talk about the Union she would have testified to such an event at the hearing. The fact that she did not corroborate Houdashelt's testimony on this point is

of great concern to me. According to Ingram, after some initial conversations in late May, she did not speak to employees about the union again until after she had sent her email to Raver on June 28. Houdashelt displayed deficiencies as a witness. At times she could not recall the specific details of an event. At other times she appeared to testify in a manner calculated to help her case. I find that her testimony regarding the alleged June 7 incident falls into the latter category. I am unwilling to rely on Houdashelt's testimony, uncorroborated by Ingram, that George threatened employees on June 7 that they could not talk about the Union. I credit George's denial of the conversation and therefore dismiss paragraph 8(A) of the complaint.

Paragraph 8(B) of the complaint alleges that in approximately mid-July, 2011, the Respondent, through George, unlawfully created the impression that an employee' s union activity was under surveillance.

In support of this allegation, Ingram testified that during the week of July 18 to 22, George appeared to follow her around the Respondent's Marysville facility, as Ingram performed her duties. Ingram testified specifically regarding an incident that occurred that week while Ingram was in the garage area performing a pre-trip inspection of her bus period Ingram explained that before every route, the driver has to perform a detailed inspection of the vehicle. Ingram testified that on this occasion she was on her hands and knees looking underneath the bus to insure there were no leaks or anything broken, when she noticed George standing behind the next bus. Ingram claimed that she determined it was George by virtue of the shoes that the individual was wearing. After Ingram finished checking her bus, she observed George in the garage area but Ingram did not speak to her. Ingram also testified that on two occasions that week George was standing in the hallway outside the breakroom, when Ingram was speaking to other employees in the breakroom.

George testified that she did not follow Ingram around the Marysville facility the week of July 18 to 22. George also testified that she was unaware of any union activity that Ingram or any other employee may have engaged in during that week. I credit George's denial that she followed Ingram around the Marysville facility the week of July 18, but I do not credit her denial that she was unaware that Ingram was a supporter of the Union at that time. The Respondent's facility in Marysville is quite small. It is composed of George's office, a hearing and dispatch office, the breakroom, two restrooms, and an attached shop and garage area. The ladies restroom door is located immediately across the hallway from the door to the breakroom. George testified as a regular part of her duties she walked through the entire facility daily. George's testimony on this point is corroborated by the Respondent's "Daily Safety & Health Walk-through Guide" (R. Exh. 10) which, in checklist form, mandates a daily inspection of the Respondent's facility. I note the checklist specifically refers to supervisory assistance in pre-trip inspections. George testified that she performs the daily inspection and it is only when she is not present that the dispatcher or the OBI perform such duties. Given the layout of the Respondent's facility, George passes by the breakroom every time she uses the women's restroom. Under these circumstances, I conclude that George's presence in the hallway outside the breakroom on two occasions and her presence in the garage area occurred during the regular performance of her duties and did not involve an attempt to engage in surveillance, or create the impression of surveillance, of Ingram's union activities. Accordingly, I shall dismiss paragraph 8(B) of the complaint.

In making this finding, however, I do not credit George's testimony that she was not aware of Ingram's union support prior to July 22, the date that Ingram was discharged. George, at times, appeared to testify in a manner designed to bolster the Respondent's defense and I find that her testimony on this point was one of those occasions.[5]

The Board has long held, pursuant to its small plant doctrine, that when employees carry out protected activities at work and the employer has a small work force an inference may be drawn that the employer is aware of such activity. *Pro-Spec Painting, Inc*., 339 NLRB 946, 950 (2003); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003); *D & D Distribution Co*., 277 NLRB 909 (1985), enfd. 801 F.2d 636 (3d Cir. 1986); *Wiese Plow Welding Co.,* 123 NLRB 616 (1959). However, the Board has indicated it is appropriate to draw this inference in somewhat limited circumstances. In *Ralston Purina Co*., 166 NLRB 566, 570 (1967), the Board reiterated the principle set forth in its decision in *Hadley Mfg. Corp*., 108 NLRB 1641, 1650 (1954), that:

> [T]he mere fact that Respondent's plant is of a small size, does not permit a finding that Respondent had knowledge of the union at duties of specific employees, absent supporting evidence that the union activities were carried out in such a manner, or at times that in the normal course of events, Respondent must have noticed them

As I have noted above, Ingram had discussions with several employees about the Union at the Respondent's facility from approximately July 8 through July 18. Given the small size of the office area in the Respondent' s facility in Marysville and the relatively small size of the work force, approximately 20 employees, it is reasonable to infer that George became aware that Ingram was the major proponent of organizing the employees at the Marysville facility by July 19. Accordingly, I conclude that, at least since July 19, George was aware that Ingram was the primary proponent of the Union at the Marysville facility.

The Alleged Discriminatory Discharge of Ingram

Paragraphs 9 of the complaint alleges that the Respondent terminated Ingram on July 25, 2011, in violation of Section 8(a)(3) and (1) of the Act.

Facts

Ingram began her employment with the Respondent as a driver at the Marysville facility in October 2005 and had never been disciplined prior to the events at issue herein. As set forth above in detail, in May 2011, she became interested in organizing a union at the Respondent's Marysville facility. In May, she spoke to Houdashelt and two other employees about seeking union representation. To that end, Ingram sent an email to the Union's organizing director on June 28 and in early July began to have discussions with employees about the Union during break times at the Respondent's facility that continued until she was discharged on July 25. On

[5] In discrediting George's testimony that she was unaware of any union activity among the employees by July 18, I have considered her implausible testimony that she never saw the Teamsters' van on July 15 as it circled in the adjacent YMCA parking lot and came within 100 feet of her.

July 15, she attended a meeting with union representatives at a restaurant in Marysville, where she signed an authorization card. On July 18, after work on the Respondent's premises, she obtained a signed authorization card from another employee.

On Friday, July 22, 2011, the Respondent conducted its annual "start up" meeting to review procedures for the upcoming school year. Pursuant to an established UCBDD policy, the Respondent's employees were not permitted to park in the front parking lot without permission. In this connection, UBCDD issued a letter dated January 27, 2011, to the Respondent setting forth the parking policy in detail (R. Exh. 11). Pursuant to this policy, the back parking lot was designated for the Respondent's employees. The letter from UCBDD indicates that while previously there may not have been a clear understanding about the parking policy, the letter was designed to eliminate any confusion . A copy of the letter was posted at the Respondent's facility. Since July 22 was the first day of work for new drivers, a UCBDD representative asked George to remind employees where they were permitted to park. At the beginning of the meeting, George made such an announcement. Ingram was present for the announcement.[6] At the hearing, Ingram admitted knowing that she was not permitted to park in the front parking lot.

During lunchbreak, Ingram left the facility, as employees were permitted to do. Ingram returned late and parked in the front parking lot. During the afternoon session George again reminded employees to park in the back lot. After the meeting was over, Ingram left hurriedly to be on time to perform her afternoon route and did not move her car before leaving. After being informed by a UCBDD employee that a car belonging to one of the Respondent's employees was parked in the front lot, George, on the CB radio she used to communicate with drivers, asked which employee was parked in front lot. Ingram responded that it was her and George asked Ingram to see her when Ingram returned from her route.

According to Ingram, when she went to George's office after completing her route, Mike Huff, the mechanic at the facility, was also present.[7] Ingram testified that George told her that she was being given a verbal reprimand for parking in front of the building. Ingram responded "okay." George then told Ingram that she was going to give her a written copy of the reprimand. The written verbal warning (GC Exh. 4) indicates the following under the "description of violation" section: "[P]arking in a non-authorized area. When employee was asked did she know she wasn't supposed to park there, she responded "Yes." She was running late." The warning was then signed by Ingram, George and Huff and George gave a copy of the warning to Ingram.[8]

I do not credit George's testimony that Ingram "snatched" the warning from her hand. Huff's testimony did not corroborate George's testimony on this point and Ingram specifically denied that she "snatched" the warning from George. For the reasons I have expressed, I find Ingram to be a more credible witness

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[6] I do not credit George's uncorroborated testimony that Ingram disrupted the meeting by purposefully dropping books on the floor from her table, creating a loud noise. George admitted that she had her back turned when the incident occurred and based her opinion regarding Ingram's intent on some vague testimony regarding Ingram's facial expression. (Tr. 723-724.)

[7] George testified it was her practice to have another individual present as a witness when she issues discipline to an employee.

[8] The complaint does not allege that the issuance of this warning to Ingram violated the Act.

Ingram testified that after George gave her a copy of the warning she left the office. Ingram read over the warning and decided she did not need to keep a copy of it since it would be maintained in her personnel file and threw it in the trash can in the hallway by the copy machine. Ingram testified that she did not see any other employees in the hallway at that time. Since it was the end of the workday, Ingram then left the facility and went home.

George had remained in her office after the meeting and did not observe Ingram throw the warning away (Tr. 790). George testified that Mike Hollis, the UCBDD janitor, reported to her that Ingram threw the warning in the trash can. According to George, dispatcher Sharon Griggs also reported to her that Ingram threw the warning away. Finally, George testified employees Amy Endsley and Sharon Parker came to her office and asked her "how much more of this are you going to take." According to George, Sharon Parker also reported that Ingram was laughing as she went out the door. George then went to the wastebasket and retrieved the warning.

Sharon Parker testified that as she was returning from her route on July 22 she looked out of the window of her van and observe Ingram smiling as she walked out of the door. Parker did not testify, however, that she reported this to George or made any comments to George about the incident. Sharon Griggs testified that she was in the dispatch office when she observed Ingram come out of George's office with a paper in her hand. According to Griggs, Ingram was laughing and threw the paper in the trash can. Griggs testified that she reported the incident to George. Hollis and Endsley did not testify at the hearing.

With respect to what occurred after Ingram left George's office on July 22, I do not credit Griggs that Ingram was laughing when she threw the warning in the wastebasket. I find Griggs' testimony to be implausible as Ingram did not strike me as a person who would find the issuance of a warning a joking matter. Ingram specifically denied that she was laughing and I credit her testimony as I find her to be a reliable witness on this point. In this connection, she testified consistently about this incident on both direct and cross-examination. I give no weight to Parker's observation of Ingram as she left the building that day. Parker was looking out of the door of her van at some distance. Even if Ingram was smiling at that point, I do not believe it to be relevant in assessing the reasons for discharge. As I noted above, Parker did not testify that she reported this incident to George or made any further comment to George about it.

After considering all the evidence on this matter, I find that reports were made to George by Griggs and Hollis that Ingram threw the warning away. I further find that Ingram was not laughing as she put the warning in the wastebasket. I specifically discredit George's uncorroborated testimony that Endsley and Parker commented on Ingram's actions. I find this testimony by George is an attempt to make the Respondent's case stronger than it is.

On Monday, July 25, Ingram reported for work at approximately 6 a.m., when George asked to see her. When Ingram entered George's office, Rick Morris of UCBDD was also present. George informed Ingram that she was terminated because she was insubordinate when she threw the warning away the previous Friday. Ingram responded "okay" and George asked her to sign the termination form that George had already prepared (GC Exh. 5). The form merely indicates that Ingram was terminated for insubordination. Ingram then left George's office.

Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and, at times, an antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089.

With respect to cases in which an employer's asserted reasons for the discharge are found to be pretextual, the Board does not apply the second part of the *Wright Line* analysis. In this connection, in *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), the Board indicated:

> However, if the evidence establishes that the reasons given for the Respondent's actions are pretextual -- that is, either false or not in fact relied upon -- the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*., 255 NLRB 722 (1981).[9]

In the instant case, the Acting General Counsel contends that the Respondent discharged Ingram because of her union activities in violation of Section 8(a)(3) and (1) of the Act and that the Respondent's asserted reasons for the discharge are pretextual. The Respondent contends that the Acting General Counsel has not established a prima facie case, because there is no evidence that the Respondent knew of Ingram's union support prior to her discharge. Alternatively, the Respondent contends that if I should find that there was knowledge of Ingram's union activity, her insubordinate conduct warranted discharge.

As set forth above, Ingram was the primary proponent of the Union at the Marysville facility. In this regard, Ingram initiated contact with the Union and arranged the July 15 meeting with the union representatives. She openly spoke to several employees about the Union at work and on July 18 obtained the signature of another employee on an authorization card. Admittedly there is no direct evidence of knowledge by a statutory supervisor of her union activity. However, as I have discussed above, given the fact that the Respondent's work force is composed of approximately 18 employees and since Ingram openly conducted union activity in the office area of the Respondent's Marysville facility, I draw the inference that George became aware of her union activity by July 19. I note that employees reported to George that Ingram

[9] In *Austal USA, LLC*, 356 NLRB No. 65 (2010), the Board reiterated that a *Wright Line* analysis is applicable in cases in which there is a finding that an employer's purported justification for its action is pretextual, but it is unnecessary to perform the second part of the analysis.

threw away her warning on July 22. I find this evidence of a tendency by employees to report to George on the activity of Ingram is supportive of the inference I draw that the union activity of Ingram would have been reported to George.

As I discuss in greater detail later, the Respondent committed violations of Section 8(a)(1) of the Act shortly after Ingram's discharge, thus indicating that it did possess animus regarding the union activities of its employees at the Marysville facility. Certainly, the timing of Ingram's discharge shortly after arranging the meeting with union representatives and openly discussing the Union with employees at work raises a strong inference that Ingram's discharge was discriminatorily motivated. *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). Accordingly, I find that the Acting General Counsel has established a prima facie case under *Wright Line* and the burden shifts to the Respondent to establish that it would have taken the same action against Ingram regardless of her union activities.

In its defense, the Respondent relies on George's testimony that, after discovering that Ingram had thrown her warning away, George felt embarrassed and belittled by Ingram's conduct and called her supervisor, Area Manager Turney, and reported the incident. According to George, Turney instructed her to contact Rick Kellerman, the human resources manager for the Respondent. George called Kellerman and reported to him what had happened regarding Ingram. George testified that "Rick Kellerman informed me that I would need to terminate on grounds of insubordination." (Tr. 735.) George also testified, however, that she terminated Ingram because she felt Ingram mocked her by the insubordinate act of throwing the warning in the garbage can (Tr. 735).

Turney testified that George, as the location manager, has the authority to discharge employees but must clear the decision with him and the human resources department. Turney testified that George discussed the events leading to Ingram's termination and that he supported the decision to discharge her (Tr. 927-928). Kellerman did not testify at the trial.

The record is somewhat unclear as to who actually made the decision to terminate Ingram. Turney's testimony indicates that George made the decision to terminate Ingram and that he concurred. In one instance, George testified that she terminated Ingram because of insubordination. George also testified, however, that Kellerman informed her she would have to terminate Ingram for insubordination. Thus, it is somewhat unclear as to whether George made the decision to terminate Ingram or whether Kellerman instructed her to do so. The lack of specificity regarding who made the decision to discipline an employee has been found by the Board to cast doubt on the truthfulness of an employer's explanation for disciplinary action. *Ferguson Enterprises, Inc*., 355 NLRB No. 189 at sl. op. pps. 11-12. (2010)

At minimum, however, George recommended that Ingram be discharged. The decision to terminate Ingram was made between the afternoon on Friday, July 22 and Monday, July 25 at approximately 6:00 a.m.when Ingram was given the discharge notice. The Respondent relied solely on the reports from other employees regarding the circumstances of Ingram throwing the warning away. George never spoke to Ingram before the decision was made to discharge her. Thus, Ingram was never given an opportunity to explain the circumstances regarding her actions in throwing away the warning. The Board has held that the failure to give employees in

opportunity to defend themselves before imposing discipline warrants an inference that the employer's motive was unlawful. *Embassy Vacation Resorts,* 340 NLRB 846, 849 (2003).

The fact is that shortly after beginning to organize a union at the Marysville facility and the Respondent becoming aware of Ingram's role in that effort, she was precipitously discharged. Such a precipitous discharge of a six-year employee with an unblemished work record prior to July 22, 2011, without giving her an opportunity to explain her actions, is highly suspect. In *Ferguson Enterprises*. supra, at sl.op.p. 12 the Board held that "suspicious timing coupled with the lack of an investigation into an incident supports a finding of discriminatory motivation." (Citations omitted.)

The summary discharge of Ingram for insubordination is quite different from the circumstances surrounding the discharge of Marilyn Chapman, the only other employee terminated for insubordination at the Respondent's Marysville facility. On June 8, 2011, Chapman was given a written warning by George for speeding through an apartment complex. On June 13, George terminated Chapman for insubordination. In the termination notice, George referred to a June 10, 2011 incident when Chapman disregarded a direct order from the dispatcher regarding the manner in which she should drop off children on her bus. In the termination notice, George also referred to four other disciplinary actions when Chapman had been informed of the Respondent’s policies and procedures. George noted, "Marilyn shows no concern about these procedures that have to be taken so we can operate safely on daily basis. Marilyn has been insubordinate in the past as far as speeding while operating a school bus and also when given direct orders from others." (GC Exh. 8.)

It is clear that the Respondent's approach to the alleged insubordinate action of Ingram was treated far differently from the insubordinate actions of Chapman. Chapman was given several opportunities to conform to the Respondent’s policies before she was discharged for refusing to follow them. Ingram was discharged without being given any opportunity to even explain her actions. The difference in treatment accorded Ingram is further evidence, in my view, of the pretextual nature of the Respondent's assertion that Ingram was discharged for insubordination.

In my view, the Respondent seized on Ingram's conduct in throwing away her warning as a basis for discharge, when the real motivation was her primary role in attempting to organize a union at the Marysville facility. I am not persuaded by the Respondent's argument that George would not discharge an employee for union activity because of her previous involvement in a Teamsters local, including acting as a union steward. At the time of the Ingram incident, George was a relatively new supervisor and was more stringent enforcing the Respondent's rules than her predecessor had been. When George learned that some employees’ response to her management style was to organize a union, I believe she took this as a personal affront. I also believe that when George discovered that Ingram threw away the parking warning that she was given on July 22 she seized on that incident to discharge her for union activity. I also do not accept the Respondent's arguments that its corporate philosophy of neutrality in a union organizing campaign establishes that it would not countenance the discharge of an individual for union activity. The existence of the policy does not establish that it is always applied. In this case, I am convinced that the managers involved did not abide by the policy and that, for the reasons

expressed above, the Respondent discharged Ingram because of her union activity in violation of Section 8(a)(3) and (1) of the Act,

The Events of July 27 and 28, 2011

Background

The Harold Lewis School was scheduled to start on July 27, 2011. One of George's duties is to determine the number of drivers that are needed to cover all of the bus routes. In July 2011, George determined that because of turnover and vacations the Marysville facility did not have sufficient drivers to cover all of the planned routes. George requested four substitute drivers from the Respondent's Columbus facility. Columbus drivers were available at that time since the Columbus schools were not yet in session. Theresa Ritchie, who was then the Respondent's Columbus operations manager, testified that the Columbus drivers are laid off during the summer school recess.

Pursuant to George's request, Ritchie selected Curtis McMorris, Kim Dukes, Stanley Vinson, and Ernest Pearson for temporary assignment to Marysville. Tabitha Scaggs was selected as an alternate. These employees were instructed to report to Marysville on July 26, 2011, the day before school started for "dry runs" without passengers so they could learn the routes. On July 25, 2011, George requested two more drivers from the Columbus facility because she was uncertain whether Houdashelt and Linda Hensley would return to work in time to start the school year. Since Ritchie had already designated Scaggs as a substitute, she needed to obtain one more driver. Ritchie had administrative employee Felice Foster call Gary Warnick and offer him a temporary assignment to Marysville. Warnick accepted the assignment, which he was informed could last until approximately August 5.

The six Columbus drivers met at the Columbus facility early in the morning of July 26 and were transported to Marysville. Warnick testified, without contradiction, that when the Columbus drivers arrived at the Marysville facility at around 7 a.m. they all went into the breakroom where two or three Marysville drivers were present. Warnick mentioned that the employees in Columbus had voted in the Union and were "settling the contract." Warnick opined that this is going to be a good thing for all of the Columbus employees and that the employees at Marysville may want to consider organizing a union. A couple of the Marysville employees, whose names he did not remember, said that they were trying to organize.

Houdashelt returned to work on July 26 and was assigned to work with Warnick (Tr. 505). On that date, Houdashelt was the driver and Warnick acted as a monitor on the "dry run." After the morning route on July 26 was finished, Columbus drivers Kim Dukes, Ernest Pearson, Tabitha Scaggs, Stanley Vinson, and Warnick were present with some Marysville employees in the breakroom. According to the uncontroverted and credible testimony of Vinson, Warnick stated that he liked Ritchie, the location manager in Columbus, but that if she talked to him like she talked to other people "he'd smack the shit out of her." (Tr. 955-956.) Warnick also told Scaggs that he knew that she liked to have sex with other women while her husband watched.[10]

[10] Warnick did not testify regarding these statements at the hearing.

George testified that on July 26, Marysville employees Betty White and Sharon Parker, as well as Vinson reported to her statements that Warnick had made that day (Tr. 739-740). Ritchie testified that no one called her that day regarding Warnick's conduct (Tr. 896). On the morning of July 27, McMorris called Ritchie to report Warnick's behavior. Ritchie then spoke to Dukes and Scaggs by phone regarding Warnick's conduct on July 26.[11]

On the morning of July 27 Ritchie and George spoke about the complaints they had received regarding Warnick's behavior the previous day. Ritchie requested that George arrange a conference call later that day between her, George, and the Columbus drivers who were working at Marysville.

On July 27, Houdashelt and Warnick were again assigned to work together. On the morning route, Houdashelt was the driver and Warnick acted as the monitor. At approximately 8:30 a.m. on July 27, Union Representatives Charles Schnell and Keith Pennington, along with Ingram, arrived at the Marysville facility to engage in informational handbilling regarding the Union on a public sidewalk located near the Respondent's Marysville facility. The sidewalk was located next to Charles Lane, a two lane road leading into the UCBDD property on which the Respondent's facility was located. At approximately 9 a.m., Houdashelt and Warnick were returning from their morning route to the Marysville facility, when they arrived in the area where the union agents and Ingram were attempting to pass out handbills. Warnick asked Houdashelt to stop the van to let him off, as he wished to speak to the union representatives. Houdashelt stopped the van to let Warnick off but she did not get out of the vehicle. Ingram approached the van and was speaking to Houdashelt when Houdashelt heard George instruct her over the CB radio to report to George's office. Houdashelt drove the van to the garage area and then reported to George's office. After Warnick finished his conversation with the union representatives, he walked the approximately 100 yards to the facility.

The Alleged Violations of Section 8(a)(1) on July 27, 2011

Paragraph 8(C) of the complaint alleges that on or about July 27, 2011, the Respondent, through George, told an employee that she was not permitted to talk with anyone from the Union and thereby adopted an unlawfully broad and discriminatory rule.

According to Houdashelt, when she reported to George's office after returning to the facility, Rick Morris of UCDDD was also present and George and Morris were looking out of the window in George's office toward the area of handbilling. Houdashelt testified that George told her that she had stopped illegally to let Warnick off of the van. When asked by counsel by the Acting General Counsel if George mentioned anything about the Union, Houdashelt answered, "I think she said something to the fact that we were not supposed -- I was not supposed to stop up there because of -- because that was the Union and we were not supposed to be talking to the Union." (Tr. 511.) Houdashelt then left George's office.

[11] The record contains signed statements dated July 26, 2011, by Skaggs (R. Exh. 14) and Dukes (R. Exh. 15) regarding the offensive statements made by Warnick on July 26.

George testified that when Houdashelt arrived at her office, George asked Houdashelt why she stopped her van at an unauthorized stop in front of the building. Houdashelt replied that Warnick wished to get off of the van. George told Houdashelt that while she was working she could not stop the vehicle for the Union or anyone else. George told Houdashelt, however, that on her own time she could do whatever she wanted to.[12]

As I indicated previously, both George and Houdashelt exhibited certain deficiencies as a witness. With respect to this allegation, I credit George's version of the conversation. George's testimony on this point was clear, sufficiently detailed, and was inherently plausible under the circumstances. Her demeanor reflected certainty with regard to what she told Houdashelt. On the other hand, Houdashelt's testimony indicated uncertainty as to what George specifically said to her.

It is clear that Houdashelt and Warnick were still on their route and were actively working when Houdashelt stopped the van and Warnick discussed union related matters with Schnell and Pennington. It is well settled that an employer may prohibit employees from discussing a union when employers are actively working. *Our Way*, 268 NLRB 394 (1983). An employer violates the Act, however, when employees are prohibited from discussing a union during working time but are free to discuss other subjects unrelated to work. *Stevens Construction Corp*., 350 NLRB 132, 133-134 (2007); *Teledyne Advanced Materials,* 332 NLRB 539 (2000). In the instant case, the precise issue is whether the Respondent acted lawfully when George instructed Houdashelt that she was not to stop her van for the Union or anyone else while she was working but that on her own time she could do as she wished. I find, based on the cases noted above, that George's instruction was lawful. Warnick asked Houdashelt to stop the van before the route was finished so that he could talk to nonemployee union representatives. In my view, prohibiting such conduct, on its face, is lawful.

Houdashelt testified that prior to July 27 drivers had stopped to pick up a "person" (presumably an employee) on Charles Lane who was walking to or from McDonald's and nothing was ever been done about it. However, there is no evidence that a statutory supervisor was aware of such an occurrence. Under these circumstances, there is insufficient evidence to establish that George's instruction to Houdashelt was a deviation from an existing policy of permitting drivers to stop and pick up or drop off other employees while on their routes. Accordingly, based on the above, I shall dismiss paragraph 8(C) of the Act

Paragraph 8(D) of the complaint alleges that on July 27, 2011, the Respondent, through George, impliedly threatened employees with unspecified reprisals and adopted an unlawfully broad and discriminatory rule when she coercively instructed an employee to keep quiet about union business, and coercively implemented an unlawfully broad and discriminatory rule by informing employees that they were not permitted to talk with union representatives; and impliedly threatened employees with unspecified reprisals when she informed employees that she did not want employees to engage with the Union because Union County would cancel its contract with the Respondent.

[12] Morris did not testify at the hearing because of a previously scheduled vacation. The parties reached a stipulation as to his testimony (Jt. Exh. 2), but the stipulated testimony does not refer to this meeting

In support of this allegation, the Acting General Counsel relies on the testimony of Warnick. According to Warnick, when he walked into the building after his conversation with the union representatives on the sidewalk, he saw Houdashelt leaving George's office. Warnick testified that Houdashelt seemed upset and said "she had just got the riot act" read to her by George for dropping him off to speak to the union representatives. Warnick decided to let George know that he had asked Houdashelt to let him off the van so he could speak with the union representatives and accordingly went to George's office. Warnick told George it was his fault that Houdashelt stopped because he had asked her to and explained that he had wished to speak to the union representatives. George replied, "[T]hat's fine, I guess, but I don't want you involving my employees with the Union" and added that she did not want Warnick to talk to the Marysville employees about the Union. George also indicated that if employees spoke about the Union they would all lose their jobs because UCBDD would cancel the contract (Tr. 355-356). Warnick replied that he would speak to anyone he wanted to and the left George's office and went to the employee breakroom.

George testified generally that she never told any employees not to speak to the Union. She also denied telling employees that if they spoke to the Union, the Respondent will lose its contract with Union County.

I credit Warnick's version of this conversation. His testimony was sufficiently detailed to have a ring of authenticity about it. He testified in a forthright manner and displayed a resolute demeanor regarding this incident. George's denial was somewhat perfunctory and devoid of any detail. Based on the credited testimony, I find that the Respondent, through George, violated Section 8(a)(1) of the Act by informing Warnick that she did not want him to involve the Marysville employees with the Union or even talk to them about it. Such statements clearly coerce employees in the exercise of their Section 7 rights. *Smithfield Packing Co*., 344 NLRB 1, 2 (2004). I do not find, however, that the single admonition of one supervisor is sufficient to establish an unlawfully broad and discriminatory no solicitation rule. In my view, the promulgation of a rule requires a written posting or at least oral dissemination by a supervisor broader than that which occurred here. Accordingly, I dismiss that portion of the complaint allegation.

The Respondent further violated Section 8(a)(1) by George's statement that employees will lose their jobs if they became involved with the Union because Union County would cancel the Respondent's contract. The Board has held that such statements, unaccompanied by any objective evidence, violate Section 8(a)(1) of the Act. *Metalite Corp*., 308 NLRB 266, 272 (1992). In the instant case, there is no objective evidence to support George's statement.

Paragraph 8(E) alleges that on July 27, 2011, the Respondent, through George, threatened employees with job loss if they talked about the Union. Paragraph 8 (F) alleges that, on the same date, George coercively instructed employees to remain on the Respondent's property between routes in order to discourage them from talking with union representatives.

According to Houdashelt, after she left George's office she went to the break room. Houdashelt testified that all six of the Columbus drivers, James and Sharon Parker, Amy Endsley, Amy Hamby, Betty White, Barb Stanford, and Debbie Gordon, were all present. The Marysville employees were asking some questions about the Union to the Columbus employees,

when George entered the breakroom. According to Houdashelt, George stated "[T]he Union was in Columbus, we were in Marysville, and there was no such Union in Marysville, and there will never be a union in Marysville as long as she was there. And that we were no longer allowed to talk about the union. We were also informed that since our morning routes were over with, there was no reason for anyone, anyone to leave the building or the property to go talk to the union" According to Houdashelt, George added that if anyone talked to the Union their job would be in jeopardy. (Tr. 513-514.) There is no testimony to corroborate Houdashelt's version of this encounter. Importantly, although he was present in the breakroom at this time, Warnick merely testified that there was "idle conversation." (Tr. 357.)

George denied making any of the statements alleged by Houdashelt. Gordon, who was present in the breakroom, denied that George stated that employees would be disciplined or discharged for talking about the Union and that no instructions were given to not leave the premises that day (Tr. 675).

As I indicated earlier, I do not find Houdashelt to be a particularly reliable witness. With respect to this incident, Warnick, who was present in the breakroom at the time George allegedly made such statements, did not corroborate Houdashelt's testimony. On the other hand, Gordon, who was also present, supported George's testimony that she never made such statements. Gordon testified in a straightforward manner regarding this incident and her demeanor was persuasive. Accordingly, since Gordon corroborates George's denial that she made the statements attributed to her, I do not credit Houdashelt's testimony on this point. Accordingly, I find that the Acting General Counsel has not established that the Act has been violated and I shall dismiss paragraphs 8(E) and (F) of the complaint.

Paragraph 8(G) of the complaint alleges that on or about July 27, 2011, the Respondent, through Theresa Ritchie, by conference call in the presence of George, told employees that they were not permitted to talk to the Union.

Warnick testified that later in the day on July 27, 2011, he was called into George's office with the other Columbus drivers for a conference call with Ritchie. George was also present during this conference call. According to Warnick, Ritchie told the assembled Columbus drivers that "while we were there, we were on Nicole's dime." She added that they were not to talk about the Union, or have any involvement with the Marysville drivers regarding the Union and that they were to follow George's rules. She then asked each employee individually if they understood.

Current employee Stanley Vinson was called as a witness by the Respondent. Vinson testified that Ritchie told the Columbus drivers that she wanted the Columbus drivers to be polite and courteous while they were in Marysville. Ritchie also stated that as long as the employees "were on the clock" they were not to have any kind of communication with the Union. Vinson added that Ritchie also stated that the Columbus employees were "on the clock" from 5a.m., when they got on the bus in Columbus to go to Marysville, until they arrived back in Columbus at the end of the day.

Ritchie testified that on July 27, after receiving calls from several drivers about Warnick's comments regarding Skaggs, she called George and asked her to set up a conference call with the

Columbus drivers. At that time, George told Ritchie that Warnick had asked a Marysville driver to stop and let him off the van at the entrance to the Marysville facility so he could speak to union representatives. During the conference call, Ritchie told the Columbus drivers that while they were at Marysville their conduct was a reflection on her. She asked them to be careful about what they talked about. She said that some things that were said at the Columbus location might not be received the same by the drivers at Marysville, because they were older. She did not speak to Warnick directly about his behavior. Ritchie testified that during this call she told the Columbus drivers that "while they were in Marysville that they could not speak to the Union while performing First Student duties and on the clock."

Valerie Larson, the Respondent's safety manager in Columbus, also testified regarding this conference call. Larson was present in Columbus with Ritchie Larson testified that Ritchie emphasized that the employee should not make inappropriate comments and to be respectful. Larson also testified that Ritchie stated that because there were some "union issues" going on, employees were not to discuss the Union or talk to any of the union representatives until "you're off the clock."

With respect to this conference call, George testified that Ritchie told the Columbus employees that they were on George's "dime" and that they needed to be respectful. Ritchie said that the employees in Marysville were older and that some language had been used that was not called for and that it was not to happen again. George claimed that Ritchie told the Columbus employees that when they were working they were not to stop to talk to the Union.

Based primarily on the testimony of Vinson and Larson, I find that during the conference call on July 27Ritchie told the assembled Columbus drivers as long as they were "on the clock" they were not to discuss the Union or have any communication with the Union. She also stated that employees were on the clock from when they got on the bus in Columbus in the morning to be transported to Marysville until they returned to Columbus in the evening. To the extent that the testimony of Ritchie, George, and Warnick conflict with that of Vinson and Larson, I do not credit their testimony. I find the testimony of disinterested witnesses Vinson and Larson to be the most reliable version of the statements made by Ritchie regarding the restrictions on communicating with the Union. Both witnesses were called by the Respondent and had no motive to be untruthful regarding this event and their demeanor reflected certainty.

In *Our Way*, 268 NLRB 394, 395 (1983), the Board found that rules prohibiting soliciting during "working time" are presumptively lawful because they state with sufficient clarity that employees may solicit on their own time, such as lunch hours and break periods. Relying on its decision in *Essex International Inc.*, 211 NLRB 749 (1974), the Board reiterated that rules using "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of work shifts, periods that include the employees' own time. *Our Way*, supra, at 395. The Board has also held that rules banning union solicitation during "company time" are presumptively invalid as they do not "clearly convey to employees that they may solicit on breaks, lunch, and before and after work." *Laidlaw Transit, Inc*., 315 NLRB 79, 82 (1994).

In the instant case, Ritchie's statement that the Columbus employees could not communicate about the Union or speak with union representatives while they were "on the

clock" is facially overbroad because it can be reasonably understood by employees to encompass the entire workday. In my view, the phrase "on the clock" is synonymous with the term company time. Ritchie's statements restricted the rights of employees to communicate about and with the Union because she did not make it sufficiently clear that employees could communicate about the Union and with the Union during lunch, breaks, and before and after work. Rather, Ritchie expressly defined "on the clock" as encompassing the entire workday. As such, Ritchie statements unlawfully restricted the rights of employees to communicate about and with the Union in violation of Section 8(a)(1) of the Act. In so finding, I do not agree with the Respondent's argument that, if I should find that Ritchie's statements violated Section 8(a)(1), it is a technical violation that is de minimis and does not warrant a remedial order. I do not agree, as unlawfully restricting the rights of employees to communicate about a union with each other or to communicate with a union interferes with an important Section 7 right. The statements were not isolated as they were made to approximately six employees. In addition, Ritchie's statements occurred in the context of the Respondent committing other violations of the Act.

The Alleged Discrimination Against Warnick in Violation of Section 8(a)(3) and (1)

As amended at the hearing, paragraph 11 of the complaint alleges that on July 27, 2011, the Respondent discriminatory selected Warnick and prevented him from working at the Marysville facility in violation of Section 8(a)(3) and (1) of the Act.

As noted earlier, Warnick is a current employee of the Respondent who works as a bus driver at the Columbus facility. On July 25, 2011, he was offered, and accepted, employment at the Marysville facility that would last until approximately August 5. On July 26, his first day in Marysville, Warnick was assigned to go on "dry runs" with Houdashelt. Warnick was also assigned to work with Houdashelt on July 27. As discussed above in detail, when Houdashelt and Warnick returned from their morning route at approximately 9 a.m. on July 27, Warnick asked Houdashelt to stop the van and he got out to speak with the union representatives who were attempting to pass out handbills. This conduct was observed by George, who called Houdashelt and asked her to report to George's office immediately after she parked her van. At that time George admonished Houdashelt that she was not to stop her van for the Union or anyone else while she was working. Warnick then went to George's office and told her that he had asked Houdashelt to stop the van in order for him to speak to the union representatives. George told Warnick that she did not want him to speak to the Marysville employees about the Union and that if the employee spoke about the Union they will lose their jobs because UCBDD would cancel the contract between it and the Respondent. Warnick responded that he would speak to anyone he wanted to and left George's office.

Later that morning Warnick attended the conference call conducted by Ritchie, discussed in detail above, in which she cautioned the Columbus drivers about the language they used while at the Marysville facility and instructed them regarding when they could discuss the Union or meet with union representatives.

According to Warnick's uncontradicted testimony, approximately 10 minutes after the conference call with Ritchie, all of the Columbus drivers were called back into George's office. George told them that one of "her" drivers had received her certification and was going to be "okay" to drive. George also stated that she was not going to need one of the Columbus drivers

after that day. She then pointed at Warnick and told them that he was the one who she picked. George asked him if he was "okay" with that and Warnick replied "I guess I have to be." Warnick went on the afternoon of route with Houdashelt but did not work at Marysville after that.

At 11:04 a.m. on July 27, George sent an email to Ritchie and Joseph Eversole, the then Columbus location manager, entitled "Teamsters" (GC Exh. 17).[13] The email states:

> First, I would like to thank you for sending me the 6 drivers that I asked for. I had an issue this morning concerning Gary with the Teamsters on my lot. He had my driver stop her van and let him off so that he could talk to the Teamsters. Because of his actions I had to pull my driver in the office and have a conversation with her. I am only in need of 5 drivers now so I would not need Gary to return. Thank you for all the help.

The Acting General Counsel contends that the Respondent selected Warnick as the employee who would no longer work at Marysville after July 27 in retaliation for his union activity in violation of Section 8(a)(3) and (1) of the Act. The Respondent argues that it "asked Warnick not returned the Marysville because (1) he behaved inappropriately while he was there, and (2) he was not needed." The Respondent contends that, under *Wright Line,* it has established that it would have taken the same action toward Warnick even in the absence of his protected activity.

It is clear that the Acting General Counsel has presented a prima facie case of discrimination under *Wright Line* regarding the Respondent's refusal to assign Warnick work in Marysville after July 27. In this connection, as set forth in detail above, Warnick actively supported the Union and had engaged in Union activity at the Respondent's Marysville facility. The Respondent was clearly aware of his support for the union. The Respondent's animus toward Warnick's union activity is most clearly demonstrated by George's statement to him that she did not want him speaking to the Marysville employees about the Union and that if the employees spoke about the Union, UCBDD would cancel the contract with the Respondent.

The Board has held that in order to rebut the prima facie case under *Wright Line* "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996); *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

With regard to the Respondent's defense to this allegation, the mutually corroborative and uncontroverted testimony of Ritchie and George establish that George first asked Ritchie to temporarily assign four Columbus drivers to Marysville. George then asked Ritchie to assign two more Columbus drivers because George did not know if Houdashelt and Linda Hensley would return for the beginning of the school year at Harold Lewis on July 27. It is undisputed that Houdashelt did return to work on July 26. On July 27, George told Warnick that with the return

[13] It is unclear from the record whether George sent this email before or after she informed Warnick that he would not work in Marysville after July 27.

of one of her drivers, she no longer needed one of the Columbus drivers and informed Warnick that she had picked him. George's July 27 email to Ritchie and Eversole also indicates that George only needed five drivers so that she would not need Warnick to return. Considering all the circumstances, I find that the evidence establishes that, with Houdashelt's return as a driver, the Respondent's temporary need for Columbus drivers at the Marysville facility was reduced to five from six. The Board has held, however, that even if there may be legitimate reasons for a layoff generally, if an employee's selection for the layoff is based on a discriminatory motive, such a layoff violates Section 8(a)(3) and (1) of the Act. *Ferguson Enterprises, Inc*. 355 NLRB No.189 at sl. op. p. 13 (2010); *W. F. Bolin Company*, supra*; Knoxville Distribution Co*. 298 NLRB 688 (1990).

The Respondent's witnesses gave conflicting accounts as to who actually made the decision that Warnick was the employee who would not return to work at Marysville after July 27. In the first instance George's email to Ritchie and Eversole on July 27 indicates that she was the one who decided she did not want Warnick to return. Consistent with her July 27 email, George also testified that she made the decision to direct Warnick not to return to Marysville because Houdashelt had been cleared to return as a driver and she did not need him anymore. George further testified that Warnick's conduct on July 26 with regard to his inappropriate language in the breakroom was also a basis to direct him to not to return to Marysville. (Tr. 762-763.) Ritchie testified, however, that after receiving George's July 27 email stating that she only needed five drivers in Marysville, Ritchie and Eversole made the decision to not send a driver back to Marysville. She testified that Warnick was selected "because of his behavior in Marysville while he was down there." (Tr. 909-910.) She also testified that Warnick was the last employee chosen to go to Marysville, so he was the first one to be told he was no longer needed. Ritchie acknowledged that she did not inform Warnick of his selection as the employee who would not return to work at Marysville and had no knowledge as to how Warnick was informed he would no longer be working at Marysville.

The conflicting accounts of the Respondents witnesses establishes a lack of clarity regarding the individuals who actually made the decision that Warnick was not to return to Marysville. The lack of clear evidence as to the management personnel who made the decision regarding the termination of Warnick's temporary assignment casts doubt on the veracity of the Respondent's explanation for its actions. See *Ferguson Enterprises*, supra, at sl. op. pps 11-12. I find, however, that George was, in fact, the individual who decided to return Warnick to layoff status.

While Warnick engaged in boorish behavior in the breakroom on July 26, I do not believe his conduct that day is the real reason for his removal from Marysville. Rather, I find the Respondent's reliance on his conduct as the reason to be pretextual. In the first instance, although Warnick's remarks about Scaggs and Ritchie were reported to George on July 26, she took no action and did not even speak to Warnick about it that day. When some Columbus drivers and George reported Warnick's comments to Ritchie on the morning of July 27, Ritchie merely asked George to convene a conference call with all the Columbus drivers. On this conference call she did not address Warnick's behavior directly but rather spoke in generalities and asked the Columbus drivers to be careful about what they said, because statements that were made at the Columbus facility, which was composed of younger employees, might not be received the same way by the older drivers at Marysville. It is clear that on the morning of July 27, the Respondent

had not determined what discipline, if any, it would take against Warnick for his comments on July 26. I note that Warnick was never informed his removal from Marysville on July 27 was as a result of his conduct on July 26. In fact, the investigation into Warnick's comments on July 26 was still being undertaken by the Respondent on August 10 and 11 when it obtained some additional signed statements from two of the employees who overheard his remarks. (GC Exh. 34.) After the Respondent's investigation was concluded, on August 16 Warnick was given a written warning for the statements he made in the break room in Marysville on July 26. (R. Exh. 16.)[14]

It is clear to me that the reason Warnick was selected as the employee who would not return to Marysville was the overt union activity engaged in the morning of July 27. The most salient evidence regarding the reason Warnick was removed from Marysville is the July 27 email from George to Ritchie and Eversole explicitly linking Warnick's discussion with the union representatives as the reason for his removal. There is no indication in the email that Warnick was selected because of his comments on July 26 or because he was the last employee to be given a temporary assignment to Marysville. In fact, there is no record evidence that George was even aware that Warnick was the last employee selected. Accordingly, I find that the assertion that Warnick was removed from Marysville because of his comments made on July 26 or because he was the last employee assigned to be pretextual. Accordingly, I conclude that the Respondent has not rebutted the Acting General Counsel's prima facie case and find that the removal of Warnick from Marysville violated Section 8(a)(3) and (1) of the Act.

The Alleged Discrimination Against Houdashelt in Violation of Section 8(a)(3) and (1)

The June 2011 Allegations

Paragraph 10 of the complaint alleges that on or about June 13, 2011, the Respondent verbally disciplined Houdashelt and on June 15, 2011, demoted her from the position of on bus instructor; in violation of Section 8(a)(3) and (1) of the Act.

Facts

Houdashelt began her employment with the Respondent as a driver in Marysville in 2004. Prior to 2011 the only discipline she had received was a warning for attendance in 2005. In May 2011, Houdashelt was working as a driver and as an on bus instructor (OBI). As an OBI Houdashelt had to train new drivers, answer questions regarding procedures, and to maintain certain records associated with these duties. As the dispatcher, she had the responsibility of answering the phone, taking messages, relaying instructions to other drivers, and conducting a safety meeting once a month. Houdashelt admitted that as a result of her multiple duties, "I just did not have enough time in the day to do everything that I was supposed to do." (Tr. 498-499.)

As discussed earlier in detail, in December 2010, Houdashelt was contacted by Union Representative Pennington about whether there was any interest in organizing union at Marysville. Houdashelt indicated that she had some interest but took no steps at that time to contact other employees. In late May 2011, Ingram called Houdashelt at home and asked her if

[14] There is no allegation in the complaint that this warning violates the Act.

she was interested in forming a union at Marysville. Houdashelt again expressed her interest. The only evidence of any union activity at the Respondent's Marysville facility in May 2011 were two conversations that Ingram had with employees Kirkendall and Cox to gauge their interest. As I have explained above, I do not credit Houdashelt's testimony that on June 9, 2011, Houdashelt was discussing organizing a union when George interrupted and allegedly told employees that they were not permitted to talk about the Union at work. Accordingly, the only credible evidence of union activity being conducted at the Respondent's Marysville facility prior to June 13 is the two brief conversations that Ingram had with fellow employees.

On June 9, George announced to employees that Houdashelt would no longer be the dispatcher and that Sharon Griggs would be the new dispatcher. George instructed Houdashelt to send employees with questions to Griggs. Later in the day on June 9, driver Marilyn Chapman and monitor Sharon Parker arrived at a child's home but the child's parents were not there. Disregarding instructions from Griggs to return the child to the facility, Chapman continued on her route. When Chapman received word that the child's parents had come home, she drove back to drop the child off, while several other children were still on the bus. After Chapman dropped off the child, she resumed her route but, as a result, several children had been on the bus for more than 90 minutes before they were dropped off. UCBDD has a policy that children should not remain on the bus for more than 90 minutes. After Chapman's route was completed, the monitor, Parker, thought that she would have to fill out a Major Unusual Incident "MUI" form to report the violation of policy. Since Parker had never filled out such a form before, she asked Houdashelt, as the OBI, if she needed to fill out an MUI for this incident. Houdashelt yelled at Parker to not ask her questions and to ask Griggs instead. Parker did not understand why she would ask Griggs this question because Griggs was not a trainer or an OBI. Parker again asked Houdashelt if she would just answer her question. Houdashelt responded by accusing Parker of trying to persuade George to remove Houdashelt as dispatcher. Griggs came out of the dispatcher's office and asked Houdashelt to stop yelling at Parker. Parker, who was crying over the incident, went outside to avoid the situation.[15]

Mechanic Mike Huff overheard this incident between Houdashelt and the other employees. Huff sent a text message to George, who had left for the day, to inform her of the incident and asked her for instructions. George called Huff and asked him to have all the employees leave the facility. The next day George spoke to all of the witnesses regarding the incident, including Houdashelt.

On June 13, George gave Houdashelt a written warning for a lack of professionalism regarding the incident that occurred on June 9 (GC Exh. 9). Houdashelt refused to sign the warning as she did not agree with its substance.

On June 21, George gave Houdashelt a memo indicating that as of June 15, Turney had removed her as an OBI (GC Exh.10). George testified that she had relayed to Turney the June 9 incident and also discussed with him the delay that occurred during Houdashelt's training of

[15] I credit the testimony of Parker and Griggs regarding this incident. Parker, in particular, testified in detail and her demeanor reflected certainty about what occurred. To the extent that Houdashelt's version of this incident differs, I do not credit it. It seems plausible to me that having just been removed as dispatcher, Houdashelt would react somewhat emotionally to this incident.

employee Brenda Cox to become a driver and the insufficient training she had given Debbie Gordon. The Respondent contends that both the June 9 incident and the problems that Houdashelt was experiencing in training other employees were the basis of her removal as an OBI.

Analysis

In considering whether the Respondent's June 13 warning to Houdashelt and her removal as the on board instructor on June 15 violated Section 8(a)(3) and (1) of the Act, I find that the Acting General Counsel has failed to establish a prima facie case under *Wright Line*. The evidence establishes that in December 2010 Houdashelt spoke to Pennington about forming a union at Marysville and she also spoke to Ingram in late May 2011 about her interest in forming a union. Thus, the evidence establishes that Houdashelt had engaged in union activity prior to the discipline imposed upon her in June 2011. I find, however, that there is no direct evidence that the Respondent knew of her union activity on or before June 13 since I do not credit Houdashelt's uncorroborated testimony regarding George overhearing her discussing her support for the Union on June 9.

The Acting General Counsel also argues, however, that I should infer that the Respondent knew of Houdashelt's union support on or before June 13 on the basis of the small plant doctrine. Prior to June 13, however, I find that Houdashelt did not engage in any union activity at the Marysville facility. The only union activity that occurred at the facility by that date was the two brief conversations that Ingram had with fellow employees. The discussions regarding the Union were at their incipient stages at that point and there is no credible evidence that Houdashelt participated in any discussions regarding the Union at Marysville facility prior to June 13. Accordingly, without any credible evidence that the union activity of Houdshelt was carried on at the Respondent's facility, there is no basis to apply the Board's small plant doctrine to infer knowledge, under the principles I have discussed above in considering Ingram's discharge. Since there is insufficient evidence to establish that the Respondent knew of Houdashelt's support for the Union on or before June 13, the Acting General Counsel has not established a prima facie case regarding the June 2011 allegations regarding Houdashelt under *Wright Line*. Accordingly, I shall dismiss those allegations in paragraph 10 of the complaint.

The September 2011 Allegations

Paragraph 10 of the complaint also alleges that the Respondent issued Houdashelt a 3-day suspension on September 29, 2011 and terminated her on September 30, 2011, in violation of Section 8(a)(3) and (1) of the Act

Facts

Houdashelt's suspension and discharge involves an incident that occurred on September 27, 2011. On that date Houdashelt was driving a van transporting adult clients of UCBDD to and from their employment at U-Co. Industries. Laurie Cummings was her monitor. Houdashelt testified that she dropped off a client and started to back out of the client's driveway when she slammed on her brakes because she remembered the client's mailbox was located across the street. According to Houdashelt, she asked Cummings to see if she hit the mailbox, and

Cummings replied that she had just missed it. When Houdashelt asked what the noise that she had heard was, Cummings responded that the van's lift had shifted.[16] Houdashelt testified that she did not get out of the van to see if she had hit the mailbox because the client's home was located on a busy state route and the mailbox was located across the street. When Houdashelt returned to the Marysville facility she inspected her van and did not see any marks that would indicate that she had hit anything. Houdashelt did not report the incident to George because Cummings had told her that she did not hit the mailbox.

At the time of the hearing, Cummings was a current employee of the Respondent and had been employed at the Marysville facility since August 2011. She worked as both a monitor and a substitute driver until approximately March 2012, when she was assigned a route as a regular driver.

Cummings' version of what occurred on September 27 is quite different from that of Houdashelt. Cummings testified that after the client had exited the van Houdashelt backed onto the road, instead of turning around in the driveway as she had in the past. As Houdashelt backed out of the driveway and into the road, she said "Oh, what did I hit." Cummings testified that she began to get out of the van and head to the back. At that point Houdashelt stated "it's just the mailbox." Cummings reentered the van and they left. As they did so, Houdashelt stated, "I didn't see anything, did you." When they arrived at the Marysville facility, Cummings did not report the matter to George in order to allow Houdashelt to report it. When nobody from management had contacted Cummings by September 29, Cummings went to George's office. Cummings testified that she went to George to see if Houdashelt had reported the incident because she did not think that the client should have to pay for the mailbox repair. Cummings asked George if Houdashelt had mentioned that she had hit the mailbox on September 27. When George responded that Houdashelt had not said anything to her, Cummings relayed to George what had occurred. George then asked Cummings to write a statement about the incident and she did so.

Cummings' signed statement dated September 29, 2011 was introduced into evidence as R. Exh. 8. Cummings statement indicates:

> While leaving our last stop on Tuesday, September 27, 2011 we were backing out of (the client's) driveway. Claire backed over (the client's) mailbox . Claire asked me what did I hit. She then said Oh it was the mailbox. I didn't hear anything did you. Then drove on. I gave her a day to report it to management. Then I felt I should tell them so the client's mailbox could be taken care of properly. I felt it was not (the client's) responsibility to fix a driver's mistake.[17]

At the hearing, Cummings testified that she did not actually see Houdashelt hit the mailbox. She also testified, however, that prior to September 27 she had been to the client's home

[16] The van is equipped with a lift to allow wheelchairs to be raised and lowered into and out of the van. The lift is located at the back of the van.

[17] I have deleted the client's name from Cummings' witness statement as I find that it is not necessary to reveal the client's identity in this decision.

approximately 8 to 10 times and had never seen the mailbox leaning but as Houdashelt pulled away on September 27 she saw the mailbox leaning backwards.

After interviewing Cummings, George obtained the client's address from the Respondent's route records and assigned Sharon Griggs and Debbie Gordon to take photographs of the client's mailbox. Gordon took five photographs which were introduced into evidence as Jt. Exh. 1 (a-e). One of the photographs, (Jt. Exh. 1b), clearly shows the mailbox leaning backwards, with the address number 14331 displayed on the mailbox. Gordon testified that she had driven the client home many times and was certain that she had photographed the correct mailbox. In addition, the address number matched the address listed for the client on one of the Respondent's route documents (R. Exh. 12).

On September 29, George inspected the van that Houdashelt was driving on September 27 and saw there were scratches on the back. She testified, however, that there were scratches on the back of van prior to September 27 and she could not determine what scratches occurred because of the incident on September 27.

Later in the day on September 29, after George had obtained the photographs of the mailbox, she interviewed Houdashelt regarding the incident. George told Houdashelt that she had received a report that Houdashelt had hit a mailbox but had not reported it. George testified that she showed the photographs that had been taken of the mailbox to Houdashelt and asked her to write a statement regarding the incident. The statement signed by Houdashelt (GC Exh. 31) dated September 29, 2011, indicates "did back out of the driveway, mailbox was already leaning saw it several times. Didn't realize I had hit, but I think I did touch it. Nothing was said to me about it."

George then gave Houdashelt a disciplinary action form indicating she was suspended pending further investigation for backing into the mailbox and not reporting it. In the employee comment section Houdashelt wrote "mailbox was already leaning- didn't realize I had hit it." (GC Exh. 13).

Houdashelt testified that at the meeting with George on September 29 George informed her that she had hit a mailbox and Houdashelt replied that she did not hit a mailbox as her monitor said that she had missed it.[18] George then told Houdashelt that her monitor had reported to George that Houdashelt had hit the mailbox. Houdashelt admitted that George showed her two photographs of the mailbox that were entered into evidence (Jt. Exhs. 1d and e) but specifically denied that she was shown (Jt. Exh. 1b), the photograph that prominently displays the client's address. At the hearing Houdashelt also denied that the photographs George showed her were photographs of the client's mailbox. Houdashelt further testified that the statement she signed on September 29 in George's office was false and that George told her what to write on it. Houdashelt claimed that she wrote the statement that way "because, at that point, I saw the writing on the wall" and "realized that she wanted me out of the compound, and this is-was her

[18] Although George was not asked at the hearing whether Houdashelt initially denied hitting the mailbox, the written statement George prepared dated September 29, 2011, contains the following: "I asked Claire about backing into the mailbox, Claire said I didn't back into anything. She denied knowing what I was talking about." (GC Exh. 36.)

way of doing it." Houdashelt claimed that George also instructed her as to what to write regarding her comments on her suspension notice.

On September 30, 2011, the Respondent sent a letter, signed by George, to Houdashelt notifying her of her termination. In relevant part, this letter states:

> Based on the results (of) our recent investigation, it has been confirmed that you hit a mailbox with your van on September 27, 2011 and failed to report the accident to local management as required by company policy.
>
> The employee handbook states: "it is the driver's responsibility to notify his/her supervisor of any of the following events (occurring on or off the job) within the time frame stated below:
>
> > Collision-*immediately* if occurred on job/before the next job shift if off the job.
> >
> > Incident-By the end of the business day.
>
> Any employer who fails to notify the Company of any of the above occurrences within the time frame indicated will be subject to disciplinary action, up to and including termination."
>
> In addition, based on the review of your statements made during the investigation, you provided false information about the incident when asked about it. "Dishonesty" as discussed in the employee handbook is considered serious misconduct and "may subject an employee to immediate termination."
>
> After carefully reviewing all the facts in this matter, the decision has been made to terminate your employment with First Student effective immediately.

In the first instance, I credit Cummings' testimony regarding what occurred on September 27. She testified consistently on both direct and cross-examination. Importantly, her testimony was consistent with the written statement that she gave to George on September 29. Although employed by the Respondent at the time of the hearing, Cummings has no vested interest in the outcome of this matter. There is no evidence to suggest that she would have any motive to fabricate testimony against Houdashelt. Finally, her demeanor while testifying was reflective that she recalled the events with certainty. On the other hand, I find Houdashelt's testimony regarding the events of September 27 to be unreliable and I do not credit it. I find Houdashelt's account of the incident to be implausible as she claims that Cummings told her that she had not hit the mailbox. I doubt that Cummings would have voluntarily gone to George and given her a statement indicating that Houdashelt had admitted that she had hit the mailbox, if it were not true. Cummings did not strike me as an individual that would fabricate such an account. In addition, Houdashelt's testimony appeared to be designed to support her case rather than actually reflect the facts of what occurred.

With respect to the meeting between George and Houdashelt on September 29, I credit George's testimony over Houdashelt's to the extent it conflicts. It is undisputed that at the time George interviewed Houdashelt, George had in her possession the five photographs that comprise Jt. Exh.1. Houdashelt's testimony that George showed her only two photographs and not the one with the address prominently displayed (Jt. Exh. 1b) is simply implausible. Compounding the implausibility of her testimony is Houdashelt's claim that the mailbox pictured in Jt.Exh.1 is not the mailbox of the client she dropped off on September 27. This claim is squarely contradicted by the address clearly shown on Jt. Exh. 1B, which corresponds with the address of the client that is contained in the Respondent's route sheet. I also do not believe that Houdashelt followed commands from George to write untruthful comments on the suspension notice and her statement dated September 29 regarding the mailbox incident. As noted above, at the hearing Houdashelt claimed that she signed these allegedly false statements in order to placate George. I again find this explanation implausible. In June 2011, when Houdashelt was written up for her conduct regarding the incident with Parker, Houdashelt refused to sign the warning because she did not agree with the facts set forth in it. I find no convincing reason as to why Houdashelt would admit to conduct that she claimed was not true and could lead to discipline in September, when she refused to sign her warning in June because she disagreed with the factual assertions contained in it.

I find, on the basis of foregoing, that on September 27, 2011, as Houdashelt backed out of the client's driveway she stopped and said, "Oh, what did I hit." As Cummings got out of the van to investigate, Houdashelt stated it was "just the mailbox." Cummings got back into the van and Houdashelt drove away. As they drove away, Cummings saw that the mailbox was leaning backwards and had never noticed this before. Houdashelt then stated to Cummings "I didn't see anything, did you" in an attempt to secure Cummings' silence regarding the matter. Houdashelt did not report this incident to George.

Cummings went to George on September 29 and reported the incident. She signed the witness statement noted above and George asked two employees to take photographs of the mailbox at issue. George interviewed Houdashelt on September 29 and showed her all the photographs that had been taken of the mailbox. After initially denying that she had hit the mailbox, Houdashelt freely signed a statement indicating that she didn't realize that she had hit the mailbox, "but I did, I think, touch it." In her comments on the suspension form given to her that day, Houdashelt again freely wrote "mailbox was already leaning-didn't realize I had hit it."

George testified that she decided to terminate Houdashelt for not reporting an accident which is an offense warranting termination. In her tenure as the manager no other driver had failed to report an accident.

At the hearing, the Acting General Counsel introduced GC Exh. 16 which indicates that during the period 2006-2011, there were seven occasions when employees had collisions, accidents or incidents in one of Respondent's vehicles. The only evidence reflecting the circumstances surrounding any of these occurrences is that Ingram had an accident on June 18, 2007, and Chapman had an accident on June 4, 2007, and neither employee was discharged. There is no record evidence, however, to indicate that the Respondent was aware of any employee, other than Houdashelt, who had failed to report an incident or an accident. There is no record evidence of other employees being disciplined for dishonesty.

Analysis

By the time of her discharge and suspension in late September 2011, Houdashelt had engaged in union activity and her support for the Union was known to the Respondent. As I indicated earlier in this decision, by July 19, the evidence warrants an inference that the Respondent was aware of Ingram's role as a union proponent. I find that by that date, the evidence also warrants the inference that the Respondent was aware of Houdashelt's support for the Union. In addition, Houdashelt stopped her van on July 22 to allow, Warnick, a known union adherent, to stop and talk to the union representatives that were standing on the sidewalk outside of the Respondent's facility engaging in handbilling. While the van was stopped, Houdashelt was observed talking to Ingram, who had been fired shortly before this date in retaliation for her union activity. Thus, I find that by the time of her suspension and discharge, the Respondent was aware of Houdashelt's support for the Union. By virtue of its commission of certain violations of Section 8(a)(1) set forth herein and the unlawful actions taken against Warnick and Ingram, the Respondent demonstrated that it had animus regarding the union activities of its employees at the Marysville facility. Accordingly, I find that the Acting General Counsel has presented a prima facie case under *Wright Line*.

In order to meet its burden under *Wright Line*, the Respondent must show that it had a reasonable belief that Houdashelt failed to report an accident, a dischargeable offense under its rules, and that it acted on that belief when it discharged her. *J. J. Cassone Bakery, Inc*. 350 NLRB 86, 87 (2007); *McKesson Drug Co.,* 337 NLRB 935, 937 fn. 7 (2002).

In the first instance, I note that the Respondent's employee handbook in existence at the time of Houdashelt's September 27 incident provides that the failure of a driver to notify his/her supervisor of a collision or incident under specified time frames may result in termination (GC Ex. 3, p. 46). It also provides that dishonesty can subject an employee to immediate termination (GC Exh. 3, p. 34). As the Respondent's discharge letter to Houdashelt dated September 30, 2011, accurately indicates, if the collision occurs on the job it must be reported immediately and an "incident" must be reported by the end of the business day. Whether Houdashelt's backing into the mailbox is considered a collision or an incident, it is undisputed that Houdashelt made no report regarding the matter prior to September 29, 2000. After Cummings reported the incident to George on that date, George asked Cummings to write the witness statement noted above. Cummings' statement indicates that Houdashelt first asked Cummings what had she had hit. Houdashelt then acknowledged that she had hit the mailbox and drove away. George then directed that photographs be taken of the mailbox, using the Respondents route records to ensure that the correct mailbox was photographed.

George then interviewed Houdashelt who, at first, denied hitting the mailbox. After being confronted with Cummings report that she had done so and being shown the photographs of the damage to the mailbox, Houdashelt freely signed two statements indicating that she had back into the mailbox. Thus, when George made the decision to discharge Houdashelt, she considered Cummings statement in which Houdashelt admits hitting the mailbox, photographs of the damage to mailbox and two written admissions made by Houdashelt. Accordingly, the Respondent has demonstrated that it had a reasonable belief that Houdashelt backed into the mailbox and failed to report it, conduct that warranted discharge under its rules. Moreover, Houdashelt initially denied hitting the mailbox and later admitted doing so in the two brief

statements she wrote on September 29. This conduct appears to support the reference to dishonesty as a secondary reason for her discharge.

While the Acting General Counsel points to the fact that other employees have had accidents and were not discharged, as I have noted above, there is no evidence that the Respondent was aware of any employee who failed to report an accident. There is also no evidence that the Respondent was aware of an employee who engaged in dishonest conduct and not been discharged. Thus, there is no evidence of disparate treatment. On the basis of the foregoing, I find that the Respondent has established a valid *Wright Line* defense to the allegations in paragraph 10 of the complaint regarding Houdashelt's September 2011 suspension and discharge. Accordingly, I shall dismiss those allegations in the complaint.

Conclusions of Law

1. The Respondent has engaged in unfair labor practices in violation of Section 8 (a)(1) of the Act by:

(a) Instructing an employee to not talk to other employees about a union or involve other employees with a union.

(b) Threatening employees with loss of jobs if they became involved with a union.

(c) Instructing employees that they could not have any communication about or with a union while they were "on the clock."

2. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by discharging Pennie Ingram because Ingram and other employees engaged in union activities.

3. The Respondent has engaged in unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by discriminatorily selecting Gary Warnick to return to layoff status from a temporary assignment at its Marysville, Ohio facility because Warnick and other employees engaged in union activities.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employee Pennie Ingram, must offer Ingram reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Respondent, having discriminatorily selected Gary Warnick to return to layoff status from a temporary assignment at its Marysville, Ohio facility, must consider Warnick for any future temporary assignment to its Marysville, Ohio facility and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The proposed order submitted by the Acting General Counsel seeks that the notice be read to employees by a responsible management official of the Respondent. While the violations committed by the Respondent are serious, there is insufficient evidence to establish that this measure, in addition to the Board's traditional remedies, is necessary to remedy the effects of the Respondent's unfair labor practices. *Latino Express, Inc*., 358 NLRB No. 94 (2012; *Chinese Daily News*, 346 NLRB 906, 909 (2006), enfd. mem. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Respect to the notice portion of the remedy, I found that Warnick, a permanent Columbus employee, was discriminated against for his union activity in Marysville in violation of Section 8 (a)(3) and (1) of the Act. I have also found that Ritchie's statements to the Columbus employees on temporary assignment to Marysville unlawfully restricted their rights to communicate about, and with, the Union in violation of Section 8(a)(1) of the Act. I find that such conduct warrants ordering that the notice be posted at both the Respondent's Marysville and Columbus facilities. Since the Columbus employees were on temporary assignment to Marysville, posting the notice at only that facility will not effectuate the Board's objective of informing affected employees about the outcome of this proceeding and the nature of their rights under the Act. Accordingly, I find that it would best effectuate the policies of the Act to require that the notice be posted at both the Marysville and Columbus facilities. *Technology Service Solutions*, 334 NLRB 116 (2001).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, First Student, Inc., Marysville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to not talk to other employees about a union or involve other employees with a union.

(b) Threatening employees with loss of jobs if they became involved with a union.

(c) Instructing employees that they could not have any communication about or with a union while they were "on the clock."

(d) Discharging employees, discriminatorily selecting employees for a return to layoff status from a temporary assignment, or otherwise discriminating against employees for engaging in union or other protected concerted activities.

(e) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Pennie Ingram full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Ingram whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the Ingram in writing that this has been done and that the discharge will not be used against her in any way.

(d) Consider Gary Warnick for future temporary assignments to its Marysville, Ohio facility.

(e) Make Gary Warnick whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel

records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in Marysville and Columbus, Ohio, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since July 25, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found

Dated, Washington, D.C., August 10, 2012.

_____
Mark Carissimi
Administrative Law Judge

20 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT instruct employees to not talk to other employees about a union or involve other employees with a union.

WE WILL NOT threaten employees with loss of jobs if they become involved with a union.

WE WILL NOT instruct employees that they cannot have any communication about or with a union while they are "on the clock."

WE WILL NOT discharge or otherwise discriminate against employees for engaging in union or other protected concerted activities.

WE WILL NOT discriminatorily select employees to return to layoff from a temporary assignment for engaging in union or other concerted protected activities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Pennie Ingram full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Pennie Ingram whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Pennie Ingram, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL consider Gary Warnick for any future temporary assignments to our Marysville, Ohio facility.

WE WILL make Gary Warnick whole for any loss of earnings and other benefits resulting from his discriminatory selection to return to layoff status from a temporary assignment at our Marysville, Ohio facility, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful selection of Gary Warnick for return to layoff status from a temporary assignment at our Marysville, Ohio facility and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discriminatory removal from temporary employment will not be used against him in any way.

FIRST STUDENT, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086

(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3740.