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Tschiggfrie Properties, Ltd *and* Teamsters Local 120, a/w International Brotherhood of Teamsters. Case 25–CA–161304

February 13, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On June 24, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and cross-exceptions, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

The General Counsel excepts to the judge's finding that the Respondent's prehearing interviews with employee Bill Kane did not violate Section 8(a)(1).[3] For the reasons that follow, we reverse the judge and find this violation.

The Respondent's attorney, Davin Curtiss, and General Manager Tschiggfrie interviewed Kane twice in preparation for the hearing in this case. The first interview was approximately a month before the hearing, and the second interview was approximately a week before the hearing. During the first interview, the Respondent questioned Kane about the union campaign and Galle's approaching Kane to talk about the Union. Kane testified that he could not "honestly say" whether the Respondent told him that the first interview was voluntary,

[1] We adopt the judge's findings that the Respondent's August 17, 2015 written warning to employee Darryl Galle independently violated both Sec. 8(a)(1) and (3) of the Act.

We also adopt the judge's finding that the Respondent's discharge of Galle violated Sec. 8(a)(3). Initially, we agree with the judge's statement of the General Counsel's initial *Wright Line* burden. See *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011) (General Counsel establishes antiunion motivation of employer's conduct in the first instance by showing "union activity by the [affected] employee, employer knowledge of the activity, and antiunion animus by the employer"; the General Counsel's initial burden does not include a fourth "nexus" element). The judge correctly found that the General Counsel established that Galle's union activity, which included initiating the organizing campaign, serving as the Union's election observer, and frequently discussing the Union with coworkers, was a motivating factor in the Respondent's decision to discharge him. The Respondent clearly had knowledge of Galle's union activity—its August 17 warning to Galle expressly disciplined him for engaging in union discussions—and that warning also establishes animus.

The judge also correctly found that the Respondent failed to establish that it would have discharged Galle even in the absence of his union activity. The Respondent's General Manager Rodney Tschiggfrie testified that he discharged Galle for sleeping on the job and for having a nonwork-related website open on his personal laptop on October 1, 2015. The Respondent, however, had known for months that Galle had been sleeping on the job, yet it never disciplined him for it. The Respondent claims that it was awaiting documentation from Galle's doctor to verify if Galle had a medical condition that caused him to fall asleep on the job. However, the Respondent never followed up with Galle about this documentation even after several months had passed without receiving it. Moreover, the Respondent made no reference to sleeping on the job when discharging Galle. With regard to Tschiggfrie's observing a nonwork-related website open on Galle's laptop, we note that the Respondent allows employees to use their personal computers for work and does not have a rule prohibiting employees from accessing nonwork-related websites. Moreover, the Respondent did not attempt to verify Galle's claim that he was using his laptop to get information about a truck transmission on which he was working. Instead, the Respondent immediately discharged Galle and only subsequently investigated his use of the internet. Further, although Tschiggfrie testified that the Respondent regards accessing nonwork-related websites during work time as "theft of company time," the Respondent did not establish that it has previously punished an employee for accessing a nonwork-related website during work time or for committing any comparable infraction. We therefore find, in agreement with the judge, that the Respondent failed to establish that it would have discharged Galle even in the absence of his union activity.

Acting Chairman Miscimarra disagrees with the judge's statement that the General Counsel does not have to prove a connection between an employer's antiunion animus and the adverse employment action, the lawfulness of which is at issue. In *Wright Line*, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, under *Wright Line*, the General Counsel must establish a link or nexus between the employee's protected activity and the employer's decision to take the employment action alleged to be unlawful. See *Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014) (then-Member Miscimarra, concurring in part and dissenting in part), enfd. 801 F.3d 767 (7th Cir. 2015); *Starbucks Coffee Co.*, 360 NLRB 1168, 1172 fn. 1 (2014) (then-Member Miscimarra, concurring); see also *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015) (holding that "there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker"); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554–555 (8th Cir. 2015), denying enforcement of 361 NLRB No. 22 (2014) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive.") (alterations and internal quotations omitted). Applying this standard, Acting Chairman Miscimarra finds the General Counsel made the requisite prima facie showing required under *Wright Line* in this case.

[2] We shall amend the remedy and modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

[3] The General Counsel does not except to the judge's failure to find that the Respondent's prehearing interview with Samuel Becker violated Sec. 8(a)(1).

but the Respondent did not tell Kane that it would not take any action against him as a result of the first interview. During the second interview, the Respondent again questioned Kane about the union campaign without telling him that the interview was voluntary or assuring him that it would not take action against him as a result of the interview.

When an employer interviews an employee about protected activity in preparation for an unfair labor practice hearing, "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis." *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). "The Board has held that compliance with *Johnnie's Poultry* safeguards constitutes the minimum required to dispel the potential for coercion in cases where an employer questions employees in preparing for a Board hearing." *Albertson's, LLC*, 359 NLRB 1341, 1343 (2013) (internal quotations omitted), affd. and incorporated by reference in 361 NLRB No. 71 (2014); see also *Freeman Decorating Co.*, 336 NLRB 1, 19 (2001) (stating that the Board takes a "bright-line approach" in enforcing the *Johnnie's Poultry* safeguards), enf. denied on other grounds sub nom. *Stage Employees IATSE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003).[4]

During both interviews, the Respondent questioned Kane about protected activity by asking him about the union campaign and Galle's approaching him to talk about the Union. The Respondent failed to provide Kane with assurances against reprisals at both interviews and failed to inform him that his participation in the second interview was voluntary. By questioning Kane at the prehearing interviews without complying with *Johnnie's Poultry*, the Respondent violated Section 8(a)(1).[5]

AMENDED REMEDY

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

Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by issuing a written warning to Darryl Galle on August 17, 2015, we shall order the Respondent to rescind the warning, remove from its files any references to the warning, and notify Galle in writing that this has been done and that the warning will not be used against him in any way.

Having found that the Respondent violated Section 8(a)(3) and (1) by discharging Galle, we shall order the Respondent to offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Galle for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[6] Additionally, the Respondent shall be required to compensate Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order the Respondent to remove from its files any reference to Galle's unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

We will allow the Respondent to establish in compliance that based on the after-acquired evidence produced by the Respondent's post-discharge investigation, Galle should not be reinstated and/or that backpay should be terminated as of the date the Respondent acquired

[4] We agree with the General Counsel that the judge erred by applying the *Rossmore House* standard governing alleged interrogations. 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987) (finding that the dissent's reliance on *Rossmore House* was misplaced because "the nature and circumstances of employer interviews in preparation for litigation justify a more formal standard for ensuring that employees' rights are protected").

[5] Acting Chairman Miscimarra agrees that the interviews of employee Kane violated Sec. 8(a)(1), and he would reach the same result under the "totality of the circumstances" standard the Board adopted in *Rossmore House*, supra. He does not reach and expresses no view as to whether an interview in preparation for an unfair labor practice hearing that does not strictly adhere to the *Johnnie's Poultry* safeguards may nonetheless be noncoercive and lawful in certain circumstances.

[6] For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, Acting Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

knowledge of Galle's misconduct.[7] The Respondent must establish that Galle engaged in misconduct for which the Respondent would have lawfully discharged any employee. See *Berkshire Farm Center*, 333 NLRB 367, 367 (2001).[8]

ORDER

The National Labor Relations Board orders that the Respondent, Tschiggfrie Properties, Ltd, Dubuque, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees to refrain from discussing Teamsters Local 120, a/w International Brotherhood of Teamsters (the Union) or other matters regarding representation by the Union during work.

(b) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the Union.

(c) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(d) Coercively interrogating employees about matters that are the subject of unfair labor practice proceedings.

(e) In any like or related manner interfering with, 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 this Order, rescind the written warning issued to Darryl Galle on August 17, 2015.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning, and within 3 days thereafter, notify Darryl Galle in writing that this has been done and that the warning will not be used against him in any way.

(c) Within 14 days from the date of this Order, offer Darryl Galle full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Darryl Galle whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Darryl Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Darryl Galle in writing that this has been done and that the discharge will not be used against him in any way.

(g) 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 rec-

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[7] Acting Chairman Miscimarra agrees that the Respondent is entitled to an opportunity to show, at compliance, that Galle engaged in pre-discharge misconduct for which the Respondent would have lawfully discharged any employee. Acting Chairman Miscimarra does not reach or pass on whether backpay should terminate as of the date that the misconduct occurred, the date that the Respondent discovered the misconduct, or some other date, assuming hypothetically that the Respondent can establish that Galle engaged in pre-discharge misconduct for which the Respondent would have lawfully discharged him. Cf. *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 9 fn. 11 (2016) (then-Member Miscimarra, dissenting in part).

[8] We agree with the judge that even assuming, arguendo, that Galle falsely testified that he did not access websites related to his personal business during work time on October 1, 2015, the allegedly false testimony does not warrant denying Galle reinstatement and full backpay. In addition to the factors on which the judge relied, we note that the allegedly false testimony did not cause the Board to waste resources. Cf. *Precoat Metals*, 341 NLRB 1137, 1139 (2004) (denying reinstatement and backpay because the employee's "falsehoods . . . caused the Board to expend considerable resources pursuing an ultimately groundless complaint"); *Toll Mfg. Co.*, 341 NLRB 832, 836 (2004) (denying backpay from the period when the employee first lied under oath during the initial unfair labor practice hearing because the employee's "false testimony resulted in the necessity to reopen the record and to hold the second unfair labor practice hearing").

Acting Chairman Miscimarra notes that, in the instant case, (i) the General Counsel has satisfied the burden of proving that Galle's discharge occurred because of a prohibited reason, and the Employer did not have "cause" for discharging him; and (ii) the Board defers to compliance proceedings the narrow question of whether the Respondent can establish, as an affirmative defense, that pre-discharge misconduct by Galle—unknown to the Respondent at the time of Galle's discharge—would have independently resulted in Galle's discharge had the Respondent known about the misconduct. As indicated in fn. 7, supra, this affirmative defense, if proven at compliance, would render inappropriate the Board's standard remedy of reinstatement and would at least limit the backpay remedy. Acting Chairman Miscimarra notes that this issue is materially different from an issue presented in *Total Security Management*, where the Board majority created a new type of discipline-bargaining requirement, and then-Member Miscimarra objected to deferring the "cause" issue in all cases to the compliance stage, even when "cause" for discharge unquestionably existed and was known at the time of discharge. See *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 slip op. at 19–20, 33–37 (2016) (then-Member Miscimarra, concurring in part and dissenting in part) (Sec. 10(c) prohibits the Board from ordering reinstatement or backpay in any case where an employee "was suspended or discharged for cause," and the General Counsel bears the burden of proving the absence of "cause.").

ords 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.

(h) Within 14 days after service by the Region, post at its Dubuque, Iowa facility copies of the attached notice marked "Appendix."[9] 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 August 17, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 25 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.

Dated, Washington, D.C. February 13, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT instruct you to refrain from discussing Teamsters Local 120, a/w International Brotherhood of Teamsters (the Union) or other matters regarding representation by the Union during work.

WE WILL NOT issue disciplinary warnings to any of you because of your support for and activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union.

WE WILL NOT coercively question you about matters that are the subject of unfair labor practice proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the written warning issued to Darryl Galle on August 17, 2015.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning issued to Darryl Galle, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Darryl Galle full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Darryl Galle whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Galle whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Darryl Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

TSCHIGGFRIE PROPERTIES, LTD

The Board's decision can be found at www.nlrb.gov/case/25-CA-161304 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Derek Johnson, Esq., for the General Counsel.
Davin Curtiss Esq. (*O'Connor & Thomas, P.C*), of Dubuque, Iowa, for the Respondent.
Kyle A. McCoy, Esq. (*Soldon Law Firm*), of Middleton, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. The Respondent did it backwards, discharging a known union supporter and then investigating. Previously, the Respondent had warned this employee, in writing, not to discuss the union with other workers. Evidence obtained after the discharge neither can rebut the inference that antiunion animus was a substantial motivating factor nor establish that the Respondent would have fired the employee anyway, even if he had not led a successful union organizing campaign.

Procedural History

This case began on October 5, 2015, when the Union, Teamsters Local 120, affiliated with International Brotherhood of Teamsters, filed an unfair labor practice charge against the Respondent, Tschiggfrie Properties, Ltd., with Region 25 of the National Labor Relations Board, which docketed the charge as Case 25–CA–161304. The Union amended this charge on January 12, 2016.

On January 28, 2016, the Acting Regional Director for Region 25 issued a complaint and notice of hearing, referred to below simply as the complaint. In doing so, she acted on behalf of, and pursuant to authority delegated by, the Board's General Counsel. Respondent filed its answer on February 22, 2016.

On April 14, 2016, a hearing opened before me in Dubuque, Iowa. The parties finished presenting evidence on April 15, 2016, and I adjourned the hearing. On May 27, 2016, it resumed by conference call, counsel presented oral arguments, and then the hearing closed.

Admitted Allegations

The Respondent admitted a number of allegations in its answer or by stipulation at the hearing. Based on those admissions, I find that the General Counsel has proven the allegations raised in complaint paragraphs 1(a), 1(b), 2(a), 2(b), 2(c), 3, 4, and 5(b).

More specifically, I find that the Union filed and served the charge and amended charge as alleged in complaint paragraphs 1(a) and 1(b).

Further, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act. Additionally, I find that the Respondent meets all relevant standards for assertion of the Board's jurisdiction.

Additionally, I find that Respondent's president, Ed Tschiggfrie, and his son, Rodney Tschiggfrie, who is Respondent's general manager, are supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act.

Further, I find that, at all material times, the Union was a labor organization within the meaning of Section 2(5) of the Act.

Respondent has admitted, and I find, that on about October 1, 2015, it discharged its employee Darryl Galle. The Respondent has denied that it did so because Galle had formed, joined, or assisted the Union and had engaged in concerted activities, and to discourage employees from engaging in these activities. It also denied that it had violated the Act. These allegations will be discussed below.

Disputed Allegations

Mechanics employed by the Respondent, Tschiggfrie Properties, Ltd., repair and maintain trucks owned by another related business, Tschiggfrie Excavating. In the spring of 2015, the Union began an organizing drive. On April 22, 2015, it filed a representation petition, which the Board docketed as Case 25–RC–150678. The Respondent entered into an election agreement with the Union. On May 13, 2015, Respondent's employees voted in a Board-conducted election which the Union won.

Mechanic Darryl Galle served as the Union's observer during that election. However, the Respondent knew about Galle's union activities even earlier. By mistake, the Union had placed Galle's name on the representation petition it had filed on April 22, 2015. The Union had listed Galle on the petition as the management representative to contact, so when the Board sent a copy of the petition to the Respondent, the envelope bore Galle's name.

General Manager Rodney Tschiggfrie testified that, after the election, at least two employees complained to him that Galle was

speaking to them about the union. Tschiggfrie mentioned these complaints to the attorney Respondent had hired to negotiate with the Union. The lawyer, Denis Reed, brought up this matter in a telephone conversation with Union Business Agent Kevin Saylor. Reed also mentioned it in a May 20, 2015 email to Saylor. The email stated:

> I have forwarded the Tschiggfrie Properties benefit structure as you asked.
>
> Please speak to Darryl Galle as he continues to harass other employees on company time. If it doesn't stop I will recommend steps be taken.

Although Saylor was "pretty sure" he spoke with Galle about this matter, he could not recall a specific conversation and neither could Galle. In any event, the record indicates that the complaining employees complained further about Galle. In response, management issued Galle a warning which the complaint alleges to be an unfair labor practice.

Complaint Paragraphs 5 and 6(a)

Complaint paragraph 5 alleges that, about August 17, 2015, the Respondent instructed employees not to discuss the Union during work. Complaint paragraph 6(a) alleges that, about August 17, 2015, the Respondent issued to Galle a written disciplinary warning. Complaint paragraph 6(c) alleges that the Respondent took this action because Galle formed, joined and assisted the Union and engaged in concerted activities, and to discourage other employees from doing so.

The Respondent denies these allegations. It also denies the conclusions, alleged in complaint paragraphs 7 and 8, that it thereby violated the Act.

Both complaint paragraphs 5 and 6(a) refer to a written warning issued to Galle on August 17, 2015, and signed by the Respondent's president, Ed Tschiggfrie. The warning stated:

> This is an official notice of written warning for discussing union organizational viewpoints with fellow employees during work. This matter will stop immediately.

Based on the credited testimony of General Manager Rodney Tschiggfrie, I find that his father made the decision to issue the discipline at a meeting with the Respondent's attorney, Denis Reed. General Manager Tschiggfrie also attended this meeting.

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. ' 158(a)(1). Section 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also "the right to refrain from any or all of such activities… "29 U.S.C. ' 157.

To determine whether a manager's statement interferes with, restrains or coerces employees in the exercise of Section 7 rights, the Board considers the effect the statement reasonably would have on an employee under the totality of circumstances present. This objective standard does not turn on the effect the statement actually had on a particular employee but rather focuses on the effect such a statement reasonably would have on a typical employee. *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992).

The Respondent did not prohibit its employees from discussing other topics during their working time. It had no rule that employees refrain from talking with each other while "on the clock."[1]

Employees reasonably would understand the August 17, 2015 letter, prohibiting discussion of "union organizational viewpoints" but not other matters, as a warning that employees would be subject to discipline for exercising their Section 7 rights. It therefore reasonably would chill the exercise of those rights and violates Section 8(a)(1) of the Act. *Teledyne Advanced Materials*, 332 NLRB 539 (2000).

Complaint paragraphs 6(a) and 6(c) allege that this same statement constitutes discrimination unlawful under Section 8(a)(3) of the Act. If the warning had identified the prohibited conduct as having discussions with other employees during working time, it would be necessary to examine other evidence to determine what had motivated the Respondent to issue it. However, the warning itself identified the disfavored conduct as "discussing union organizational viewpoints with fellow employees during work."

In the absence of any work rule categorically prohibiting employee discussions of any sort during working time, there can be no doubt that prohibiting union-related discussions constitutes discrimination based on protected activity. Therefore, it is not necessary to perform the type of analysis needed when a disciplinary action arises from mixed motives or where an employer's asserted reason for the discipline might be a pretext.

On its face, the August 17, 2015 warning letter constitutes discrimination for engaging in protected activity. The record reveals no reason to believe that Galle had engaged in any misconduct that would strip him of the Act's protection and I find that he did not. Therefore, I conclude that the Respondent's issuance of this letter violated Section 8(a)(3).

The letter also prohibits the employee from engaging in similar protected activity in the future. ("This matter will stop immediately.") This prohibition interferes with, restrains and coerces employees in the exercise of Section 7 rights, and constitutes an independent violation of Section 8(a)(1).

In sum, I recommend that the Board find that the Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraphs 5 and 6(a), and that it violated Section 8(a)(3) by the conduct alleged in paragraph 6(a).

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that about October 1, 2015, the Respondent discharged employee Darryl Galle. Complaint paragraph 6(c) alleges that Respondent did so because Galle had formed, joined and assisted the Union and had engaged in protected activities, discourage other employees from engaging in such

[1] Respondent's General Manager, Rodney Tschiggfrie, testified, in part, as follows:

> Q. BY Mr. JOHNSON: Now, I want to check, Mr. Tschiggfrie, there is no rule that the Company has now as to what employees can discuss while they are at work, is there?
>
> A. Correct.
>
> Q. So employees are free to talk about the weather or how the Hawkeyes are doing; is that correct?
>
> A. That is correct.

activities. Complaint paragraphs 7 and 8 allege that the discharge violated, respectively, Section 8(a)(1) and (3) of the Act.

In its answer, the Respondent admits discharging Galle on about October 1, 2015, but "denies said termination was related to any concerted or protected activities or to otherwise discourage the exercise of same." The Respondent also denies that the discharge violated the Act.

General Manager Tschiggfrie testified that on the morning of October 1, 2015, he was looking for Galle in connection with a repair. Galle was working on a piece of equipment. Tschiggfrie went to a backroom where, he believed, he would find Galle working on the equipment. Galle was not there, but Tschiggfrie saw two laptop computers sitting on the counter.

To repair heavy equipment, a mechanic sometimes must transmit data from the equipment's onboard computer to a diagnostic website. To allow mechanics to access the Internet, the Respondent has established a Wi-Fi system protected by a firewall. The Respondent provides laptops for the mechanics to use, but also allows them to bring in their own computers, if they wish. Tschiggfrie believed that one of the computers on the counter belonged to the Respondent and that the other belonged to Galle.

Tschiggfrie looked at the screen of the laptop he believed to be Galle's. On the screen, he saw a website called "QuickFunnels.com" and tabs for other webpages that apparently had been accessed but were not then being displayed. These tabs bore the names "GoGoDropShip.com," "Thunderball Marketing, Inc." and "Traffic Authority E-mail prof." Mechanics would not visit any of these four websites in connection with their job duties.

Tschiggfrie photographed the computer screen. He then continued to look for Galle until realizing that it was breaktime.

A brief time later, Tschiggfrie, accompanied by the Office Manager, Ty Malcolm, returned to the room and found Galle there. He recorded the ensuing conversation with Galle, which began as follows:

> Mr. TSCHIGGFRIE: Darryl, is this your laptop over here, or is this the Company's?
>
> Mr. GALLE: No, it's mine.
>
> Mr. TSCHIGGFRIE: Okay, were you on this before break?
>
> Mr. GALLE: Off and on, yeah.
>
> Mr. TSCHIGGFRIE: Okay.
>
> Mr. GALLE: Just so you're aware, I don't take all of the pages down. I just put it into sleep.
>
> Mr. TSCHIGGFRIE: I just walked into this room about ten minutes ago, Darryl, and this page was up. The computer wasn't even sleeping, and just so you know, I photographed this, and it appears, Darryl -- and I'm recording this conversation, Darryl.
>
> It appears that you are doing something else, other than what you're getting paid for. Is that pretty accurate?
>
> Mr. GALLE: No, it's not.
>
> Mr. TSCHIGGFRIE: So, what were you doing on this computer, looking at this stuff here, when I am hired to pay you to work on a transmission?
>
> Mr. GALLE: Getting the information because this transmission -- because you don't have the manual for it.
>
> Mr. TSCHIGGFRIE: Darryl, this is the page that is up, and let me read it out loud here. It was -- I scrolled just a little bit. I am sorry about this.
>
> 'Part 2, the Automatic Authority Formula,' it says, 'The Automatic Authority Formula is the art of using a well-designed welcome e-mail sequence over the first five to seven days.'
>
> It sounds like some kind of a business plan or something else, other than what we would want to have at Tschiggfrie Excavating.
>
> I think your first response is pretty accurate, that you're on your computer here prior to work -- prior to break time here.
>
> Do you have anything else to say?
>
> Mr. GALLE: I was looking for information on that transmission.
>
> Mr. TSCHIGGFRIE: There's another laptop right here. Who owns this laptop?
>
> Mr. GALLE: That's yours.
>
> Mr. TSCHIGGFRIE: Okay. Well, you know what? Darryl, as of this moment, you are terminated.
>
> And what I'll do is I'm going to take this computer --
>
> Mr. GALLE: No, you're not taking that computer.
>
> Mr. TSCHIGGFRIE: Yeah, I have a right. You are using it during my company time. That computer is my property as of right now, and you're --
>
> Mr. GALLE: No, you're not --
>
> Mr. TSCHIGGFRIE: Darryl, okay. You're terminated right now for not cooperating with what I'm asking you to do.

Galle unplugged his laptop and would not let Tschiggfrie have it. After Galle left, Tschiggfrie asked an information technology specialist, Victor Mowery, to visit the Respondent's facility to investigate.

Although Mowery did not have access to Galle's laptop, the Respondent's firewall recorded information about computers using the Respondent's Wi-Fi system to contact the Internet. This information included the Internet address of each website visited and a number uniquely identifying the computer which had accessed a particular website. Mowery concluded that Galle's computer had visited websites unrelated to the websites which mechanics used to perform their work.

Obviously, the information provided by Mowery could not have influenced Tschiggfrie's decision to discharge Galle because Tschiggfrie did not obtain this information until after the discharge. However, Mowery's testimony is relevant to Galle's credibility as a witness because Galle expressly denied that he had used his computer, during working time, to visit websites unrelated to work. In essence, Galle testified that he had used his laptop at home to visit certain websites before coming to work, and that those websites remained on the computer screen. Galle explained as follows why his laptop had displayed the "QuickFunnels.com"

webpage while he was at work:

Q. Okay. And the webpage, or the page that was up on your computer, did you recognize that page?
A. Yes.

Q. And how do you -- why do you recognize that page?
A. When I use my computer, I'll open several screens and I don't normally take them all down. My wife and I were in the process of setting up a business at home, and I didn't take all of the screens down, and I told Rod that, and you know, the screens are up.

Q. And so --so that page is one of the screens that was up?
A. Yes.

Q. Okay. Had you reviewed that page while you were at work that morning?
A. Not on company time, no.

Mowery's testimony, based on records from the Respondent's firewall, casts serious doubt on Galle's claim that he had not accessed the "QuickFunnels.com" website at work. According to Mowery, Respondent's firewall records show that a computer using Respondent's Wi-Fi visited that website at 9:06 a.m. on October 1, 2015. Mowery testified that this computer had used the host name "Darryls."

The Board's Rules do not provide for routine pretrial discovery in unfair labor practice proceedings and there was no such discovery in the present case. Galle testified before Mowery took the stand and therefore would not have known that Mowery would provide evidence inconsistent with his denial. Moreover, the government did not recall Galle to offer rebuttal testimony.

Mowery's testimony became quite technical at times, but that does not make it sacrosanct. Possibly, a competing expert might have pointed out flaws in Mowery's analysis of the firewall logs, but no competing expert testified. My personal experience with computers does not lead me to believe these machines are infallible, but the present record does not provide any obvious, specific ground which would call into question Mowery's interpretation of the firewall data.

Therefore, it would appear likely that, contrary to his testimony, Galle did use Respondent's Wi-Fi to access websites unrelated to his job duties. Therefore, where Galle's testimony conflicts with other evidence, I do not credit it. However, the case does not turn on the reliability of Galle's testimony.

In determining whether Respondent violated Section 8(a)(3) of the Act when it discharged Galle, I follow the framework the Board established by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

Here, evidence independent of Galle's testimony suffices to carry the General Counsel's initial burden. The record establishes that Galle engaged in union activity: He started the union organizing campaign by contacting the Union and served as the Union's observer during the election. The Respondent admitted knowing that Galle supported the Union. Moreover, the August 17, 2015 "official notice of written warning for discussing union organizational viewpoints with fellow employees during work" establishes the presence of antiunion animus.[2]

The burden of proceeding therefore shifts to the Respondent, which must present evidence showing that, when management considered whether to fire Galle, the presence of animus did not tip the balance in favor of discharge. See *North Fork Services Joint Venture*, 346 NLRB 1025 (2006), citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

Carrying this substantial burden requires more than showing that some reason existed which might justify the discharge. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

In *Lampi LLC*, 327 NLRB 222 (1998), the Board stated that in assessing whether a respondent has established this defense, "we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline." 327 NLRB at 222–223.

However, if a respondent offers a pretextual reason for discharging an employee, that falsehood dooms the respondent's rebuttal evidence to fail. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). Here, the General Counsel argues that the Respondent's asserted reason is a pretext, and that its evidence should not be considered. I disagree.

If anything, this Respondent displays symptoms of candor. Typically, an employer bent on subterfuge does not give a worker a letter stating that it is a "written warning for discussing union organizational viewpoints with fellow employees."

The circumstances surrounding the discharge suggest almost an impulsive, spur-of-the-moment decision, not a careful plot to conceal discrimination behind a crafted pretext. For months, employ-

[2] The Respondent notes that the August 17, 2015 warning letter was signed by the Respondent's president, Ed Tschiggfrie, and not by General Manager Rodney Tschiggfrie, who made the decision to discharge Galle. However, to prove animus sufficient to carry the government's initial burden, the General Counsel does not have to prove a connection between the antiunion animus and the specific adverse employment action. *Lubertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10 (July 9, 2014); *Nichols Aluminum*, LLC 361 NLRB No. 22, slip op. at 3, fn. 7 (August 18, 2014). Additionally, President Ed Tschiggfrie made the decision to issue the discipline during a meeting with General Manager Rodney Tschiggfrie and the Respondent's attorney, Denis Reed.

ees had been complaining about Galle to General Manager Tschiggfrie. Some of these complaints had concerned Galle sleeping on the job, which resulted in other employees having a heavier workload.

When Tschiggfrie asked Galle whether he had been sleeping on the job, Galle replied that he was taking medicine which made him drowsy. Although Galle then provided Tschiggfrie with a slip from his doctor, Tschiggfrie asked for further documentation, which Galle said he would furnish. However, Tschiggfrie never received it.

On October 1, 2015, Tschiggfrie saw Galle's computer screen and concluded that he was visiting websites unrelated to his job during working hours. Galle explained that he and his wife had started a business and the websites were related to that business. However, Galle's involvement in another business raised another possibility, that this outside work made Galle so tired that he fell asleep on the job.

In these circumstances, it appears likely that mixed motives lead Tschiggfrie to discharge Galle. Therefore, Respondent's evidence should be considered to determine whether it would have made the same decision even if Galle had not engaged in protected activity.

As noted above, *Wright Line* and its progeny require the Respondent to present specific evidence. In particular, how an employer treated similarly situated employees in the past gives a good indication how it would have treated an alleged discriminatee in the absence of protected activity. However, it is not the law that an employer can prevail *only* by showing prior identical misconduct and discipline. *Sara Lee d/b/a International Baking Co.,* 348 NLRB 1133 (2006).

The Respondent's employee complement falls between 5 and 8. With so few employees, it would be unlikely to find a past instance when the Respondent disciplined an employee whose conduct resembled Galle's except for the protected activity. Therefore, I draw no conclusion from the absence of evidence regarding the Respondent's treatment of a similarly-situated employee.

However, the Respondent also did not establish that it had any rule prohibiting employees from visiting nonjob-related websites during working time.

Neither the Act nor the Board has set any standards concerning what conduct is sufficient to warrant discharge. The Board's concern extends only to whether antiunion animus, or animus arising out of an employee's protected activities, affected the decision-making process and, if so, whether it affected the outcome.

In other words, the Board does not judge a particular disciplinary action based on some abstract notion of "fairness." However, if the severity of the discipline seems disproportionate to the gravity of the offense, it is appropriate to wonder whether some other factor, besides the offense, has affected the weighing of transgression versus punishment. If antiunion animus exists, it could be the "dark matter" on the scales.

Here, General Manager Tschiggfrie decided to discharge Galle after concluding that Galle had visited websites unrelated to his job during working time. The record does not establish that the Respondent had any rule which required employees to visit only those websites necessary for their work. There also is no evidence that Respondent ever told Galle not to visit websites unrelated to work during working time. Under these circumstances, the decision to discharge rather than to suspend or warn Galle seems harsh enough to raise the suspicion that some other factor affected the decision.

However, the Respondent characterizes Galle's misconduct not as wasting company time but as stealing it. Moreover, the Respondent argues, this was not the first time Galle had stolen company time. Earlier, he had been sleeping on the job. Thus, during oral argument, Respondent's counsel stated that the discharge decision rested on more than the websites Galle had visited when he should have been working:

> [W]ebsiteusage. . .wasn't the only thing that he did a lot on the job. Mr. Tschiggfrie at the time he terminated Mr. Galle, would have also had in his state of mind and present in his thoughts, the other theft of time that Mr. Galle engaged in, that is sleeping on the job. The record is replete with examples of it. He slept -- he was observed sleeping in the back of a blue Ford pickup truck, in the bathroom, in the shop, in -- in a truck -- underneath a bridge in a truck just down the road from the shop; that's at Transcript Page 306. He was caught sleeping by his computer on a couple of occasions. He was caught sleeping in the office at his desk. He was caught sleeping at Bob Ben's desk in his chair. He was caught dozing off while working on a truck while he was actually talking to Bill Kane. Those references are at Transcript Page 333. Mr. Tschiggfrie also observed Mr. Galle sleeping on the job, and not only that, Your Honor, Darryl Galle himself admitted to dozing off on the job at least once a week during the summer of 2015.

When Tschiggfrie had confronted Galle about sleeping on the job, Galle had replied that prescription medication made him drowsy and later provided a note from his doctor. Tschiggfrie asked for more documentation but never received it. Then, it appears, he dropped the matter.

Tschiggfrie's testimony indicates that the problem with Galle falling asleep at work arose in June 2015, and perhaps continued into July. The fact that Tschiggfrie took no action after asking Galle for documentation suggests that Galle no longer fell asleep at work. If the problem had persisted into August or September, presumably Tschiggfrie would have suspended Galle, or given him another warning, or at least have insisted that Galle furnish the documentation Tschiggfrie had requested.

Certainly, some of Galle's coworkers did not like him and complained to management about him. If Galle had continued to sleep on the job, they likely would have made further complaints. Tschiggfrie's inaction suggests either that there were no further complaints about Galle sleeping on the job or that Tschiggfrie did not consider the matter serious enough to warrant discipline.

Galle did receive a written warning on August 17, 2015, but this warning said nothing about sleeping on the job. Instead, it cautioned him not to discuss "union organizational viewpoints with fellow employees during work."

It is logical to assume that, in general, an employer will be more likely to impose discipline for conduct which is of greater concern and will be less likely to discipline for conduct of lesser concern. Therefore, I conclude that the Respondent was more concerned about Galle discussing the union with other workers than about his sleeping on the job.

This conclusion appears consistent with another fact. On August 18, 2015, the day after Respondent issued Galle the warning for discussing the union, the Respondent's attorney, Denis Reed, sent an email to Union Business Agent Saylor. It stated:

> Rod has had other employees unhappy about his constant diatribe. If he can't get it out of his system and stop bothering people at work I believe he will be subject to termination.

Reed's testimony makes clear that "his" referred to Galle. Thus, Reed described this document as "another e-mail from me to Kevin, getting more forceful about trying to do something about Mr. Galle's efforts to disrupt—really disrupt the other employees, we thought." The email raises the possibility that Galle would be discharged but does not mention Galle sleeping on the job.

The Board does not set any standards regarding how much investigation, if any an employer must conduct before discharging an employee. However, an absence of investigation may be considered in assessing the employer's motivation. Here, the Respondent conducted scant investigation before discharging Galle but hired a computer expert to investigate afterwards.

This sequence of events, discharging Galle and then conducting the investigation, is relevant to an argument Respondent raised concerning Galle's refusal to turn his personal computer over to the general manager when Tschiggfrie asked for it. During cross-examination, the Respondent questioned Galle about this refusal. Galle's explanation, that he did not give the laptop to Tschiggfrie because he had already been discharged, accords with the audio recording which Tschiggfrie made at the time. Thus, the portion of that recording quoted above includes the following:

> Mr. TSCHIGGFRIE: Okay. Well, you know what? Darryl, as of this moment, you are terminated.
>
> And what I'll do is I'm going to take this computer --
>
> Mr. GALLE: No, you're not taking that computer.

A further portion of the recording, not excerpted above, establishes that Tschiggfrie persisted in asking Galle to turn over his computer for forensic examination even after he told Galle that he was discharged:

> Mr. GALLE: I'm not leaving my computer here for you to do whatever you want with.
>
> Mr. TSCHIGGFRIE: No, you can stand right here. I'm going to have a computer forensic -- now, listen to me. I'm going to have a computer forensic technician come here and look at that and see how much you're on that computer and that website. Is that fair?
>
> Mr. GALLE: You already said I was terminated.
>
> Mr. TSCHIGGFRIE: My question is, is that fair? And you are terminated.

Galle owned the laptop in question. Galle's refusal to turn it over to the man who had just fired him is the reaction I would expect from someone with a proud and assertive personality. This refusal may well reflect annoyance at being summarily discharged rather than any intent to conceal the information on the computer. Therefore, I draw no inference from the refusal.

The Respondent raises a further argument because the computer no longer was in Galle's possession at the time of hearing. Galle testified that he had sent the laptop to a "forensic person" in Arizona. On further questioning, Galle identified the "forensic person" as his uncle. During oral argument, the Respondent characterized Galle's action as spoliation of evidence:

> But, Your Honor, most insidious in this case is that neither Local 120, nor the Field Agent or Office of General Counsel of the NLRB ever asked Mr. Galle to preserve the laptop or his browser history as evidence, and the Respondent, Your Honor, expressly requests that the Court make an express finding that Darryl Galle and the Local Union and the NLRB failed to preserve the evidence, and enter a spoliation evidentiary finding that the browser history, if it had been preserved appropriately, would confirm, one, what Rod Tschiggfrie saw on the morning of October 1, 2015, demonstrated that Mr. Galle was using personal paid --paid company time to pursue his own personal business interests; two, that the findings of Victor Mowery would have been substantiated by Mr. Galle's own computer to establish a finding of actual misconduct.

Galle's rather vague description of what his uncle would be doing with the laptop does raise some suspicions about his motive. Nonetheless, I am somewhat skeptical that the present record would suffice to establish spoliation should I consider and resolve the issue at this point. The Respondent asserts that neither the Union nor the General Counsel told Galle to preserve the laptop and the record does not establish that he otherwise had notice to do so. However, I need not decide this question now because the answer would not affect the outcome.

Here, I must determine whether General Manager Tschiggfrie would have decided to discharge Galle if there had been no protected activity. If Galle had not gone to the Union to start the organizing drive, if he had not spoken with other employees urging them to support and vote for the Union, if he had not served as union observer, and if he had not continued to promote the Union after the election, would Tschiggfrie still have fired him?

No information on Galle's laptop could answer or even help answer that question. Tschiggfrie did not know what was on the computer's hard drive at the time he discharged Galle, so whatever that data might reveal could not have affected the decision. Tschiggfrie had seen the laptop's screen and taken a photograph of it before discharging Galle, so what he saw on the screen could have influenced his decision. However, he did not probe deeper into the computer, so the information he might have found on the hard drive is not relevant.

Similarly, the information which the computer expert, Mowery, later obtained from the Respondent's firewall could not have affected the discharge decision because Tschiggfrie did not know that information when he decided to discharge Galle. The computer expert's testimony is indeed relevant to the issue of Galle's credibility as a witness because it casts doubt on Galle's denial that he had visited certain websites while at work. However, I have not considered Mowery's testimony in determining Tschiggfrie's motivation because it is not relevant to that inquiry.

If Galle sent his laptop to his uncle to make the information on it inaccessible during the hearing, such an action might be relevant in determining the remedy but the issue which must be decided

now concerns liability. Therefore, the spoliation issue may be deferred until the compliance stage.

As stated above, in considering a respondent's defense, the Board looks to the respondent's own documentation concerning the discharged employee's conduct, to the respondent's personnel policy handbook, and to how the respondent treated other employees with recorded incidents of discipline. The Respondent has not presented such evidence sufficient to carry its burden.

With respect to evidence concerning Galle's conduct, the only documentation consists of the August 17, 2015 written warning for discussing the union with other employees, and two emails the Respondent's attorney sent to the Union's business agents. These documents say nothing about Respondent's claimed reasons for discharging Galle, namely that he stole time by sleeping on the job and by working on his own Internet-related business instead of performing his assigned duties.

With respect to the Respondent's personnel policy, the Respondent does not have an employee handbook. Moreover, it has no rule prohibiting employee discussions during working time.

With respect to the Respondent's past treatment of employees, the Respondent did not present any evidence that it had dealt with other employees in a similar manner for conduct similar to Galle's. In view of the small employee compliment, it seems unlikely that there would be any such past incidents.

In other respects, the Respondent has not carried its burden of showing that it would have treated Galle in the same way even if he had not engaged in protected activities. Therefore, I recommend that the Board find that the Respondent violated the Act, as alleged in the complaint, by discharging Galle.

The *Johnnie's Poultry* Issues

During the hearing, the General Counsel moved to amend the complaint to allege that while preparing its defense in this case, the Respondent had violated Section 8(a)(1) of the Act by questioning employees without giving them the assurances specified in *Johnnie's Poultry Co.*, 146 NLRB 770, 774–776 (1964), enf. denied 344 F.2d 617, 619 (8th Cir. 1965).

In *Johnnie's Poultry*, the Board set forth safeguards to reduce the possibility that an employer, while questioning an employee in preparation for a trial or hearing, might interfere with, restrain or coerce employees in the exercise of their Section 7 rights, and thereby violate Section 8(a)(1) of the Act. Before asking the employee any questions, the employer must (1) inform the employee of the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; and (3) obtain the employee's participation in the interview on a voluntary basis. *Johnnie's Poultry*, 146 NLRB at 775.[3]

The General Counsel argues that the testimony of employees Sam Becker and Bill Kane reveals that the Respondent's counsel did not comply with the Johnnie's Poultry requirements before interviewing them:

> Both employees, Sam Becker and Bill Kane, testified that they were interviewed by Rod Tschiggfrie and Respondent's attorney. Mr. Becker's interview was several months after Darryl Galle was discharged, and Mr. Kane's was about a month before the hearing, and then again the week before the hearing. Those interviews covered a broad range of subjects related to this Unfair Labor Practice case, and much like the questions that were asked by the Respondent at the hearing, which Mr. Becker testified to at Transcript Page 318, and also specifically conversations the employees had with Darryl about the Union and its organizing campaign.

Although the General Counsel cites Becker's testimony on cross-examination, the vagueness of that testimony concerns me. For one thing, Becker could not remember whether he met with the lawyer face-to-face or spoke with him over the telephone. Becker's inability to recall such a basic fact about the interview casts doubt on the extent and reliability of his memory.

Other parts of Becker's testimony also raise concerns. During oral argument, the General Counsel noted some of those problems:

> Mr. Becker's testimony was wholly incredible and filled with inconsistencies. While one minute it sounded like Darryl [Galle] was walking around the plant hassling everybody about the Union, and the next minute Mr. Becker indicated that Darryl was, quote, "stay to himself and just not talk to anybody," end quote, and that was at Page 310 of the transcript.
>
> At another point, Mr. Becker indicated that Darryl would spend time talking to him about his computer- based business, apparently while Darryl was staying to himself and not talking to anybody, and he would be showing him the computer while they were sitting there at work and how his business operated on his personal computer, but just a few moment later, Mr. Becker also volunteered that he would not even have known how to turn on a computer, and that was again at Page 310 of the transcript. Mr. Becker even amazingly testified that Darryl came in one morning flashing $30,000 in cash around the shop, an amount that must have amounted to about six months' salary.

Becker indeed did testify that on one occasion, Galle brought a bag with $30,000 in it to work. No other evidence corroborates this testimony. Because of other inconsistencies in Becker's testimony, I am reluctant to suspend my disbelief.

Moreover, Becker gave nonresponsive answers to some questions. For example, on direct examination, Becker testified that he quit his job because Galle was hassling him so much that he could not concentrate on his work. On cross-examination, the General Counsel asked if he had quit for another reason:

[3] Even if an employer takes these steps, the employer still must take care not to violate the Act. The Board also stated in *Johnnie's Poultry* that the "questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees." 146 NLRB at 775. The Board further stated: "In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent." Id.

Q. And isn't it true that you told several of your colleagues that you were quitting because the lights in the shop were bothering your eyes?
A. They were supposed to be getting in but -- somewhat of that.

Q. Okay. And that's what you told employees was the lights was part of the reason you were quitting?
A. No, that wasn't because I was quitting though.

Q. But you told them the lights were bothering you?
A. They weren't bothering me, I just couldn't see no more.

Becker's answers are either nonresponsive, or unintelligible, or both. Perhaps, when Becker testified that his eyes "weren't bothering me, I just couldn't see no more," he meant that his eyes failed in a painless way, but that interpretation is speculative. Moreover, even if that is what Becker meant, he did not answer the question the General Counsel had asked.

Although a judge may credit some portions of a witness' testimony but not other parts, doing so would not be appropriate here because there are inconsistencies even in the portion of Becker's testimony pertaining to the *Johnnie's Poultry* allegations. Becker initially testified that the Respondent's attorney assured him there would be no retaliation:

Q. Okay. And did he tell you that no actions would be taken against you regardless of what you said?
A. Yes.

However, two questions later, Becker said the opposite:

Q. Okay. But did -- my question is did he tell you that he wouldn't disciple you, for example, whether you cooperated or not?
A. No.

Q. So he didn't talk about you know, no discipline would be taken against you?
A. Right.

In sum, I conclude that Becker's testimony is too flawed to trust. Therefore, I deny the General Counsel's motion to add a *Johnnie's Poultry* violation based on that testimony.

The General Counsel also has moved to amend the complaint to allege *Johnnie's Poultry* violations in connection with Respondent's pretrial interviews with employee William Kane. According to Kane, the first of these meetings to place about a month before the hearing, which would place it in mid-March 2016. Kane testified that the second meeting took place about a week before the hearing, placing it in early April 2016.

According to Kane, on both occasions he met with General Manager Rodney Tschiggfrie and the Respondent's counsel, Davin Curtiss. With respect to the mid-March meeting, Kane testified that the general manager's secretary called him to the office, where Tschiggfrie introduced him to the Respondent's attorney:

Q. Mr. Curtiss? Okay. And so what kind of questions did they ask about?
A. Just, you know, if I had worked with Darryl and if I had seen him sleeping, you know, using his personal computer. I've never really actually seen him on his personal computer. I know he brought it to work and took it home every day. But, I didn't -- I've never actually seen him do anything on it, you know?

Q. Okay. Did they also ask you questions about the Union campaign?
A. Yeah, a few, but not a lot.

Q. But questions about -- like conversations Darryl had about the Union?
A. Yeah. I had told them then, they didn't ask me, but I had told them about him calling me a snitch and stuff like that, so --

Q. Okay. And they asked about the other kinds of harassment and stuff by Darryl?
A. Yep.

Q. Okay. And kind of the questions that we talked about --
A. Uh-huh.

Q.-- about him approaching you and talking about the Union?
A. Yep.

Q. Okay. And I guess at any point during any -- I just want to focus on the one just about a month ago, to start with, did either Rod Tschiggfrie or the company attorney inform you, actually tell you it was voluntary to be there?
A. Yes.

Q. They told you it was voluntary?
A. I believe so.

Q. Okay. Who was it who told you it was voluntary?
A.Well, Rod had called -- when I got called up to the office and then he just asked me these questions, but I guess I can't honestly say if they told me if it was voluntary or not.

When asked whether he had received assurances that no action would be taken against him, Kane answered, "Yeah, nothing was brought up of that, no."

Whether or not this interview constituted an unlawful interrogation, cannot be determined by referring only to the *Johnnie's Poultry* precedent. Rather, to determine whether the interview interfered with, restrained and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1), I apply the test developed by the Board in *Rossmore House*, 269 NLRB 1176 (1984), and its progeny. This framework guides an assessment of the impact the questioning reasonably would have on employees' willingness to exercise their Section 7 rights.

The *Johnnie's Poultry* principle creates a kind of safe harbor for trial preparation, provided that the interview adheres to its standards. However, an otherwise lawful question does not become unlawful because the *Johnnie's Poultry* assurances were not given. To take an obvious example, a manager could spend all afternoon asking an employee about the best way to cook hotdogs and the questions would be lawful even if the manager failed to tell the employee the purpose of the questions, that answering was voluntary, and that no action would be taken against him regardless of his answers.

So, it is appropriate to begin the analysis by focusing on whether the questions were coercive and, if so, to what extent. From Kane's testimony, I conclude that much of the interview con-

cerned whether Galle was using his computer for purposes unrelated to his work duties and the extent to which he had slept on the job.

When the General Counsel asked whether Tschiggfrie and Curtiss had posed any questions about the Union, Kane replied, "Yeah, a few, but not a lot." When the General Counsel then referred to "conversations Darryl had about the Union, Kane answered "Yeah. I had told them then, *they didn't ask me*, but I had told them about him calling me a snitch and stuff like that. . ." (Italics added.)

When the General Counsel asked whether any questions concerned Galle "approaching you and talking about the Union" Kane simply answered "Yep." However, the General Counsel did not press for details. Kane did not describe any specific question related to the Union.

Kane's testimony, that there were "not a lot" of questions about the Union is quite credible because neither the general manager nor the attorney had any reason to ask questions about the Union. They were interviewing Kane to prepare the Respondent's defense, essentially, to search for proof that Galle had flaws totally unrelated to his union activities. More specifically, they would have been looking for evidence which supported the Respondent's defense, evidence that Galle had slept on the job and had neglected his job duties while using his computer to further his own business.

Under *Wright Line*, a respondent's defense entails showing that factors *other than* union activities weighed so heavily in the decision-making process that the presence of antiunion animus would not have affected the outcome. So, it is not surprising that the Respondent's general manager and counsel did not ask a lot of questions about union activities.

From Kane's testimony, I cannot conclude that Tschiggfrie and Curtiss asked any specific question about union activities. At most, the record supports a conclusion that the subject of unions came up during the meeting. However, not every reference to a labor organization constitutes an unlawfully coercive interrogation.

It is not possible to judge the lawfulness of a question using the *Rossmore House* standards without knowing what the question was. Because the record does not establish that Tschiggfrie or Curtiss asked any specific union-related question during the mid-March 2016, amending the complaint to allege an unlawful interrogation at that meeting would not be warranted.

Likewise, the record does not establish that Tschiggfrie or Curtiss asked Kane any specific union-related question during the meeting a week before the hearing. When the General Counsel asked Kane if they "pretty much run through the same kind of questions that you were asked this morning," Kane answered "Yes."

The General Counsel bears the burden of proving that the Respondent asked an employee unlawful questions about union activities or sentiments or other protected activities. The government does not have to elicit testimony quoting the question verbatim, but it must offer proof enough to reveal what information the employee was called upon to provide. Such evidence is not present here.

Unless the record reveals at least the gist of a question, it cannot be determined how much, if at all, answering the question would coerce the employee. Moreover, the Respondent would have no way of knowing what evidence it needed to present as a defense.

In sum, I conclude that amending the complaint to allege instances of unlawful interrogation would be unwarranted. Therefore, I deny the General Counsel's motion.

Summary

For the reasons discussed above, I find that the Respondent violated Section 8(a)(1) of the Act by the conduct described in complaint paragraphs 5, 6(a) and 6(b) and violated Section 8(a)(3) of the Act by the conduct alleged in complaint paragraphs 6(a) and 6(b).

REMEDY

Having found that the Respondent committed the unfair labor practices alleged in the complaint, I recommend that Board order the Respondent to take actions to remedy the violations, including posting the Notice to Employees attached to this decision as Appendix A.

This case presents several issues concerning the most appropriate remedy for the Respondent's unfair labor practices. The General Counsel, of course, seeks an order requiring the Respondent to reinstate Galle and to make him whole for all losses of earnings he suffered because of the unlawful discrimination against him. Such relief is typical and customary to remedy the unlawful discharge of an employee.

The General Counsel also seeks additional remedial provisions. Specifically, the government requests an order requiring that the Respondent reimburse Galle for all search-for-work and work-related expenses regardless of whether Galle received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay. The government also requests that the make whole remedy include "reasonable consequential damages incurred as a result of the Respondents unlawful conduct."

The General Counsel's request for a remedy which the Board customarily has not ordered seeks a change in Board policy. The judge has no authority to change Board policy. Therefore, I do not include such additional provisions in the recommended order below.

The customary remedy for an unlawful discharge includes both reinstatement and backpay. However, evidence which the Respondent acquired after the discharge raises some doubt about the appropriateness of these usual remedies in the present case. Here, reinstatement and backpay might be challenged under either of two legal theories.

Board precedent holds that, in certain circumstances, it may deny a backpay remedy to someone who has given false testimony in the Board proceeding. In *Toll Manufacturing Co.*, 341 NLRB 832 (2004), the Board stated that it "conducts a 'balancing' analysis and assesses the impact of the discriminatee's transgression on the integrity of the Board's processes." The Board considers the overall veracity of a witness' testimony and also considers the impact the falsehood had on the Board's processes.

Here, I am concerned about Galle's testimony denying that he had accessed websites unrelated to his job duties while at the Respondent's facility. The firewall logs and the testimony of a computer expert, Victor Mowery, contradict that claim and do so ra-

ther persuasively. Therefore, to the extent that other evidence conflicts with Galle's testimony, I do not credit that testimony.

However, I stop short of finding that the inaccurate testimony resulted from a lie. The firewall evidence concerning the websites visited impresses me as being trustworthy but I still hesitate to reach the harsh conclusion that Galle deliberately testified falsely while under oath. Absent additional evidence of deceptive intent, it is fair to give Galle the benefit of the doubt rather than conclude that he committed perjury.

Moreover, regardless of whether Galle did or did not visit websites unrelated to his job during working time, and even without Galle's testimony, I would find his discharge to be unlawful. Evidence other than Galle's testimony established all elements the government needed to make its initial showing, which the Respondent's defense did not surmount.

Even assuming for the sake of analysis that Galle *deliberately* gave false testimony on this one point about what websites he visited while at work, I would not conclude that he failed to be truthful in the rest of his testimony. For purposes of determining Galle's eligibility for reinstatement, Galle's denial that he visited certain websites during working time would fall into the category of an "insignificant trespass on the truth" as the Board used that term in *Toll Manufacturing Co.*, above, citing *Lincoln Hills Nursing Home, Inc.*, 288 NLRB 510, 512 (1988). It did not affect the outcome of this proceeding and also did not pose a significant threat to the integrity of the Board's processes. Therefore, this testimony would not, in my view, warrant denying Galle a full backpay remedy.

However, a second legal theory also must be considered. The information Mowery obtained by examining the firewall logs does reveal apparent wrongdoing which might have justified Galle's discharge and which might make him unsuitable for future employment by the Respondent. This evidence, which the Respondent acquired after Galle's discharge, does not redeem that termination because the Respondent did not consider this evidence when making the discharge decision. Nonetheless, information found in the firewall logs does bear on the appropriateness of reinstatement.

It reveals that Galle was not honest with his employer. That, in turn, calls into question the truthfulness of Galle's explanation for sleeping on the job, the claim that prescription medication made him drowsy. It also raises a question of how much working time Galle spent developing his own online business rather than performing his job duties.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), an employee secretly violated her employer's confidential document policy. The employer did not know about this breach when it terminated her employment but learned later, after she sued for age discrimination. The Supreme Court held that the misconduct made reinstatement inappropriate and that backpay would be tolled as of the date the employer discovered the misconduct. The Court further held that when an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone had the employer known of it at the time of the discharge.

Accordingly, I recommend that the Board permit the Respondent to litigate, at the compliance hearing stage, whether Galle's misconduct, revealed after his discharge by examination of the firewall logs, was of such severity that he would have been discharged lawfully on that basis alone had the Respondent known of the misconduct at the time it. A determination that the Respondent lawfully would have discharged Galle had it been aware of the evidence of misconduct would also stop backpay from accumulating beyond the date Respondent discovered that evidence.

In view of this recommendation, that Respondent be allowed to contest at the compliance stage the appropriateness of a reinstatement remedy, a question arises concerning the wording of the order recommended below. Should the recommended order include a provision that the Respondent reinstate Galle if that issue has not yet been decided?

The recommended order and notice language below do include the requirement that the Respondent reinstate Galle. Leaving this customary language in the recommended order is consistent with the Board's practice in *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB No. 113 (2015).

In its *Somerset Valley* decision, the Board discussed whether the respondent should be ordered to reinstate two discriminatees, Jacques and Wells. After a thorough analysis, the Board reached a conclusion contrary to that of a federal district court which had been petitioned to grant interim injunctive relief under Section 10(j) of the Act. The Board decided that the two discriminatees should be reinstated and ordered the respondent to do so within 14 days. See 362 NLRB No. 113, slip op. at 3.

The Board's order required the respondent to offer reinstatement to the discriminatees within 14 days. The order did not specifically state that the respondent could continue to litigate the reinstatement issue in a compliance proceeding.

When the respondent petitioned for review of the Board's decision, and the Board cross-applied for its enforcement, it brought the contradictory conclusions of the Board and the District Court to the attention of the United States Court of Appeals for the Third Circuit. However, the Board's brief to the Circuit Court stated that the respondent would have the opportunity to challenge the reinstatement order at the compliance stage. See *1621 Route 22 West Operating Company, LLC, d/b/a Somerset Valley Rehabilitation And Nursing Center v. NLRB*, ___ F.3d ____, Docket Nos. 15-2466 & 15-2586, slip op. at 38 (3rd Cir. 2016) ("The Board. . .points out that it deferred the matter to compliance proceedings. . .which will provide an opportunity to litigate whether this evidence affects Wells' entitlement to reinstatement and backpay.") The Court enforced the Board's order.

Accordingly, I conclude that the presence of a reinstatement requirement in the recommended order below would not signify a final adjudication of the reinstatement issue and would not preclude the Respondent from raising and litigating it in at the compliance stage.

CONCLUSIONS OF LAW

1. The Respondent, Tschiggfrie Properties, Ltd., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Teamsters Local 120, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by instructing employees not to discuss the Charging Party at work, by

issuing a disciplinary warning to an employee because he discussed the Charging Party at work, and by discharging the employee because of his activities on behalf of the Charging Party and to discourage other employees from engaging in such activities.

4. The Respondent violated Section 8(a)(3) of the Act by issuing a disciplinary warning to an employee because he discussed the Charging Party at work, and by discharging the employee because he formed, and/or joined and assisted a labor organization, including by discussing the Charging Party with other employees at work, and to discourage other employees from engaging in such activities.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[4]

ORDER

The Respondent, Tschiggfrie Properties, Ltd., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to discuss the Charging Party or other matters regarding representation by the Union at work.

(b) Taking disciplinary action against employees because they discussed the Charging Party or other matters regarding union representation at work.

(c) Discharging employees because they formed, joined or assisted a labor organization or engaged in other protected, concerted activities, including discussing the Charging Party at work, and to discourage other employees from engaging in such activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Within 14 days after service by the Region, post at its facilities in Dubuque, Iowa, copies of the attached notice marked "Appendix A."[5] 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 immediately upon receipt 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 addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). 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 August 17, 2015. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(b) Within 14 days from the date of this Order, offer employee Darryl Galle full reinstatement to his former position or, if his former position no longer is available, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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

(d) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. June 24, 2016

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 interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT instruct our employees not to discuss the Union or any matters related to representation by the Union while at work.

WE WILL NOT issue a warning to, or take any disciplinary action against an employee because the employee discussed the Union or union representation at work, because the employee formed,

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

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

joined or assisted a labor organization or engaged in protected, concerted activities, or to discourage other employees from doing so.

WE WILL NOT discharge any employee because the employee discussed the Union or union representation at work, because the employee formed, joined or assisted a labor organization or engaged in protected, concerted activities, or to discourage other employees from doing so.

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

WE WILL, within 14 days from the date of the Board's Order, offer Darryl Galle full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed.

WE WILL make Darryl Galle whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful written warning and discharge of Darryl Galle and WE WILL, within 3 days thereafter, notify him that neither the warning nor the discharge will be used against him in any way.

TSCHIGGFRIE PROPERTIES, LTD

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-161304 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.