Frye Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 481, a/w International Brotherhood of Electrical Workers, AFL–CIO. Case 25–CA–30270

April 28, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 19, 2007, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has considered the decision and the record in lights of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt his recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and order that the Respondent, Frye Electric, Inc., Avon, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraph.

2. Substitute the attached notice for that of the administrative law judge.

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 discharge or otherwise discriminate against Thomas Fosnight, Dennis Hensley, or any of our other employees for supporting, engaging in activities on behalf of, or seeking assistance from, the International Brotherhood of Electrical Workers, Local 481, AFL–CIO, or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Thomas Fosnight and Dennis Hensley full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Fosnight and Dennis Hensley whole for any loss of earnings and other benefits result-

[1] On March 31, 2008, the General Counsel filed a Notice of Issuance of Sec. 10(j) Injunction and Motion to Expedite Decision. The motion is granted.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We dismiss the complaint allegation that the Respondent interrogated employees in violation of Sec. 8 (a)(1). We find in this regard that the record is unclear as to whether Respondent's vice president of operations, Rick Miers', statement to employee Thomas Fosnight was an inquiry that amounts to an interrogation, as alleged.

The judge found that, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must meet a 4-prong evidentiary standard. To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065–1066 (2007); *Desert Springs Hospital Center*, 352 NLRB 112 (2008). Chairman Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co*., 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Chairman Schaumber agrees with this addition to the formulation, which the judge applied here.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3 (b) of the Act.

We shall modify the recommended Order to conform to the violations found.

ing form their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Thomas Fosnight and Dennis Hensley, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

FRYE ELECTRIC, INC.

Raifael Williams, Esq., for the General Counsel.
Michael L. Einterz, Esq., of Indianapolis, Indiana, for the Respondent.
Steve Dunbar, of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on July 23, 2007.[1] The charge was filed March 5, and it was amended on May 23. The complaint was issued May 29.

The complaint alleges that the Company wrongfully discharged two of its employees, Thomas Fosnight and Dennis Hensley, because of their protected union activities. It is also alleged that an agent of the Company, Rick Miers, coercively interrogated Fosnight about his union activities. The General Counsel asserts that these actions violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Company filed an answer denying the material allegations of the complaint. As described in detail in the decision that follows, I conclude that the Company did violate the Act in the manner alleged by the General Counsel.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, engages in the business of electrical contracting at its facility in Avon, Indiana, where it annually performs services valued in excess of $50,000 for customers located outside the State of Indiana. The Company admits[3] and I find that it is an employer engaged in 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.

[1] All dates are in 2007, unless otherwise indicated.

[2] While the transcript of the proceedings is generally accurate, a few errors require correction. [Certain errors in the transcript have been noted and corrected.]

[3] See the Company's answer to the complaint, pars. 2 and 3. (GC Exh. 1(g).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Frye Electric, an Indiana corporation, was founded over 30 years ago by its president, Harold (Hal) Frye. It has two types of operations in the electrical contracting field, residential and commercial. The residential work typically consists of service calls for repairs to lights, plugs, and switches. Commercial work involves both repair and construction assignments, including installation of light fixtures, panels, and switches. The workload is evenly divided between the two components.

At all relevant times, the Company has employed approximately 35 persons, including 29 nonsupervisory and nonclerical personnel. These consist of two classifications, lead electricians and helpers. The work force is not represented by a labor organization. There are three managerial employees, Frye, Miers, and Gregory Wells.[4] Miers is the vice president of operations and the number two ranking official in the Company. Wells is director of operations. Both men report directly to the president, Frye. Generally speaking, Wells manages the residential division and Miers is in charge of the commercial side.

The remaining key participants in the events of this case are two employees of the Company, Fosnight and Hensley. Fosnight, a lead electrician, was originally hired by the Company in April 2000. He remained in that position until December 5, 2005. The circumstances of his departure in 2005 are somewhat unclear. The attorneys did not ask Fosnight for his account of what led to his departure from employment. Initially, Frye was unequivocal in asserting that Fosnight was fired, "because he was smoking pot during company time in a company truck." (Tr. 63.) Under further examination by counsel for the General Counsel, Frye retreated from this contention. He was shown personnel records indicating that Fosnight had twice smoked marijuana in a company vehicle. According to the records, he was given a warning for the first offense. On the second occasion, the personnel file reflects that:

> Tom smoked again (in truck?)[.] He was told to take 3 days off (w, th, f) by Rick M[iers]. Tom came in and quit on Monday (Dec. 5th)?

(GC Exh. 7, p. 2.) After examining this record, Frye testified that, "I'm not sure if he quit or not." (Tr. 65.)

Wells provided a different version, indicating that Fosnight was suspended for 5 days for smoking pot in the van. As he described it, "I told him to take five days off of work, and he never came back."[5] (Tr. 76.) On balance, I conclude that both

[4] The Company concedes that these men are all supervisors and agents within the meaning of the Act. See the Company's answer to the complaint, par. 4, as supplemented by counsel for the Company's trial stipulation. (GC Exh. 1(g); Tr. 9.)

[5] This bit of history regarding Fosnight is illustrative of the difficulties I have in accepting the testimony of the Company's managers. Frye made a clear-cut statement that crumbled under further exploration. Wells gave an equally adamant account that contradicted the Company's own records in two key aspects. While Wells claimed that he was the person who suspended Fosnight and that the suspension was for a period of 5 days, the records indicate that Miers imposed the disciplinary action and that the period of suspension was actually 3

Wells' version and the description in the personnel file support the conclusion that Fosnight was suspended for marijuana usage and quit as a result.

It is undisputed that Fosnight was hired for a second time as a lead electrician in June 2006. This was initiated through communications involving Fosnight's brother who had continued to be employed by the Company. Fosnight testified that Frye asked his brother to invite him to return to employment. Subsequently, Fosnight met with Frye and Miers. He agreed to return to work, subject to certain conditions. He requested and received a wage increase. In addition, he explained that family and other commitments precluded him from accepting on-call assignments. This refers to the Company's practice of making rotating weekly assignments of employees to be available after hours and on weekends for emergency service calls. Fosnight testified that Miers and Frye agreed to these terms of employment.[6] As a result, Fosnight returned to duty on June 20, 2006.

Just over 2 months later, Hensley joined the Company's work force. He had been working on hurricane reconstruction in Alabama. He testified that this work was disappearing, leading him to contact Fosnight, whom he characterized as his "long-time friend." (Tr. 155.) Fosnight informed him that Frye was looking for staff. As a result, Hensley drove to Indiana to complete an application. A week later, he was hired by the Company as a helper. He was informed of the decision to hire him by Fosnight. His original assignment was for commercial work, typically helping an electrician named Tom Odell.

Matters continued in this posture until mid-to-late January. At that time, management decided to alter Fosnight's conditions of employment by requiring him to participate in the on-call assignment rotation.[7] Wells testified that he and Miers met with Fosnight to inform him of this change. According to Wells, Fosnight responded by stating, "I'll see what I can do." (Tr. 102.) Nevertheless, Wells indicated that, after making that statement, Fosnight "cops a little attitude and walked out." (Tr. 102.) Fosnight confirmed the meeting and reported that he complained to the supervisors that he did not think this change in his conditions of employment was fair due to their prior understanding regarding this issue.

The parties agree that Wells and Fosnight had a second discussion about the on-call duty approximately a week or 2 later. Wells reported that Fosnight, "[R]efused to take on call, he wasn't going to do it." (Tr. 102.) Fosnight indicated that Wells became "loud and verbally abusive with me." (Tr. 138.) He told Fosnight that "I could either take the call or I could be terminated." (Tr. 139.) Fosnight disputed Wells' assertion that he refused the assignment. Instead, he testified that "I said nothing. I bit my lip, turned around and walked out." (Tr. 139.)

I resolve this conflict in the testimony by noting that the Company's subsequent actions support Fosnight's account. That account indicates that Fosnight expressed disgruntlement with the decision to place him on the emergency schedule, but never made a statement refusing to perform the assignment. This is entirely consistent with the Company's action placing his name on the posted list for future on-call assignments. I conclude that it would have been odd for the Company to have taken such action in the face of an unequivocal refusal to accept the duty. Had Fosnight taken such a definitively negative stance, one would assume that the Company would have implemented its decision to terminate his employment for such a refusal. This, coupled with my general conclusion that the managers' testimony was unreliable, leads me to accept Fosnight's version of the parties' conversations during their meetings regarding the on-call schedule.

In any event, it is undisputed that management proceeded to implement its decision to require Fosnight to participate in the on-call rotation by posting a schedule showing that Fosnight would have his first on-call assignment commencing on March 23. It is clear that the decision to alter Fosnight's conditions of employment led to his disaffection with his job. In February, he contacted the Union, speaking with Organizer Steve Montgomery. Fosnight explained that his purpose was "to see, you know, what kind of benefits and everything they had available. If they had any job openings, as well." (Tr. 130–131.) By this time, Hensley had been transferred to duties on the residential side and was frequently assigned to work as Fosnight's helper. He testified that, on February 21, while they were working as a team, Fosnight told him that he planned to meet with a union representative on the following day.

On February 21, Fosnight did meet with Montgomery at the union hall. They discussed the Union's benefits, and Montgomery instructed Fosnight to "speak to anybody else that may be interested . . . as going into the union as well as myself." (Tr. 133.) Montgomery presented Fosnight with a booklet that outlined the Union's wages and fringe benefits and solicited Fosnight to "help organize Frye Electric." (Tr. 172.) Finally, during the meeting, Fosnight completed an application form for membership in the Union. On the form, he listed his employment history. Regarding his current employment, he noted that "I am having conflic[t]s with the management making promises and going back on them." (GC Exh. 8, p. 2.) In his testimony, he explained that he was referring to the issue of the on-call assignment.

Two days later, on the morning of February 23, Fosnight and Hensley were present in the Company's breakroom prior to making their service calls. A number of other employees were also present, including Keith Shepard, Corey Trotter, Shannon Reed, and Mike Cook. They were located "a couple of feet" from Fosnight and Hensley. (Tr. 135.) At that time, Fosnight began to recount to Hensley what he had learned regarding the benefits of membership in the Union. He specifically addressed issues such as wages, benefits, and scheduling of work

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days. This forms part of an overall pattern of incorrect and implausible assertions by the three managers that lead me to conclude that their testimony was unreliable.

[6] In addition to being uncontroverted by any management witnesses, Fosnight's account of his agreement with the Company regarding the terms of his rehire is also supported by the fact that he was not assigned on-call duties during the vast majority of his period of employment. His first on-call assignment was not scheduled to begin until March 23, almost a month after his termination.

[7] There was testimony that other employees were unhappy that Fosnight had been exempt from this duty. While the Company did not present evidence as to the reasons for altering Fosnight's terms of hire, this factor may well explain it.

assignments. In conjunction with this discussion, he showed Hensley the booklet that he had been given describing the Union's advantages. Fosnight testified that he "[m]entioned to [Hensley] about coming and joining the union, as well, and putting an application in." (Tr. 135.) He further testified that Hensley said he was "interested" in doing so. (Tr. 135.) Hensley confirmed Fosnight's account of their conversation, noting that other employees were within "arm's reach" and "could have easily, probably, have heard what we were talking about." (Tr. 158.)

Fosnight and Hensley's discussion of the Union occurred on a Friday. On the following Tuesday, the events of this case reached their culmination. On that day, Fosnight and Hensley were assigned to work together. They took a company van and proceeded to make service calls. It is undisputed that, during the course of the day, the Company's management decided to fire both of these employees. Surprisingly, the managers' testimony as to how this came about was in substantial conflict. Wells reported that he spoke to Frye by telephone. He recommended that both Fosnight and Hensley be terminated. Wells was very clear in asserting that he and Frye jointly "[d]ecided what they were going to do." (Tr. 104.) He noted that, regarding Fosnight, Frye told him that "I think it's time just to part ways." (Tr. 86.) Similarly, Wells testified that both men discussed Hensley's situation and concluded that he should be fired. He confirmed counsel for the General Counsel's assertion that, "both of you made the decision to discharge Mr. Hensley." (Tr. 90.)

Wells' account would seem like a straightforward example of a company president and the director of its residential department discussing and determining whether to discharge two employees of that residential operation. Nevertheless, it is directly contradicted by Frye's own version of this decision-making process. For example, counsel for the General Counsel explored with Frye the nature of that process regarding Hensley as follows:

> COUNSEL: Now did you have any participation at all in the decision to discharge Mr. Hensley?
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> FRYE: No.
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> COUNSEL: Do you know when the decision was made to discharge Mr. Hensley?
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> FRYE: No.
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> COUNSEL: Do you know if anyone conducted an investigation or anything like that prior to Mr. Hensley's discharge?
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> FRYE: I wouldn't know that.
>
> COUNSEL: You don't know?
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> FRYE: No.

(Tr. 58.) Similarly, counsel asked Frye who made the decision to fire Fosnight and when it was made. He flatly indicated that Wells had made that determination and that he had no idea when the decision had been made. Specifically, he was asked if Wells had consulted him prior to Fosnight's discharge and he responded, "I don't believe so." (Tr. 54.)

This stark contrast between the testimonies of the two managers is highly probative on the overall questions of exactly what happened and what motivated the Company's officials to make it happen. It is certainly reasonable to expect that the two supervisors would be able to provide a consistent explanation of the manner in which it was decided to discharge the two employees. In this regard, I note that the events under examination took place only a matter of months before the trial of this case. The Company is a relatively small employer and the firing of two employees on the same day was surely a noteworthy and unusual event.[8] Despite this, the Company was unable to present a coherent account of how it was decided to make these important employment decisions.

In *Black Entertainment Television,* 324 NLRB 1161 (1997), the Board endorsed an earlier observation by an administrative law judge that "[t]he Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." [Internal quotation marks and citation omitted.] I readily draw such an inference in this situation, noting particularly that Frye's professions of a degree of ignorance amounting to blithe indifference regarding the decision to terminate two employees on the same day suggests that he was attempting to distance himself from responsibility for an improperly motivated course of conduct. It is far more likely that, as Wells described, the two men discussed the matter and reached a joint decision to proceed with such consequential personnel actions.

After Wells and Frye decided to fire the two men, it fell to Wells to make the necessary announcements. At the conclusion of the workday, Fosnight and Hensley returned to the Company's facility. While Hensley proceeded to unload tools from the van, Fosnight went inside to clock out for the day. Fosnight testified that Wells approached him and stated that "they were parting ways with me." (Tr. 136.) Wells agreed, reporting that he told Fosnight that "[w]e feel that it's just best for us to part ways."[9] (Tr. 106.)

According to Wells, upon being fired, Fosnight responded, "[w]hatever," and walked out the door. (Tr. 106.) Shortly thereafter, he returned, throwing the keys to the Company's van at Wells. The two men had no further conversation and Fosnight left the premises. On the other hand, Fosnight testified that he asked Wells for an explanation of why he was being terminated. Wells declined to discuss it. Fosnight removed his things from the van and walked back inside. He handed Wells the keys and left the premises.

As to these conflicting accounts of what transpired after Wells told Fosnight he was discharged, I credit Fosnight's. It comports with a common sense appreciation of human behavior in this unhappy situation to conclude that a man who has just

[8] Wells testified that, during a typical year, the Company discharges between one and three employees for reasons of poor attitude or performance. Thus, the firing of Fosnight and Hensley on the same day was roughly equivalent to a normal year's worth of such activity.

[9] Wells' choice of language provides additional support to his account of how he and Frye decided to fire the employees. It will be recalled that Wells testified that Frye confirmed the decision to fire Fosnight by observing to Wells that "I think it's time just to part ways." (Tr. 86.) Unsurprisingly, Wells used Frye's exact phrasing to convey their decision to Fosnight. Indeed, he was careful to use the same language when firing Hensley as well.

been told that he has been deprived of his means of earning a living would attempt to learn why this was being done to him. To believe that a person in Fosnight's position, having heard such startling and unpleasant news from his boss, would simply shrug it off as Wells claims is to ignore basic human emotions.

Following his termination, Fosnight told Hensley what had just happened to him. Hensley testified that he asked Fosnight why he had been fired. Fosnight explained that Wells, "didn't give me any reason." (Tr. 160.) Hensley proceeded to enter the facility in order to clock out himself. Once inside, Wells approached and told Hensley that he was discharged. As Wells testified, he told Hensley that "it's best we part ways." (Tr. 110.) Both men agree that Hensley asked for a reason for his firing. Wells' response was to state, "[L]et's just leave it as the best course to part ways." (Tr. 110–111.) Hensley then left the premises and telephoned his wife to report the bad news.

While driving home a few minutes after these events, Fosnight decided to telephone Miers. Fosnight testified that he asked Miers about his termination and Miers, "told me he had only learned about [it] minutes previous to it and then asked me what was this about biding my time 'till the union called." (Tr. 136.) Miers confirmed that Fosnight phoned him shortly after his termination and asked him, "if I knew what was going on and why." (Tr. 198.) He reported that he responded by telling Fosnight that "Tom, I don't know what's going on yet. I said, once I find out, I said I'll let you know." (Tr. 198.) This ended their conversation and they have never spoken since. Miers specifically denied making any reference to the Union during this phone call.

Once again, I must resolve a flat contradiction between these accounts. In doing so, I note that Miers' version strikes me as a highly unlikely course of action for a management official to take. I find it very peculiar for a manager outside the normal chain of authority for the residential operation, on learning of the discharge of a residential employee, to promise the employee that he would investigate the matter and report back to the now-fired worker. Indeed, reinforcing my conclusion in this regard is the fact that Miers readily conceded that he did not perform any such investigation and did not report back to Fosnight at any time thereafter. His feeble excuse for breaking his supposed commitment to do so was simply that Fosnight, "didn't call me back. Obviously, he wasn't interested as to why [he had been fired]." (Tr. 202.) I reject this illogical picture of events and credit Fosnight's testimony that Miers gave him a veiled account of the true reason for his discharge through the mechanism of posing a question about Fosnight's union activities.

It will be recalled that the Company's explanation of the opening chapter of the events involving the discharges at issue in this case was marked by contradictory testimony. Frye and Wells were unable to present a coherent account of the manner in which they decided to fire the two employees. It is noteworthy that the final chapter of this tale was similarly clouded by the Company's inability to explain a matter as simple as the post-discharge documentation of the firings.

It is uncontroverted that, at the time they were fired, Fosnight and Hensley were not given any written documentation regarding their terminations. Instead, Wells testified that he prepared such reports, "[r]ight after they walked out the door." (Tr. 108.) However, when shown the actual reports, he noted that they were dated as of the following day, February 28. As a result, he had to concede that he had actually prepared these reports on the following day. Taken in isolation, this would be a minor point. However, viewed in the context of a string of inaccuracies and contradictions, it underscores the conclusion that the Company has been unable to provide a rational and consistent account of its behavior regarding the key events of this case.

To round out the history of this matter, Fosnight testified that he contacted Montgomery on the day after his termination. He advised Montgomery that he had been terminated and that "the only excuse I got was they asked me why I was biding my time 'till the union called.'" (Tr. 140.) Montgomery referred him to another union official, Steve Dunbar. On March 1, Dunbar met with both Fosnight and Hensley. During the course of this meeting, Hensley prepared a union application form. That form was misplaced. As a result, Hensley completed a second application on March 6. It indicates that Fosnight was the person who had referred him to the Union. Finally, I note that the Union filed the original charge in this case on March 5, and an amended charge on May 23. The complaint issued on May 29.

B. Legal Analysis

1. The discharges of Fosnight and Hensley

In assessing the legality of the Company's terminations of Fosnight and Hensley, the key inquiry will focus on the question of the employer's motivation. As a result, I must apply the analytical framework for analysis devised by the Board in *Wright Line.*[10] A comprehensive distillation of that test was provided by the Board in *American Gardens Management Co.,* 338 NLRB 644, 645 (2002):

> *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel.
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> To establish his initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such ac-

[10] 251 NLRB 1083 (1980), enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

> tivity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.
>
> If, after considering all of the relevant evidence, the General Counsel has sustained his burden of proving each of these four elements by a preponderance of the evidence, such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred. Under *Wright Line* the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Internal quotation marks, citations, footnotes, and language not relevant to this case have been omitted.]

In applying its *Wright Line* test, the Board mandates consideration of a wide range of evidence and appropriate inferences derived from that evidence. In *West Maui Resort Partners,* 340 NLRB 846, 847 (2003), rev. dismissed 2004 WL 210675 (D.C. Cir. 2004), it observed:

> Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proferred reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of discipline to the union activity. [Citations omitted.]

Keeping these principles in mind, I will now examine the facts and circumstances involved in the discharges at issue.

Initially, the General Counsel must show that the employees engaged in protected activities within the meaning of the Act. Of course, it is clear that Fosnight, spurred by dissatisfaction with the decision to require him to perform on-call duty, contacted the Union and applied for membership in it. Thereafter, he discussed the Union with a fellow employee, Hensley. As Hensley put it, Fosnight told him about the "benefits of the union." (Tr. 158.) Without doubt, Fosnight's course of conduct represented a classic example of activities protected by the Act.

The situation is only slightly less clear regarding Hensley's involvement in protected union activities. While recognizing that Hensley did not apply for membership until after his discharge, it is apparent that he did engage in discussions with Fosnight regarding the Union. When Fosnight solicited Hensley to join, he "said he was interested." (Tr. 135.) By engaging in such discussions about the benefits of union membership, Hensley placed himself within the protections of the Act.[11]

Having found that the two employees engaged in protected union activities, I must next determine whether the Company was aware of their involvement in this conduct. Turning first to Fosnight, I conclude that there is direct evidence that management was aware of his union activities. It will be recalled that immediately after he was discharged, Fosnight telephoned Miers and inquired why he had been fired. Miers responded by asking Fosnight, "[W]hat was this about biding my time 'till the union called." (Tr. 136.) This statement by the Company's second highest ranking official clearly shows knowledge of Fosnight's union activities.[12]

In addition to direct evidence of knowledge about protected activities, the Board turns to analysis of a variety of other factors in assessing this element of the *Wright Line* test. This was comprehensively explained in *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enf. 97 F.3d 1448 (4th Cir. 1996), as follows:

> [A] prerequisite to establishing that [employees] were wrongfully discharged is finding that the Respondent knew of their union activities. This "knowledge" need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. The Board additionally has relied on factors including the delay between the conduct cited by the respondent as the basis for the discipline and the actual discharge, and—in the case of multiple discriminatees—that the discriminatees were simultaneously discharged.
>
> Finally, the Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation."

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[11] Even if I were to find that Hensley had not engaged in protected activity, his discharge would be unlawful. His situation is similar to that presented in *Martech Medical Products,* 331 NLRB 487 (2000), enf. 6 Fed. Appx. 14 (D.C. Cir. 2001). In that case, an employee who had not engaged in union activity was fired along with other active union supporters. The employee was known to eat lunch with the activists, one of whom was her sister. The Board found her discharge to be unlawful, noting that "the discharge of an employee who is not known to have engaged in union activity, but who has a close relationship with a known union supporter may give rise to an inference of discrimination." Supra at 488. Hensley was known as a close friend of Fosnight. Indeed, the Company chose to have Fosnight call Hensley to inform him that he had been hired. The two men were often assigned to work as a team. I conclude that, at a minimum, Hensley was targeted due to his friendship with Fosnight.

[12] The fact that this direct evidence of knowledge arose after Fosnight's discharge is immaterial. The situation is virtually identical to that presented in *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004), where an employer's knowledge was established when a discharged employee was interrogated about his union involvement 1 week after he had been fired.

> The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist. For example, in *BMD Sportswear Corp.,* the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoff, and the layoffs were proximate to the start of the union organizing campaign. [Footnote and numerous citations omitted.]

Turning to the application of these factors, it is first vital to note the temporal relationship between the employees' breakroom conversation and the disciplinary action taken against them. Fosnight and Hensley engaged in a favorable discussion about the Union on the morning of Friday, February 23. During their conversation at least four fellow employees were located within easy hearing distance. I readily infer that it was probable that their conversation was overheard and became the subject of discussion among other persons associated with the Company.[13] Significant confirmation of this was provided by Miers. He testified that, while he was unaware of the discharged employees' union activities on the date of their discharge, he learned of it on the very next day. He reported that he gained this knowledge, "through fellow employees, scuttlebutt." (Tr. 198.) Significantly, it was on the second succeeding workday after their breakroom discussion that the two men were fired.

I conclude that Miers' contention that he encountered this scuttlebutt only on the day after the discharges is all too convenient. In its so-called "small plant doctrine," the Board has long recognized that it is reasonable to infer that management of a small firm is likely to gain knowledge of the identity of employees who are involved in union activities. See *Wiese Plow Welding Co.,* 123 NLRB 616 (1959); *D & D Distribution Co. v. NLRB,* 801 F.2d 636 at fn. 1 (3d Cir. 1986) ("The essence of the small plant doctrine rests on the view that an employer at a small facility is likely to notice activities at the plant because of the closer working environment between management and labor."); and *LaGloria Oil & Gas Co.,* 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003). Miers' admission that there was virtually contemporaneous scuttlebutt about the union activity strongly supports the validity of the application of the small plant doctrine to the facts of this case.

In addition to the inference I have drawn based on the likelihood that Fosnight and Hensley's conversation about the Union was overheard and reported to management, other powerful circumstantial evidence supports a finding of knowledge of the protected union activity. One of the most compelling items of that proof is the timing of the discharges. As a labor law judge, I am often struck by the power of emotions such as anger and fear to trump the wiser and more rational aspects of human nature resulting in a virtual compulsion to take revealingly hasty action in response to union activity. This case presents a classic example of this phenomenon.

Fosnight and Hensley discussed the benefits of the Union in a conversation conducted in the presence of a number of fellow employees. The conversation took place on Friday, February 23. The men were discharged on the following Tuesday, February 27. Thus, the lapsed time between these two events was only two workdays. Decades ago, an appellate court hit upon a felicitous phrase to describe the conclusion that may properly be drawn from such a close proximity. In *NLRB v. Rubin,* 424 F.2d 748, 750 (2d Cir. 1970), similar facts prompted the court to affirm a finding of unlawful discrimination, based in significant part on "stunningly obvious timing."[14] I do not hesitate to draw the same inference here.

The Board also applies a related concept when assessing the circumstantial evidence regarding an employer's behavior. Once again citing the Second Circuit, the Board has noted that "[t]he abruptness of the discharge[ ] and [its] timing are 'persuasive evidence' that the company had moved swiftly to eradicate the . . . prime mover[ ] of the union drive." *Toll Mfg. Co.,* 341 NLRB 832, 833 (2004), citing *Abbey's Transportation Services v. NLRB,* 837 F.2d 575, 580 (2d Cir. 1988). Here, the abruptness of the discharges is noteworthy. As counsel for the General Counsel observes:

> The fact that the respondent waited until after Fosnight's and Hensley's termination to prepare [termination] reports suggests that respondent was in a hurry to discharge Fosnight and Hensley first and think of the reasons for their discharges afterwards.

(GC Br. at pp. 7–8.) I find the precipitous timing and the abrupt nature of the terminations in this case to be highly probative of unlawful activity.

Yet another piece of the inferential puzzle is added by noting that the Company took action against both employees at the same time. It will be recalled that this is unusual since, in a typical year, this employer would terminate between one and three employees for disciplinary reasons. Added to the rarity of a multiple termination is the striking fact that the employees chosen for termination happen to be the same employees who were in a position to be overheard giving favorable consideration to union organizing activity. As the Board has noted, a "discriminatory discharge of one worker [is] a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same prounion activity, was discriminatory." *Yellow Enterprise Systems,* 342 NLRB 804 (2004), citing *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001). See also *Extreme Building Ser-*

[13] The Board has not hesitated to draw the same conclusion in similar circumstances. See, for example, *Verizon Wireless*, 349 NLRB 640, 643 (2007) (where employee's comments were made in a work area occupied by coworkers, "[i]t is thus reasonable to assume that others likely overheard.")

[14] This phrase has been cited many times since, sometimes missing its original attribution. See, for example, *Gaetano & Associates, Inc.,* 344 NLRB 531, 532 (2005) ("An inference of antiunion animus is proper when—as here—the timing of a management decision is 'stunningly obvious.' *NLRB v. American Geri-Care,* 697 F.2d 56, 60 (2d Cir. 1982), cert. denied 461 U.S. 906 (1983).").

vices Corp., 349 NLRB 914, 916 (2007) (earlier discharge of employee for union activity "strongly supports" a finding of unlawful motivation in discharge of second employee who engaged in the same protected activity).

I find convincing proof of employer knowledge of union activity from the direct evidence of Miers' statement to Fosnight coupled with the circumstantial evidence showing that the men could readily have been overheard discussing the matter, the ease of the dissemination of knowledge in a small facility, the timing of the terminations, the abruptness with which the terminations were accomplished, and the fact that the only employees who were considering union involvement were the ones selected for simultaneous termination.

Beyond all this, there remains an equally powerful inferential factor, the pretextual nature of the employer's purported rationales for the adverse employment decisions. The Board holds that "the pretextual nature of the Respondent's reasons for [an employee's] discharge supports an inference that the Respondent had both knowledge of [the employee's] protected activity and animus towards that activity." *State Plaza, Inc.,* 347 NLRB 755, 757 (2006). (Citation omitted.) Because the issue of pretext is also highly probative on the issue of antiunion motivation, I will defer detailed discussion of it to that portion of the *Wright Line* analysis. Suffice it to say that my finding of pretext is an additional substantial element in my conclusion that the employer knew of the protected union activity by Fosnight and Hensley.

The next step in the *Wright Line* process is perhaps the simplest, a determination as to whether the employees were subject to an adverse action by their employer. In this case, Fosnight and Hensley were given the ultimate employment sanction, the termination of their means of earning a living.

Having found that Fosnight and Hensley engaged in protected union activity, that the management of the Company was aware of their participation in that activity, and that the Company took adverse action against the men, it remains to determine whether there is a motivational link between the knowledge of union activity and the subsequent discharges. The starting point for this evaluation is the documentary record prepared by the official who conveyed the decision for termination to the affected employees.

It is uncontroverted that, at the time of their discharges, neither employee was given any verbal explanation of the reason for the adverse actions. In addition, I credit their testimony that they never received any written documentation of the terminations.[15] In contradictory fashion, Wells first testified that he prepared such reports, "[r]ight after they walked out the door." (Tr. 108.) Later, he conceded that he wrote the reports on the following morning. Significantly, he also testified that those reports were "intended as an internal document." (Tr. 108.) I credit this explanation for the purpose of these reports because it is consistent with the fact that they were never issued to the employees. Thus, they were not intended to serve as an explanation to those employees for the action taken against them. Rather, they must have been designed as a record of the personnel action created for the purpose of explaining that action to others with a legitimate interest in comprehending the reasons for the firings.

Wells prepared these two documents using the Company's preprinted form entitled, "termination report." That form requires the preparer to circle one of three possible reasons for an employee's departure from employment: "quit," "insubordination," or "reduction in force." (GC Exhs. 3 and 5.) It also requires the supervisor to rate the employee on a grading scale ranging from excellent to unsatisfactory. The rating categories are for attendance, cooperation, initiative, job knowledge, and quality of work. The form also permits the evaluator to provide customized details in a space set aside for that purpose. Finally, the preparer of the form must circle a recommendation regarding the desirability of rehiring the affected employee.

Fosnight's form shows that he was terminated from his position as a lead electrician in the residential department due to a "reduction in force." (GC Exh. 3, p. 1.) The form's evaluation shows that Fosnight's attendance was good and his job knowledge and quality of work were satisfactory. His initiative was described as fair, while his cooperation was characterized as unsatisfactory. In the written remarks, Fosnight's attitude was deemed, "bad." Two examples were cited, a claim that he was the last person to arrive at work every morning and a notation that he "did not want to do night duty (on call)." (GC Exh. 3, p. 1.) It was also recommended that Fosnight not be considered for rehire.

Hensley's termination report indicated that he was terminated from his position as a helper in the residential department due to a "reduction in force." (GC Exh. 5.) His evaluation grades were fair in all categories with the exception of an unsatisfactory rating in attendance. No explanatory details were provided, but it was recommended that he not be considered for rehire.

The documentary record created on the day after the terminations indicates that Fosnight was terminated as part of a reduction in force. Apparently, he was selected for layoff due to a bad attitude. Hensley's termination was also due to a reduction in force and it would appear that he was selected due to unsatisfactory attendance.[16]

An important part of the motivational analysis involves an examination as to whether the Company's officials have been consistent in their depiction of their reasoning supporting the termination decisions. As the Board has observed, any lack of consistency is important because, "[i]t is well established that shifting of defenses weakens the employer's case, because it raises the inference that the employer is 'grasping for reasons' to justify an unlawful discharge." *Meaden Screw Products,* 336 NLRB 298, 302 (2001).

Both Frye and Wells were carefully examined as to the reasons for terminating their employees. Regarding Fosnight,

[15] This is not seriously controverted. The best that Wells could offer was that he was "not sure" if the men ever received their termination reports. (Tr. 108.)

[16] Although both termination reports classify the discharges as resulting from a reduction in force, the Company presented no evidence that it was conducting a layoff. To the contrary, Wells testified that "in our business, day-to-day operations[,] everybody is so busy[.]" (Tr. 76.)

Frye cited several justifications during his examination by counsel for the General Counsel. The first proferred reason was the existence of complaints from several other employees regarding Fosnight's "bad attitude." (Tr. 43.) Specifically, Frye indicated that employees complained that Fosnight was "on the phone most—80% of the time instead of working, just bad work ethics." (Tr. 43.) Frye added, "I think he had some absenteeism problems. Some tardiness problems, I believe." (Tr. 48.) Counsel for the General Counsel pressed Frye to ascertain if there were any other reasons for Fosnight's termination. Frye's answer simply reiterated concerns about attitude and attendance. Only after being shown the termination report did Frye make mention that Fosnight "did not want to do night duty." (Tr. 50.)

Naturally, Wells was also examined regarding the reasons for Fosnight's discharge. He cited Fosnight's bad attitude, refusal to take on-call duty, and tardiness. When asked to describe Fosnight's attitude, Wells testified that it was, "[p]oor. He had a lot of things going on personally. Staying on his cell phone all day. Productivity. Workmanship . . . Quality of work." (Tr. 84.)

In assessing the employer's asserted reasons for terminating Fosnight, I have considered the termination report in conjunction with the testimony from Frye and Wells. At the outset, it is noteworthy that the primary factor cited by all three sources was Fosnight's attitude and unsatisfactory rating in the area of cooperation. While this is a consistent explanation for his termination, it is a highly troublesome one. In *James Julian, Inc. of Delaware,* 325 NLRB 1109 (1998), it was noted that "[t]he Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a 'bad attitude' are often euphemisms for prounion sentiments." [Citations omitted.] Very recently, the Board reiterated that "[i]t is well settled that an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity." *Rock Valley Trucking Co.,* 350 NLRB No. 10 at fn. 6 (2007). (Citation omitted.)

I recognize that a supervisor's complaint that a worker possesses a bad attitude is not invariably a disguised reference to union activity. Instead, when attitude is flagged as the key justification for an adverse action, it is important to consider all of the circumstances. In this case, I find that those circumstances support the inference that the attitude problems refer in substantial part to protected activity. It will be recalled that the Company chose to rehire Fosnight and promised him that he would not be required to perform on-call duty. During his period of reemployment, he had no record of disciplinary action in his personnel file. This strongly suggests that his work ethic was deemed satisfactory.[17] The termination report's evaluation showed acceptable ratings in every area except the one related to attitude. If Fosnight's supposedly bad attitude did not manifest itself in unacceptable attendance, initiative, or job quality, it would appear more likely to be related to protected activity. The suspicious nature of the reliance on Fosnight's attitude was underscored by Wells' choice of language in elaborating on this question. When asked why Fosnight was fired, he reported that "[b]asically, his attitude was carrying over to the other guys . . . Morale. Bringing morale down." (Tr. 81.) This is a classic formulation for raising grave concern regarding an unlawful motivation for Fosnight's discharge.[18]

The primary alleged reason for Fosnight's discharge was consistently asserted, but fatally linked to protected activity. The secondary reasons were not consistently articulated and are not credible. His supposedly excessive use of the cell phone was not cited in the written description intended to explain his discharge. Furthermore, the claim that he spent 80 percent of his time talking on his phone is clearly inconsistent with his evaluation showing good attendance and satisfactory quality of work. Even more striking was the reliance by Wells and Frye on claims that Fosnight exhibited poor attendance, including frequent tardiness. Such a contention is completely belied by Fosnight's rating of "Good" in the area of attendance. Indeed, his job evaluation shows that attendance was his strongest suit. Similarly, any contention that poor workmanship was a factor in his dismissal is fatally undermined by his earlier unsolicited offer of reemployment and his "satisfactory" rating on this aspect of his employment evaluation in the termination report.

Finally, I reject any claim that Fosnight was fired for refusing to perform on-call duty. I credit the evidence demonstrating that he never refused this change in his conditions of employment. While his unhappiness about this newly-imposed requirement prompted his protected activity, it did not lead him to engage in any act of insubordination. His hasty termination was effectuated long before his first scheduled on-call duty in late March.

In sum, I conclude that the only consistent rationale offered for Fosnight's discharge was his bad attitude. Considering all of the circumstances, I find that what was meant by this was Fosnight's involvement in protected concerted activities. The other proferred justifications are makeweights that are fatally undermined by the job evaluation report prepared by Wells on the morning after the termination. Indeed, that evaluation and the written comments that supplement it make it very clear that Fosnight was discharged solely due to his poor attitude, a reason that in this case was based on an unlawful motivation.

The situation is similar regarding Hensley. His job evaluation showed an unsatisfactory rating in only one area, attendance. In striking contrast, when Frye was asked why Hensley was fired, he cited a multitude of reasons that did not include attendance. The testimony went as follows:

[17] Furthermore, even the termination report is careful to indicate that Fosnight did not actually refuse to perform on-call duty, he simply indicated that he "did not want to do night duty." (GC Exh. 3, p. 1.) Indeed, if the Company had believed that Fosnight had actually refused to do that duty, it would surely have characterized his separation as being due to insubordination. It will be recalled that the termination report form listed this as one of the three possible types of separations.

[18] Wells went on to refer to the impact on other employees of Fosnight's unwillingness to do on-call work. Given that the Company had agreed to exempt him from this duty due to his scheduling problems, I view this largely as a smokescreen. Any disaffection among other employees caused by Fosnight's exemption from on-call duty was the result of a management decision, not an attitude problem on the part of Fosnight.

COUNSEL: Do you know or can you explain to me the reasons for Mr. Hensley's discharge?

FRYE: The only thing I heard is that, afterwards, and I talked to some of our lead electricians afterwards, is the reason Greg [Wells] let him go is because of some bad work ethics.

COUNSEL: What do you mean bad work ethics?

FRYE: My employees in the field said that he was lazy. I believe he refused to do a couple of jobs that they asked him to do. The commercial side just said that they couldn't work with him.

COUNSEL: So let's make sure the record is clear. Mr. Hensley was discharged because of his work ethic, his work performance?

FRYE: I believe that's what Greg had told me afterwards.

COUNSEL: And that entailed what? What was wrong with his work performance?

FRYE: Just a lack of attitude on the jobsite and the employees that worked with him said that he just didn't work, wouldn't work.

COUNSEL: And, to the best of your knowledge, those are the reasons he was discharged?

FRYE: I believe so. [Tr. 56.]

Wells was also asked why Hensley was fired. His response was, "Attendance. Attitude. Insubordination." (Tr. 90.) Asked if there was anything else, he responded, "[t]hat's all that comes to my mind right now." (Tr. 90.) When asked for details about the issue of insubordination, Wells explained that this referred to an incident that happened a couple of weeks prior to his termination. It consisted of a refusal by Hensley to comply with his lead electrician's instruction to get into a crawl space.[19]

I have examined all of the evidence regarding the Company's supposed reasons for discharging Hensley. The termination report sets forth a straightforward solitary justification, poor attendance. By contrast, the two management witnesses offered a grab bag of additional reasons from vague complaints about attitude and work performance to a grievous accusation of insubordination. The Board has often discussed the significance of this variance between the rationale written in a company's personnel records and the accounts of its executives on the witness stand. In *McClendon Electrical Services,* 340 NLRB 613, 614 (2003), an employee named Elgin's disciplinary notice stated that he was discharged for failure to complete a shift and insubordination. The Board went on to note that,

> [a]t the hearing, [the owner] added several additional reasons for discharging Elgin: (1) he was in a 90-day probationary period; (2) his work was slow/lethargic and generally not good; and (3) he had some absences and was late a couple of times. These deficiencies, however, were not contained in the disciplinary notice, which set forth the other grounds, discussed above. The Company's vacillation and the multiplicity of its alleged reasons for firing the employee render its claims of non-discrimination the less convincing. Indeed, such shifting assertions strengthen the inference that the true reason was for protected activity. [Citations, quotation marks, and some punctuation omitted for clarity.]

Similarly, in *Desert Toyota,* 346 NLRB 118, 120 (2005), a fired employee's termination form cited reduction in force and decline in job performance and attitude. At trial, management witnesses added additional reasons including failure to follow the chain of command and lack of respect. The Board pointedly observed that "[b]y adding these makeweight reasons during the hearing, and thereby changing the source of the decision to discharge [the employee], it appears that the Respondent was simply making up its defense as it went along." In my view, that is precisely what happened in this case.

Particularly striking is the situation with regard to the claim of Hensley's insubordination. There can be little doubt that insubordination is a grievous workplace offense that is often a readily understandable basis for a discharge from employment. Had Hensley actually engaged in such misbehavior, one would reasonably expect that the Company's personnel record would contain details regarding the incident and any accompanying disciplinary action. Hensley's record is barren in this regard with the possible exception of a vague and inconclusive reference to an incident on February 22. Of the greatest significance is the fact that his termination report does not cite insubordination as the reason for his discharge. This is particularly noteworthy because insubordination is one of only three printed types of separations listed on the Company's termination report form. Beyond this, Hensley's job rating in the area of cooperation was fair. Obviously, an employee who was being discharged for insubordination would be shown as having an unsatisfactory level of cooperation. I am convinced that Hensley's supposed insubordination is a clear example of a pretext being used to disguise an unlawful motivation.

In addition to a bogus claim of insubordination, the employer raised a claim that Hensley had a poor attitude manifested through laziness and poor quality job performance. Once again, this is belied by his job evaluation ratings in the key areas of quality of work, initiative, and cooperation. An employee who was being discharged for genuine laziness and substandard work would not have been rated as having "fair" performance in these areas of evaluation. This leaves attendance as the remaining reason. While Hensley did have some attendance problems, I conclude that they were not the reason for his termination.[20]

[19] Nothing in Hensley's file corroborates this alleged incident. The only possible reference is a notation in his attendance record form on February 22 indicating that Hensley was "sent home because he was complaining on who he was working [indecipherable word]." (R. Exh. 1, p. 6.) If this is indeed the incident Wells cited, the record indicates that it was Hensley who was complaining, not his lead electrician.

[20] The pretextual nature of the Company's contention that it fired Hensley for poor attendance is underscored by comparison of its characterization of Hensley's record with the documents that it submitted in support of its defense. Counsel for the Company claims that Hensley exhibited deficient attendance, "missing about 1 day per week of work." (R. Br. at p. 7.) Actually, the Company's own record of Hensley's attendance shows that he missed 7 days during his 6-month employment. (R. Exh. 1, pp. 2–3.) This continuing pattern of gross

Having found that the Company was unable to present a rational, clear, or consistent account of the grounds for the terminations of Fosnight and Hensley, I will next examine whether those terminations were in accord with the established disciplinary policies of the Company and its typical practices in this area. This is important because the Board holds that, "the fact that the Respondent's behavior was inconsistent with its progressive discipline system and its past practice" is probative evidence of discriminatory motivation. *Tubular Corp. of America,* 337 NLRB 99 (2001).

As in the case just cited, this employer maintains a written progressive disciplinary system. That system is described in the Company's handbook. The most recent edition of the handbook is dated January 1, 2007. Previous editions contained the same provisions. The handbook classifies offenses into two categories. Class one offenses are more serious transgressions that may subject the employee to immediate termination. Class two offenses consist of other violations that may result in the issuance of a written warning that "will be retained in the employee's personnel folder." (GC Exh. 2, handbook, p. 17.) The accumulation of three such written reprimands may result in termination.

It is instructive to compare the treatment of Fosnight and Hensley with the terms of this disciplinary system. At the outset, it is particularly noteworthy that the relevant personnel files for these two employees are barren of any prior written reprimands of the type described in detail in the handbook. As a result, their termination pursuant to the policy would require a finding that they committed a class one offense. Of the 13 such offenses specified in the handbook, the only one that could conceivably apply to either employee was excessive absenteeism.

Significantly, the handbook provides a clear roadmap for management of the problem of absenteeism, including tardiness. In a classic example of progressive discipline, it provides for a verbal warning with written notice to the personnel file for a first offense, written warning for a second offense, suspension for the third offense, and possible termination "after management review" for a fourth infraction. (GC Exh. 2, handbook, p. 9.) The same system of increasing penalties is applied in cases of tardiness.

While the Company contends that a reason for the terminations of Fosnight and Hensley was poor attendance, it is evident that their terminations did not comport with the progressive system described in the handbook. Under that system, before termination would be considered, each employee would have had to accumulate at least one verbal warning with written notation, a written warning, and a prior suspension for violation of the attendance policy. This simply did not occur.

All of the remaining criticisms of the two employees cited by management as justifying their dismissal fall within the definition of class two offenses in the handbook. In particular, they would fall within the prohibition against, "[n]egligence, carelessness, or conduct that adversely affects quality or quantity of you[r] work." (GC Exh. 2, handbook, p. 17.) The handbook specifies that the punishment in such cases is the issuance of a written warning or reprimand that is retained in the personnel file. In addition, "[a]ccumulation of three reprimands may result in termination." (GC Exh. 2, p. 17.) Furthermore, the handbook underscores the importance of the documentary record in this regard by noting that, "[a]ll letters and reprimands are kept as a permanent record in your personnel file." (GC Exh. 2, p. 17.) Once again, it is obvious that the discharges of Fosnight and Hensley do not fall anywhere within the Company's written disciplinary system. Since their personnel files did not contain even a single written warning or reprimand, their discharge for any class two offense or offenses violates the handbook. This is potent evidence of a rush to judgment arising from an unlawful motivation.

I recognize that employer rulebooks are not analogous to codes of criminal conduct. Experience in this area of litigation and common sense inform us that many small employers ignore the rules in the day-to-day operation of their business enterprises. Both Frye and Wells testified that such was the case with this firm. Indeed, Wells noted that the operation was so busy that it was impossible to comply with the disciplinary procedures in the handbook. As a result, the failure to follow those procedures in this case would be explainable if the terminations of Fosnight and Hensley were consistent with the Company's actual practices even where those practices appeared to violate the handbook.

Unfortunately, the evidence overwhelmingly establishes that the discharges of the two employees were entirely inconsistent with the Company's past history of handling allegations of employee misconduct. While the Company's officials readily reported that they did not follow the handbook, they were clear in asserting that they departed from that handbook's provisions by being far more lenient toward the employees than was authorized by the handbook. Wells summarized this point very authoritatively as follows:

> You know, to be just truthful, in our business, day-to-day operations everybody is so busy a lot of times it's just verbal reprimand, me talking to you just like we're talking now. You know, get your crap together, and hope that they will.

(Tr. 76.) Indeed, at another point in his testimony, Wells made a point of observing that "[w]hen it comes to us, we're pretty soft at heart." (Tr. 100.)

Frye's testimony was to the same effect. He observed that 95 percent of the Company's discipline consisted of verbal admonitions. I was so struck by these professions of tolerance and leniency that I pressed Frye on this point by asking him what the punishment would be for an employee who physically assaulted him. While he indicated that the hypothetical attacker would probably be terminated, he added, "[b]ut we tolerate a lot, so—." (Tr. 37.)

What makes this all the more interesting is the fact that management's professions of generosity and lenience were clearly applied to Fosnight and Hensley prior to their involvement in protected activity. In particular, I note that during Fosnight's

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exaggeration underscores my conclusion that attendance is a mere chimera designed to disguise the actual cause of the decision to fire this employee. I will further discuss my reasoning for this conclusion during my upcoming analysis of the Company's overall disciplinary policies and practices.

first period of employment, he was afforded such treatment to a striking degree. It will be recalled that he was twice found to have been smoking marijuana in a company vehicle on company time. This is an obvious class one offense under the terms of the handbook.[21] The handbook provides for the possibility of "immediate termination" for even a first such offense. (GC Exh. 2, handbook, p. 17.) Despite this, Fosnight was given a warning for the first offense and a suspension for the second. Similarly, whatever management's views of Fosnight and Hensley's behavior, neither employee received so much as a written warning prior to their concerted protected activities.

This general practice of leniency and the past history of application of that practice to Fosnight and Hensley stands in stark contrast to their subsequent abrupt dismissals. The Company has utterly failed to present any credible explanation for the transformation of a policy of forbearance into an attitude of uncompromising strictness even in circumstances where the handbook counsels moderation through application of progressive disciplinary steps. I conclude that the only intervening factor that can logically account for the change was the union activity.

In assessing the impact of the Company's departure from both its written policies and past practices, it is instructive to compare the facts of this case with those in the Board's recent decision in *Publix Super Markets,* 347 NLRB 1433 (2006). That employer discharged an employee for asserted reasons that included violations of its punctuality rules. The employer had followed the written requirements of its disciplinary system by issuing the employee oral and written warnings about punctuality prior to his discharge. Nevertheless, the Board found unlawful motivation based in part on the fact that the employer's application of the terms of the disciplinary rules actually "reflected an atypically, and discriminatorily, strict application of that policy." Id. at 1438. Here, the employer has taken it a step beyond. The treatment of Fosnight and Hensley was not only vastly excessive when compared to past practices, it was also more draconian than the written disciplinary policy's provisions. I conclude that it was driven by unlawful intent.

For all of the foregoing reasons, I find that the Employer's explanations for the terminations of Fosnight and Hensley are mere pretexts offered to conceal the true reason, the employees' participation in protected union activity. When this is found to be the case, the Board has long held that the *Wright Line* analysis is properly terminated because it would be redundant to shift the burden and again examine the employer's justifications as a defense to a finding of unlawful conduct. As the Board has explained:

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where 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. [Internal quotation marks and citations omitted.] [*Rood Trucking Co.,* 342 NLRB 895, 898 (2004).]

In addition to its impact on the sequential steps of the analysis, the finding of pretext relates back to the assessment of the employer's motivation. This is the case because, "[i]t is well settled that, where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal."[22] (Citations omitted.) *Key Food,* 336 NLRB 111, 114 (2001).

Considering all of the evidence, I have made the following conclusions in applying *Wright Line*. I find that Fosnight and Hensley engaged in protected union activities and that their employer was aware of their participation in those activities. Immediately upon learning of this union activity, the Company discharged the employees. Based on a variety of factors, including the timing and abruptness of the adverse action, the simultaneous action taken against both participants in the union activity, and the shifting and pretextual nature of the purported rationales for the terminations and their lack of consistency with the Company's policies and past practices, I conclude that the discharges of Fosnight and Hensley were motivated by unlawful animus toward union activities and sympathies. As a result, the employer has violated Section 8(a)(1) and (3) of the Act.

2. The interrogation of Fosnight

The remaining unfair labor practice charge concerns the interrogation of Fosnight by Miers on February 27.[23] It will be recalled that, on that day, shortly after Wells told him that he was discharged, Fosnight telephoned Miers. He asked Miers about his termination and Miers responded by telling Fosnight that "he had only learned about [it] minutes previous to it and then asked me what was this about biding my time 'till the union called."[24] (Tr. 136.) The General Counsel contends that Miers' query to Fosnight about his involvement with the Union constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.

Preliminarily, I note that Miers posed his question to Fosnight shortly after Wells had discharged him from the Company's employ. Counsel for the Company argues that

[21] The handbook lists a class one offense consisting of, "[p]ossession, use, or being under the influence of alcohol or controlled substances on Frye Electric property or on company time." (GC Exh. 2, handbook, p. 17.)

[22] In the context of the application of a statute that prohibits other forms of employment discrimination, the Supreme Court has endorsed use of this analytical methodology. *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133, 147 (2000) (In an age discrimination case, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.")

[23] The complaint alleges that Miers interrogated "employees" in the plural. (GC Exh. 1(e), par. 5.) Both at trial and in his brief, counsel for the General Counsel confirmed that there is actually only one interrogation at issue, the exchange between Miers and Fosnight on February 27. (Tr. 10; GC Br. at p. 21.)

[24] Miers admitted that the phone conversation took place but denied making any mention of the Union. For the reasons discussed earlier in this decision, I credit Fosnight's account.

"[b]ecause Fosnight was no longer an employee at the time of the conversation . . . Miers' interest in Fosnight's activities could not and did not interfere with Fosnight's rights." (R. Br. at p. 4.) Since I have found that the Company's discharge of Fosnight was unlawful, it can hardly be raised as a defense to the interrogation charge. In any event, even if the discharge were found to be lawful, the Act's protections have long been held to extend to former employees. In *Briggs Mfg. Co.,* 75 NLRB 569, 571 (1947), the Board noted that the statutory definition of "employee" was broad enough to cover "former employees of a particular employer." See also *Little Rock Crate & Basket Co.,* 227 NLRB 1406 (1977), and *Town & Country Electric,* 309 NLRB 1250, 1255 (1992), enf. 106 F.3d 816 (8th Cir. 1997).[25] As a result, whatever Fosnight's precise status at the moment of the conversation, he fell within the Act's ambit of protection as an employee.

It is evident that the Act does not prohibit all discussions between employers and workers regarding labor unions. Each situation must be scrutinized by application of the Board's analytical criteria as set forth in the leading case of *Rossmore House*.[26] This framework for analysis was usefully summarized by the Board as follows:

> The Board applies a totality of circumstances test to determine whether the questioning of an employee would reasonably tend to coerce that employee in the exercise of Section 7 rights, thus constituting unlawful interrogation . . . . [W]hen analyzing alleged interrogations the Board will consider, inter alia, factors that were first set out in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964). Those factors are: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was the interrogator in the company hierarchy? (4) The place and method of interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) The truthfulness of the reply. These and other relevant factors are not to be mechanically applied in each case. They serve as a useful starting point for an assessment of the totality of circumstances. [Some citations and internal quotation marks omitted.] [*Field Hotel Associates, LP,* 348 NLRB 1, 4 (2006).]

As is often the case, some of the *Bourne* factors support one side in this litigation, while others favor the opposing parties. In particular, the place and method of interrogation support the Company's defense. The conversation was initiated by Fosnight and took place over the telephone and was informal in nature. Indeed, Miers testified that Fosnight's call reached him while he was at a pub having a cocktail with a friend. In addition, the factor regarding the truthfulness of an employee's response to questioning does not favor the General Counsel's position. There is nothing to suggest that Fosnight felt any need or desire to dissemble. Instead, he simply avoided making any direct response to Miers' query.

While these considerations support the lawfulness of the conversation, the remaining factors strongly favor a finding of unlawful coercion. In particular, the background context of the conversation is compelling evidence of a violation. Fosnight had just been discriminatorily discharged for union activity. He was asking Miers for an explanation. Choosing this precise moment to raise the union issue with Fosnight sent a potent and toxic message linking Fosnight's loss of employment directly to his involvement with the Union. I conclude that the choice of this context by Miers was an intentional and effective method of intimidation.[27]

In addition to the background, the nature of the information being sought supports a finding of illegality. By asking Fosnight whether he was biding his time waiting for membership in the Union, Fosnight was seeking specific information about an employee's protected activities. As the Board has explained, this sort of "pointed attempt to ascertain the extent of the employee['s] union activities" is unlawful. *SAIA Motor Freight, Inc.,* 334 NLRB 979, 980 (2001).

Finally, the identity of the questioner is a factor that supports the General Counsel's position. Miers was described as the "[s]econd-in-command" of the Company. (Tr. 197.) He was clearly an important corporate official whose views would be seen as authoritative expressions of the employer's opinions.

Taking into account the totality of the circumstances, I conclude that Miers violated the Act by asking Fosnight about the extent and purpose of his union activities less than an hour after the Company had effectuated its unlawful decision to terminate Fosnight's employment. By linking the response to Fosnight's inquiry about this decision directly to his union activities, Miers engaged in the sort of coercion prohibited by Section 8(a)(1). See *Michigan Road Maintenance Co.,* 344 NLRB 617, 617–618 (2005). (Inquiry about union activity that drew an "obvious connection" between the question and another contemporaneous unfair labor practice constituted an unlawful interrogation.)

CONCLUSIONS OF LAW

1. By discriminatorily discharging its employees, Thomas Fosnight and Dennis Hensley, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

[25] In an earlier phase of the *Town & Country* litigation, the Supreme Court, in a unanimous decision, approved the Board's use of a broad definition of the term "employee" in finding that employees of a labor union that seek to apply for work with another employer for purposes of organizing that employer's work force fall within the statutory definition. *NLRB v. Town & Country Electric,* 516 U.S. 85, 91 (1995).

[26] 269 NLRB 1176, 1177 (1984), enf. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board continues to apply this test. See *Sproule Construction Co.,* 350 NLRB 774 fn. 2 (2007).

[27] In his brief, counsel for the Company asserts that Miers' question could not have intimidated Fosnight since it did not seek information about his "attitudes, membership, or activities," but only involved an inquiry into "his poor work ethic, and whether it was the result of Fosnight 'biding his time' and waiting for the union." (R. Br. at p. 4.) In my view, this only serves to underscore the unlawful nature of the interrogation since it demonstrates that the employer's dissatisfaction with Fosnight was directly linked to his involvement with the Union.

2. By coercively interrogating Thomas Fosnight about his protected union activities, the Company has also violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I will also recommend that the Company be required to post a notice in the usual manner.

With regard to affirmative relief, the Company having discriminatorily discharged its employees, it should be ordered to offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of termination to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

With regard to the manner of computing interest, at the commencement of the trial of this case and in his brief, counsel for the General Counsel sought a recommended order that would constitute a departure from existing Board precedent. (Tr. 9–10; GC Br. at pp. 9–21.) As counsel put it, "[t]he current practice of awarding only simple interest on backpay and other monetary awards should be replaced with the practice of compounding interest." (GC Br. at p. 9.)

While I agree that it is clearly appropriate for the General Counsel to notify a respondent at the earliest opportunity that he is seeking a new form of relief, I conclude that it would be inappropriate for me to entertain this recommendation. Certainly, the assigned administrative law judge has the authority to recommend a full range of remedial options. I have not hesitated to recommend extraordinary measures when I have concluded that they are required. For example, see *Metropolitan Regional Council of Carpenters (Adams-Bickel Assoc.),* 2007 WL 1629737 (June 1, 2007) (broad cease-and-desist order), and *American Directional Boring, Inc.,* 2007 WL 2430006 (Aug. 23, 2007) (bargaining order). However, what distinguishes those cases from the present request is that the forms of relief that I recommended had previously been authorized by the Board when prerequisite conditions existed that justified their use. The issue in those cases was merely whether the necessary conditions had arisen. In this case, the General Counsel seeks relief that has never been authorized by the Board.

In *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 897 (1984), the Supreme Court noted that Section 10(c) of the Act vested in the Board, "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." That authority extends to questions regarding the remedial issue of interest on any amounts owed by a wrongdoer. *NLRB v. G & T Terminal Packaging Co.,* 246 F.3d 103, 127 (2d Cir. 2001).

Consideration of a change in the manner of computing interest as proposed by the General Counsel requires the analysis and resolution of a variety of policy questions. For example, in its leading case of *New Horizons for the Retarded*, supra, the Board cited policy issues involved in determining the methods of calculating interest including the need to "encourage timely compliance with Board orders, discourage commission of unfair labor practices, and more fully compensate discriminatees for their economic losses." 283 NLRB at 1173. It also cited the factor of ease of administration of the remedy. It is apparent that these matters fall uniquely within the competence of the Board as the entity that possesses the overall knowledge, experience, and responsibility in this field.

In addition, I note that individual administrative law judges may only act within the confines of the cases assigned to their dockets. As a result, it would be inappropriate for me to issue an order imposing a new form of remedy. For example, should the parties in this case decide not to file exceptions to my decision, this employer would be responsible for providing a remedy that is more costly than any other employer who has engaged in the same forms of misconduct.[28] Furthermore, I am not in a position to address such nationwide concerns as the applicability of any new measure to other pending cases in varying stages of litigation. In this regard, the situation bears some resemblance to the problem that arises when courts of appeals reach different conclusions regarding the Board's policy judgments. As the Board has reminded administrative law judges in that context,

> it remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved. [Citations omitted.]

Pathmark Stores, 342 NLRB 378 at fn. 1 (2004). I conclude that the Board would apply the same reasoning to this situation. Were I to take individual action, it would disrupt the uniform and orderly administration of national labor law policy. See also *Southern Mail, Inc.,* 345 NLRB 644, 650 fn. 24 (2005) (Board deletes judge's remedial provision for payment of extra taxes resulting from lump sum backpay award as "inconsistent with current precedent."). For these reasons, I decline to recommend any alteration to the Board's current manner of awarding interest.[29]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Frye Electric, Inc., Avon, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against Thomas Fosnight, Dennis Hensley, or any other of its employees for

[28] By contrast, in the event that exceptions are not filed, my current recommended remedy will conform to the remedies imposed in all other cases.

[29] Nothing in this discussion should be taken as suggesting anything regarding my views as to the merits of the General Counsel's request.

[30] 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.

supporting, engaging in activities on behalf of, or seeking assistance from, the International Brotherhood of Electrical Workers, Local 481, AFL–CIO, or any other labor organization.

(b) Coercively interrogating Thomas Fosnight or any other of its employees regarding their protected union activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed 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 Thomas Fosnight and Dennis Hensley full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Fosnight and Dennis Hensley whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Avon, Indiana, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 25, 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. 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 facility 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 any time since February 27, 2007.

(f) 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.

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[31] 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."