Johnston Fire Services, LLC *and* Road Sprinkler Fitters, Local Union 669. Cases 10–CA–175681, 10–CA–177542, and 10–RC–177308

January 3, 2019

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On March 3, 2017, Administrative Law Judge Keltner W. Locke issued the attached decision. The Charging Party filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to adopt the recommended Order, and to issue a Certification of Results.[3]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Road Sprinkler Fitters, Local Union 669, and that it is not the exclusive collective-bargaining representative of these bargaining unit employees.

Dated, Washington, D.C. January 3, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Katherine Miller, Esq., for the General Counsel.
David O'Brien Suetholz, Esq. (Kircher, Suetholz & Associates), of Louisville, Kentucky, for the Charging Party.
David L. Kelly, Esq. (Keuler, Kelly, Hutchins & Blankenship),

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

No exceptions were filed to the judge's finding that Tracy Oliver, the Respondent's office manager, is an agent of the Respondent under Sec. 2(13) of the Act, or to his finding that employee Robert Rhodes was discharged from his employment and did not quit.

[2] We agree with the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by unlawfully interrogating employee Glen Michael Pirtle. Under the totality of the circumstances, we find that David Johnston's questioning of Pirtle about whether he had seen Union Organizer Todd Johnson did not interfere with, restrain, or coerce Pirtle in the exercise of his Sec. 7 rights. See *Rossmore House*, 269 NLRB 1176, 1178 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In particular, we rely on the credited facts that Pirtle initiated the conversation regarding Todd Johnson and acknowledged that he had been speaking to him before Johnston questioned Pirtle about whether he had seen Todd Johnson.

In addition, we agree with the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) by discharging employees Pirtle and Rhodes. In so doing, we note the judge's credibility-based findings that the Respondent had already made the decision to terminate both employees for attendance issues *before* learning that they had engaged in protected activity. As stated above, we find no basis for reversing the judge's credibility determinations. In these circumstances, we find that the General Counsel has not established that the Respondent's decision to discharge the employees was motivated by their Sec. 7 activity. See *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), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); see also *Brink's Inc*., 360 NLRB 1206, 1206 fn. 3 (2014).

Regarding Rhodes' discharge, the judge found that the General Counsel met his initial burden under *Wright Line*, but concluded that the Respondent met its rebuttal burden by establishing that it made the decision to discharge Rhodes *before* he engaged in any protected activity. By the judge's own finding, therefore, the General Counsel did not meet his initial burden of showing by credited evidence that Rhodes' discharge was motivated by his Sec. 7 activity. Accordingly, unlike the judge we do not reach the Respondent's rebuttal burden. Further, in agreeing with the judge's dismissal, we do not rely on his citation to *Fresenius USA Mfg.*, 358 NLRB 1261 (2012), a case decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[3] A secret ballot election was conducted between June 16 and 30, 2016, pursuant to a Stipulated Election Agreement. The tally of ballots showed 2 votes for Road Sprinkler Fitters, Local Union 669, 2 votes against, and 2 challenged ballots, a sufficient number to affect the results. Because we uphold the judge's ruling sustaining the challenges to lawfully discharged employees Glen Michael Pirtle and Robert Rhodes, the Union did not receive a majority of the votes cast. The judge ordered that the representation cases be "severed and remanded to the Regional Director for Region 10 for issuance of a certification of results of the election." However, there is no need for a remand because, under Sec. 102.69 of the Board's Rules, the Board itself has the authority to issue such a certification. Accordingly, we do not adopt the judge's recommendation to remand the representation cases but shall instead issue a Certification of Results of Election. See *Talmadge Park, Inc*., 351 NLRB 1241, 1241 fn. 4 (2007).

of Paducah, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: The credited testimony does not establish that Respondent unlawfully discharged two employees who cast challenged ballots in a Board-conducted representation election. Therefore, the challenges to their ballots should be sustained and the ballots not counted.

Procedural History

This case began on May 5, 2016, when the Charging Party, Road Sprinkler Fitters Union, Local 669, referred to below as the Union, filed an unfair labor practice charge against the Respondent, Johnston Fire Services, LLC. National Labor Relations Board staff in its Region 10 docketed the charge as Case 10–CA–175681. This charge alleged that the Respondent unlawfully had discharged its employee Glen Michael Pirtle because of his union activities. The Union amended this charge on May 18, 2016, and again on July 8, 2016.

On June 2, 2016, the Union filed a charge against Respondent which was docketed as 10–CA–177542. This charge alleged that the Respondent unlawfully discharged employee Robert Rhodes.

Two days earlier, the Union, seeking to represent a unit of the Respondent's employees, had filed a petition which was docketed as Case 10–RC–177308. On June 8, 2016, the Respondent and the Union entered into a stipulated election agreement in this case. The parties agreed to a bargaining unit of sprinkler fitters and helpers. The parties also agreed that employees in this unit could vote on June 16, 2016, by appearing in person at a polling place on the Respondent's premises during specified hours or could cast a mail ballot. To be counted, mail ballots had to be received by the Board on or before June 30, 2016.

On July 1, 2016, the Board agent conducting the election issued a tally of ballots. It showed that 2 employees had cast ballots for the Union, 2 against, and that there were 2 challenged ballots. Thus, the ballots of the contested voters could determine the outcome of the election.

The voters casting the challenged ballots were Pirtle and Rhodes, the same individuals alleged to have been discharged unlawfully. The validity of their ballots depends on whether or not the Respondent lawfully discharged them.

On July 21, 2016, the Regional Director for Region 10, acting on behalf of and with authority delegated by the Board's General Counsel (referred to below as the General Counsel or the Government) issued a complaint and notice of hearing in 10–CA–175681. The Respondent filed a timely answer.

On August 8, 2016, the Regional Director issued a Report on Challenges, Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. This pleading consolidated for hearing unfair labor practice Cases 10–CA–175681 and 10–CA–177542. The Respondent filed a timely answer.

Also, on August 8, 2016, the Regional Director issued a Report on Challenges, Order Consolidating Cases and Notice of Hearing. This pleading consolidated unfair labor practice cases with the representation case, 10–RC–177308.

On October 17, 2016, a hearing opened before me in Paducah, Kentucky. After the parties presented evidence, I adjourned the hearing until November 29, 2016, when it resumed by telephone conference call. After counsel gave oral argument, the hearing closed.

Admitted Allegations

In its answer, the Respondent has admitted certain of the allegations in the complaint. Based on those admissions, I find that the government has proven the allegations raised by complaint paragraphs 1(a), 1(b), 1(c), and 1(d).[1] Further, I find that the government has proven the allegations raised in complaint paragraphs 2, 3, 4, 5, 6(a), and 8(a).

More specifically, I find that at all material times, the Respondent has been a limited liability company with an office and place of business in Paducah, Kentucky, and has been engaged in the installation and servicing of sprinklers. Further, I conclude that the Respondent meets the appropriate standards for assertion of the Board's jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Additionally, the Respondent has admitted, and I find that at all material times, its Owner and President, David Johnston, has been its supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act.

Further, I find that at all material times, the Charging Party, Road Sprinkler Fitters Union, Local 669, has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, the Respondent has admitted, and I find that about March 31, 2016, Respondent discharged its employee Glen Michael Pirtle.

Contested Allegations

Answering complaint paragraphs 10, 11 and 12, the Respondent has denied that it violated Section 8(a)(1) and (3) of the Act and likewise has denied that it committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act. The Respondent also has denied certain other complaint allegations, described below.

Oliver's Status as Respondent's Agent

Complaint Paragraph 6(b) alleges that at all material times, Tracy Oliver held the position of Respondent's office manager, and has been an agent of Respondent within the meaning of Section 2(13) of the Act. The Respondent denies this allegation.

Although the Respondent disputes that Oliver is its agent, it does not deny that since about 2012, she has held the position of office manager. She described her duties as follows:

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[1] These paragraphs allege the dates of filing and service of the unfair labor practice charges and amended charges. In each instance, the Respondent has admitted service but not filing. Based on the Respondent's answer, the affidavits of service of the charges, the presumption of administrative regularity, and the absence of any evidence to the contrary, I find that the charges and amended charges were filed and served as alleged in complaint pars. 1(a), (b), (c), and (d).

> I oversee the daily activities, take the phone calls, schedule men, make sure everybody's where they're supposed to be. I do payroll. I do payroll taxes, just about anything that needs to be done.

Both her testimony and that of Owner David Johnston establishes that Oliver exercises considerable autonomy in making decisions affecting the Respondent's personnel. For example, Oliver testified that when employee Glen Michael Pirtle told her that he was "hazy" and having memory problems, she told him "that he should not come back to work until he saw a doctor." The record does not indicate that Oliver checked with anyone else before giving this instruction and I find that she did not.

After the Respondent decided to discharge Pirtle, Owner Johnston told Oliver to "find me someone else." She decided to call Robert Rhodes, who had previously contacted her seeking work. Oliver further testified:

> Q. When did you hire Mr. Rhodes?
>
> A. He started on that Friday, which I think is March 1st,[2] but I had called him on the 28th. I think on the 29th, he was going to get with his employer, because he was working. And then on Wednesday is when I told David, I have a replacement. He's ready to start tomorrow.

Owner Johnston's testimony also indicates that he gave Oliver responsibility for finding a replacement and that she effectively recommended that Rhodes be hired:

> Q. After you fired Mr. Pirtle, you had your office manager, Tracy Oliver, find a replacement, correct?
>
> A. Yes.
>
> Q. And she recommended that you hire Robert Rhodes, correct?
>
> A. That is correct.

However, as discussed below, Rhodes worked for the Respondent only about 2 months. Oliver drafted a letter, dated June 2, 2016, to inform Rhodes that his employment was terminated. It is not clear whether preparing this letter was Oliver's idea or Johnston's, but Oliver contacted the Respondent's attorney for advice about the content of the letter and then drafted it for Johnston's signature.

The complaint does not allege Oliver to be a supervisor within the meaning of Section 2(11) of the Act. However, during oral argument, the General Counsel invited me to find that Oliver was in fact a supervisor. Making such a finding at this point would hardly be fair to the Respondent because the complaint did not place the Respondent on notice that it needed to present evidence on this issue.

Of course, evidence that would support a finding of supervisory status under Section 2(11) is also relevant to the Section 2(13) issue of agency. Supervisors, acting within the scope of their employment, are indeed their employer's agents for some purposes.

[2] It appears that Oliver intended to say April 1, which, in 2016, was on a Friday. Other evidence establishes that Rhodes began work for the Respondent sometime in early April 2016.

Stated another way, at common law, an agency relationship comes into existence when a principal authorizes someone else, the agent, to act on the principal's behalf and in the principal's interest

Only a relationship involving a similar delegation of authority will suffice to meet the statutory definition of supervisor. Thus, to make someone a statutory supervisor, an employer must entrust to that person's independent judgment the power to take one or more of the specific actions listed in Section 2(11).[3]

So, it is appropriate to consider whether the Respondent had given Oliver the authority to take any of the actions listed in Section 2(11) even though the issue to be decided concerns whether she is the Respondent's agent within the meaning of Section 2(13). Some of the testimony indicates that Oliver effectively recommended the hire of Rhodes and, in doing so, exercised independent judgment.

Section 2(13) does not provide a specific statutory definition for agent. Instead, it guides the Board's application of common law agency principles. Section 2(13) states:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 152(13).

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Albertson's, Inc.*, 344 NLRB 1172 (2005). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

On a daily basis, Oliver dealt with Respondent's employees, and job seekers, concerning matters related to their employment. Employees reasonably would regard what she told them as reflecting company policy. Accordingly, I conclude that at all material times she has been the Respondent's agent within the meaning of Section 2(13) of the Act. *Sproule Construction Co.*, 350 NLRB 774 (2007).

Unfair Labor Practice Allegations

The Respondent installs sprinkler systems. As a construction industry subcontractor, it sometimes performs work on government-funded projects covered by laws requiring that employees be paid at the "prevailing wage" rate. On such projects, workers not represented by a union will, nonetheless, receive wages at rates not unlike those specified in collective-

[3] That section defines "supervisor": to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

bargaining agreements.

Such laws impose similar labor costs on unionized and nonunionized companies, and thus reduce any bidding advantage a nonunionized contractor might obtain by paying its employees lower wages. Unions representing construction workers therefore have an interest in making sure that nonunionized companies comply with the law.

In the present case, the Respondent had been awarded a contract to install a sprinkler system at the South Marshall Middle School being built in Paducah, Kentucky, a project at which a state prevailing wage law applied. (For brevity, I will call it the "middle school project.")

A representative of the Road Sprinkler Fitters Local 669 made visits to this jobsite to find out whether the Respondent was paying its nonunionized employees at the required wage and benefit rates. The union official, Organizer Todd Johnson, also sought to persuade these employees to sign cards authorizing the Union to represent them.

By May 31, 2016, Organizer Johnson had collected sufficient signatures to warrant filing the representation petition in Case 10–RC–177308. As noted above, the Union and the Respondent entered into a stipulated election agreement providing for a mixed manual and mail ballot election. The July 1, 2016 tally of ballots recorded two votes in favor of the Union and two against. Two challenged ballots remain sealed. Should they be opened and counted, they would determine the outcome of the election.

The General Counsel alleges that the Respondent unlawfully discharged the two individuals who cast the challenged ballots. The Respondent admits that it discharged one of them, Glen Michael Pirtle, on about March 31, 2016, but asserts that it terminated Pirtle's employment lawfully. Should the General Counsel prove the discharge to be unlawful, Pirtle's employment did not end and his challenged ballot should be unsealed and counted.

The other person who voted a challenged ballot was Robert Rhodes. The complaint alleges that the Respondent unlawfully discharged Rhodes on about June 2, 2016. The Respondent denies that it fired Rhodes. Rather, it asserts that Rhodes had found another job but did not wish to say "I quit" because he still wanted to vote in the upcoming representation election.

The Respondent argues that Rhodes, in consultation with the union organizer, devised a scheme to leave his job behind without leaving his right to vote behind. According to the Respondent, Rhodes and the union organizer came to the conclusion that, since employees can go on strike without losing their right to vote, Rhodes could simply declare himself to be on strike and then go to work for the other company.

In sum, this case focuses on the employment status of Rhodes and Pirtle. However, the complaint also alleges that the Respondent's owner made some unlawful statements to Pirtle right before discharging him. The analysis below will begin with a discussion of those alleged violations of Section 8(a)(1) of the Act.

Complaint Paragraph 7

Complaint paragraph 7 alleges, in 3 subparagraphs, that on about March 31, 2016, the Respondent, by David Johnston, (a) created an impression among its employees that their union activities were under surveillance; (b) interrogated an employee about his union sympathies; and (c) told an employee that he was untrustworthy because of his union activities. The Respondent denies all of these allegations.

To prove these allegations, the General Counsel relies on the testimony of employee Pirtle concerning what Owner Johnston said at the time of Pirtle's discharge on March 31, 2016. Only Pirtle and Johnston gave testimony concerning this conversation. Their two accounts differ so much that I must decide which testimony to credit.

The two witnesses do not agree on where the discharge conversation took place. Although this exchange occurred somewhere on the middle school jobsite, Pirtle and Johnston differ as to whether it happened in the job trailer or in the parking lot. The following testimony by Pirtle places the conversation in the job trailer:

> Q. Okay. What happened when you arrived at work that morning?
>
> A. I come in, and David was sitting there, like he often is. Asked to speak to me for a minute or told me he needed to speak to me.
>
> I said, about what? And then he questioned me. He said something about getting audited and questioned me about talking to the Union. I said yes, I have been in communication with Todd. And he said, we're going to have to let you go.
>
> Q. Did he say why he was letting you go?
>
> A. Because he couldn't trust me.
>
> Q. Did he say anything to you about your attendance at this, during this conversation?
>
> A. No.

The record makes clear that when Pirtle said "I have been in communication with Todd," he was referring to Union Organizer Todd Johnson. Sometime shortly before Pirtle's discharge, perhaps even the day before, Union Organizer Johnson and two lawyers had met with Pirtle and another employee, Zeb Gordon, to discuss filing a lawsuit against the Respondent. The lawsuit, based on the prevailing wage law, would allege that the Respondent had not paid its employees at the required rate for their work at the middle school jobsite.

Gordon had told Johnston about this meeting with the union organizer. Johnston's knowledge of this meeting adds plausibility to Pirtle's testimony that Johnston "questioned me about talking to the Union."

Johnston does not dispute that the subject of the Union came up during the discharge interview. However, according to Johnston, Pirtle raised the matter. Johnston described the conversation as follows:

> Q. Okay. Now, you testified about the events of March 31st, and I believe you wanted to explain[.] What —tell the Court this, how—what occurred between you and Mr. Pirtle on March 31st.
>
> A. Well, on March 31st, Zeb Gordon and I are in the parking lot going to the jobsite. Mike pulls in the parking

lot, and he's late. So I tell Mike that I'm not—I don't need him anymore.

Q. Okay. What did he say?

A. He said, well, are you firing me because I spoke with Todd Johnson? I said, no, Mike, I'm not. I'm firing you or letting you go because you don't show up to work, you don't call, you don't let us know. And he said so you're firing me because I spoke with Todd Johnson? I said no, Mike, I'm not. It's about the tardy. This went on three times.

For several reasons, I credit Johnston's account. Pirtle's testimony, that Johnston "questioned me about talking to the Union," is lean on detail. Ordinarily, a discharge makes a lasting impression on the person being fired. The emotions elicited by the termination of employment help burn the event into memory. So, it is not unusual for a discharged employee to testify in considerable detail about what was said. The absence of such detail from Pirtle's testimony does not compel a conclusion that it lacks reliability, but neither does it escape notice.

Because only Pirtle and Johnston testified about this conversation, no witness corroborated either account. However, other evidence in the record does bolster my confidence in Johnston's testimony.

Uncontradicted evidence—the testimony of Johnston and Office Manager Oliver—establishes that Johnston asked Oliver to find someone he could hire to replace Pirtle. Johnston made this request several days before he actually discharged Pirtle, and, it appears, before the union organizer and lawyers met with Pirtle and Gordon.[4]

The record does not indicate that Johnston expressed to Oliver any reason for wanting to replace Pirtle other than Pirtle's attendance problems. Moreover, Oliver's notes document that in January, February and March 2016, the 3 months immediately before Pirtle's discharge, he had a number of absences. Oliver's note for February 25, 2016, included the following:

> 2-25-16 off (Pirtle called TO [Tracy Oliver] at office said he was hazy, and couldn't really remember what happened that day. I told him he needed to go to doctor and he couldn't return unless doctor told him ok to work. He said, "Do you mean a psychiatrist"? I told him whatever kind of doctor he needs.

Oliver's testimony concerning this February 25, 2016 telephone conversation is consistent with the note. Pirtle's testimony about the conversation is confusing. At one point during cross-examination, Pirtle appeared to admit that he told Oliver he was having memory problems, but then said he did not recall:

Q. Was that a day that you told Tracy that you didn't remember what even occurred that day?

A. No. That was—no.

Q. Did you ever make a statement like that?

A. Yes.

Q. Because—

A. You were talking about a different instance.

Q. Was you—were you on some sort of drugs? Why couldn't you remember what was going on?

A. No.

Q. Why couldn't you remember what was going on?

A. I don't recall.

Q. But you did tell Tracy that you had no idea or could not remember any of the events on a particular day?

A. I don't recall.

Q. You don't recall saying that?

A. No.

Based on my observations of the witnesses, I believe that Oliver's testimony is reliable and credit it. However, Pirtle's inability to recall even whether he had said he had a memory problem does not contribute to his credibility. Therefore, whenever Pirtle's account conflicts with Oliver's, I credit the latter. Accordingly, I find that on February 25, 2016, Pirtle did tell Oliver that he was "hazy" and having memory problems.

For similar reasons, I believe Johnston's testimony is more reliable than Pirtle's. Indeed, as the following testimony demonstrates, Pirtle experienced memory lapses while on the witness stand:

Q. Now, on March 31st, whenever you were terminated, you were the one that brought up and asked David Johnston something along the lines of you're firing me because I'm talking to Todd Johnson, correct?

A. No. No, I don't recall.

Q. You don't recall that?

A. I don't recall.

It is difficult to believe that a discharged employee would not remember whether or not he had said, during the discharge interview, "you're firing me because I'm talking to a union organizer." Whether or not Pirtle made such a statement should be easy for him to remember because the statement concerns who should bear the blame for the discharge, a highly emotional subject unlikely to be forgotten. Pirtle's inability to remember something that is hard to forget suggests either that Pirtle's memory problem is rather severe or, if not, that he wasn't making the maximum effort to recall.

In sum, the paucity of Pirtle's testimony about the unfair labor practice allegations, his repeated statements that he could not recall certain facts, and the memory problem he described to Oliver on February 25, 2016, compel me to conclude that he is not a reliable witness. Therefore, I will neither credit nor rely upon Pirtle's testimony. Instead, I credit Johnston's testimony.

Based on Johnston's testimony, I find that Pirtle, not John-

[4] At one point in his testimony, Johnston indicated that he asked Oliver to find a replacement for Pirtle on March 26, 2016. Oliver testified that Johnston made this request on March 28. Because Oliver impressed me as being especially well organized, I have more confidence in the March 28 date, but that date still appears likely to be before Pirtle and Gordon met with the union organizer and lawyers, a meeting which, the credited evidence suggests, probably occurred on March 30.

ston, first brought up the subject of the Union during the discharge interview and that he did so by asking "are you firing me because I spoke with Todd Johnson?" Further, I find that Johnston responded as he described:

> I said, no, Mike, I'm not. I'm firing you or letting you go because you don't show up to work, you don't call, you don't let us know. And he said so you're firing me because I spoke with Todd Johnson? I said no, Mike, I'm not. It's about the tardy. This went on three times.

Crediting Johnston, I conclude that the General Counsel has not proven the allegation in complaint paragraph 7(a), that the Respondent, by Johnston, created the impression that employees' union activities were under surveillance. Similarly, I conclude that the Government has not proven the allegation raised in complaint paragraph 7(c), that he was untrustworthy because of his union activities.

Further analysis is needed to reach a conclusion concerning the allegation in complaint paragraph 7(b), that the Respondent, by Johnston, interrogated an employee about his union sympathies. Although Pirtle brought up the subject of the Union when he asked if Respondent was firing him because he had seen Todd Johnson, the union organizer, Johnston had responded by asking Pirtle if he had seen Johnson.

Based on Johnston's testimony, which I credit, I find that after Pirtle said "you're firing me because I talked to Todd Johnson," Owner Johnston asked Pirtle if he had seen Todd Johnson.[5] In any event, whether Johnston's question to Pirtle violated Section 8(a)(1) of the Act does not depend on the reason he asked it. Rather, the Board judges the question's lawfulness by asking whether, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees' Section 7 rights. See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Because Johnston's question concerned whether Pirtle had engaged in protected union activity, I must evaluate whether that inquiry had a chilling effect on employees' willingness to exercise their rights under the Act.

In *Smith and Johnson Construction Co.*, 324 NLRB 970 (1997), the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described the framework for that analysis in these terms:

> In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in *Rossmore House* noted the test set forth in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows:
>
> 1. The background, i.e. is there a history of employer hostility and discrimination?
> 2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
> 3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
> 4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality''?
> 5. Truthfulness of the reply.

With respect to the first factor, the record does not establish that the Respondent had any history of harboring hostility to Union or protected, concerted activities. It also does not suggest that the Respondent had any history of discriminating against employees who engaged in such activities. Therefore, the first factor weighs against finding that the question violated Section 8(a)(1).

With respect to the second factor, I cannot conclude that Johnston sought the information for use in deciding whether to take disciplinary action against Pirtle because Johnston had told Pirtle he was discharged before asking about his union activity. Johnston could not use the information to take action adverse to Pirtle's employment status because that already was ending. The second factor therefore weighs against finding a violation.

The third factor concerns how high the questioner was in the Respondent's hierarchy. As owner, Johnston ranked at the top, but the company was so small that he also sometimes performed the same work as employees. If anything, this factor likely would weigh in favor of finding a violation.

The fourth factor concerns the place and method of interrogation. Crediting Johnston's testimony rather than Pirtle's, I find that the conversation took place in the parking lot as the two walked towards the jobsite. It was hardly a locus of authority. Likewise, asking the question as they strolled hardly constituted unnatural formality. The fourth factor therefore weighs against finding a violation.

As to the fifth factor, whether Pirtle answered truthfully, Pirtle's antecedent question to Johnston—are you firing me because I met with Union Organizer Johnston—itself reveals, or at least strongly implies, the protected activity. The fifth factor weighs against finding a violation.

Only one of the five factors militate towards finding that the question violated Section 8(a)(1) and the other four factors tip the scales in the other direction. Therefore, I conclude that Johnston's question did not violate the Act.

In sum, I recommend that the Board dismiss all allegations raised by complaint paragraphs 7(a), (b) and (c).

Complaint Paragraphs 8(a), 9, and 11

The Respondent has admitted that it discharged employee Glen Michael Pirtle on about March 31, 2016, as alleged in

[5] Why Johnston would ask that question is not entirely clear, because Johnston already knew that Pirtle had seen Organizer Johnson and the two lawyers. Employee Zeb Gordon, who also attended that meeting, told Johnston that Pirtle was there, too.

It may simply be that Johnston was curious about the extent of Pirtle's candor. In his prehearing affidavit, Johnston had stated "I asked Pirtle if he had spoken to Todd Johnson because I already knew he had been and wanted to know if he would admit he had been talking to him."

complaint paragraph 8(a). However, it denies that it did so because Pirtle engaged in union activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 9. It also denies that Pirtle's discharge violated Section 8(a)(1) and 8(a)(3) of the Act, as alleged in complaint paragraph 11.

The facts relating to Pirtle's discharge already have been discussed above in connection with complaint paragraph 7. They may be briefly summarized as follows: Pirtle engaged in protected activity, including participating in a meeting with Union Organizer Johnson and the two attorneys who accompanied him.

Another employee, Zebulon Gordon also attended this meeting. They discussed with the lawyers the prospect of filing a prevailing wage lawsuit against Respondent. Thus, the two employees were acting together for their mutual aid or protection concerning a matter central to the employment relationship, their wage rate. Without doubt, this discussion constituted activity protected by Section 7 of the Act.

In addition to constituting protected concerted activity, participation in this meeting also fell within the definition of union activity protected by the Act. The meeting was part of Union Organizer Johnson's efforts which led to the filing of the representation petition and thus to the Board-conducted election.

Even the prevailing wage lawsuit discussed at this meeting likely would help the Union's efforts to become the employees' representative. By arranging for the lawyers to confer with the employees, the Union was demonstrating both that it cared about the employees' pay rate and that it could take action on the employees' behalf.[6]

The record suggests that Pirtle and Gordon met with the union organizer and attorneys the evening before Pirtle's discharge but leaves open the possibility that the meeting occurred on some other date. In any event, the meeting took place not long before the termination of Pirtle's employment on March 31, 2016.

Moreover, the record leaves no doubt that the Respondent knew about this meeting, and about Pirtle's participation in it, before Johnston discharged Pirtle. Employee Gordon reported that information to Johnston.

In analyzing whether Pirtle's discharge violated the Act, I will follow the framework the Board established in *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 (1) union or other protected activity on the part of employees, (2) employer knowledge of that activity, and (3) antiunion animus on the part of the employer. See *Willamette Industries,* 341 NLRB 560, 562 (2004) (citations omitted).

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*, *Inc.,* 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

In making its initial showing that Pirtle's union and protected activities were a motivating factor in the decision to discharge him, the government clearly has proven the first element. Pirtle's discussions with Union Organizer Johnston clearly constitute protected activity.

Additionally, the record establishes the second factor, employer knowledge. The testimony of employee Gordon and Owner Johnston clearly supports this finding.

However, I conclude that the General Counsel has not established the third essential element, the presence of antiunion animus. Had credible evidence supported the allegations in complaint paragraph 7, such alleged conduct not only would have violated Section 8(a)(1) but also would have provided evidence of antiunion animus. But my rejection of Pirtle's testimony as unreliable resulted in the conclusion that Johnston did not commit the alleged 8(a)(1) violations.

It is true that conduct which does not violate the Act nonetheless may constitute evidence of animus. Johnston admitted that, after Pirtle asserted that he was being discharged because of his meeting with Union Organizer Johnson, he responded by asking Pirtle if he had met with Johnson. Considering that Pirtle had raised the subject of his meeting with the union organizer, I do not believe that Johnston's question indicates any hostility to the Union.

It also is true that, depending on the facts, the existence of antiunion animus may be inferred from circumstances such as timing. See, e.g., *North Fork Services Joint Venture*, 346 NLRB 1025 (2006). Moreover, at first glance, the timing here indeed looks suspicious: Shortly after Pirtle attended a meeting with the union organizer and two lawyers—perhaps as soon as the next day—the Respondent tells him that he is discharged.

However, based on the credited testimony of Owner Johnston and Office Manager Oliver, I have found that Johnston made the decision to discharge Pirtle on March 28 but delayed telling Pirtle until Oliver had found someone to replace Pirtle. Further, I find that Johnston's discharge of Pirtle took place after Oliver actually had found such a replacement, Robert Rhodes.

In making this finding, I have considered the Government's challenge to the Respondent's argument that Johnston decided to fire Pirtle on March 28 but delayed effectuating this decision until a replacement was available. If Johnston needed someone on the job so badly, the General Counsel asks, then why did he fire Pirtle early in the morning rather than after Pirtle had completed work for the day?

The record does not answer this question definitively, but it may well be that Pirtle's attendance problems simply had exhausted Johnston's patience and that when Pirtle showed up for work late on March 31, 2016, it was the "last straw." On that date, Johnston testified, he was there when "Mike pulls in the parking lot, and he's late. So I tell Mike that I'm not—I don't need him anymore."

Moreover, by this time, Office Manager Oliver had found a

[6] Moreover, even apart from the organizing drive, the Union had an interest in enforcing the prevailing wage law to assure that a nonunionized employer did not obtain the advantage of lower labor costs while bidding against contractors who did employ union members.

replacement for Pirtle, and that replacement was willing to start work right away. Although discharging Pirtle in the morning would slow the work somewhat, it would not cause a long delay. Therefore, I do not place great weight on the fact that Johnston discharged Pirtle in the morning.

In sum, I conclude that the brief time which elapsed between Pirtle's meeting with the union organizer and his discharge reflects coincidence rather than causation. Mere coincidence is not sufficient to establish antiunion animus. *Neptco, Inc.*, 346 NLRB 18 (2005).

Under the circumstances present here, I do not believe that animus should be inferred from the timing. Additionally, I do not believe there are any other circumstances which would warrant drawing an inference of animus.

Therefore, and in the absence of any other evidence of animus, I conclude that the General Counsel has failed to establish the third essential *Wright Line* element. Accordingly, the government has not proven that Pirtle's discharge violated the Act.

However, even assuming for the sake of analysis that the timing did suffice to establish animus, I would still conclude that Pirtle's discharge was lawful. Here, a showing of animus would have placed upon the Respondent the burden of showing that it would have made the same decision to discharge Pirtle in any event, regardless of protected activity.

Ordinarily, an employer will meet this burden by showing what happened to other employees whose work-related deficiencies were similar to those of the alleged discriminate. A showing that these employees received the same discipline as the alleged discriminatee for the same kind of misconduct would demonstrate that the employer had not treated the alleged discriminatee disparately because of his protected activity. Therefore, it would lead to the conclusion that when the employer decided to discharge the employee, any existing animus did not affect the outcome of that decision.

In a large company with thousands of employees and employee personnel records, finding employees with similar infractions may be relatively easy. However, the likelihood of finding two employees with similar misconduct decreases as the number of workers goes down. The Respondent has a very small employee complement.

However, other evidence exists which has some probative value. Instead of comparing employees with equal work problems but unequal protected activity, this evidence compares employees with similar protected activity but dissimilar work records.

Employee Zebulon Gordon attended the same meeting with the union organizer and attorneys as did Pirtle. However, they differed in the number of times absent or tardy from work. Based on the credited testimony of Owner Johnston and Office Manager Oliver, I find that Gordon, unlike Pirtle, had a nearly perfect attendance record. The Respondent did not discharge or otherwise discipline Gordon.

Moreover, the record reveals reasons why the Respondent would be concerned about attendance. For one thing, the record suggests that Johnston felt considerable pressure to complete the middle school on schedule.

Additionally, an employee's absence might result in Owner Johnston having to go to the jobsite and perform the physically demanding work which the missing employee would have done. According to Office Manager Oliver, Johnston's wife had concerns about her husband performing so much physical labor.

Additionally, after Pirtle's attendance problems began, the Respondent had reason to suspect that they would continue. Pirtle had worked for the Respondent on previous occasions and Office Manager Oliver discerned a pattern in his work performance: "Usually he would work for us 3 to 6 months. You usually could get 3 or 4 good months out of Mike before he started kind of slacking, which we knew that."

Such a pattern would give the Respondent a reason to replace Pirtle quickly when his attendance flagged.

The other employee, Gordon, had proven to be very reliable. Considering that both Pirtle and Gordon had engaged in the same protected activity, and the fact that the Respondent knew about the protected activity of both employees, the fact that the Respondent discharged only Pirtle has *some* probative significance.

It should be stressed that this comparison suffers from flaws not present in the typical comparison of two employees with equal conduct records but unequal protected activity. Obviously, an employer might want to reward an employee who brought to management information about other employees' union activities.

Moreover, an employer breaks the law if it discharges one employee for union activities even if it does not discriminate against other employees it knows to have engaged in similar activities. The fact that it let some known union adherents keep their jobs while discharging others hardly proves it did not discriminate unlawfully against those it did discharge.

Considering these probative pitfalls, I approach a comparison of Gordon and Pirtle quite warily. However, the record does not lead me to believe that Johnston was cultivating Gordon as an informer and I conclude that he was not. Similarly, the record does not suggest that the Respondent was engaging in any antiunion campaign.

In the particular circumstances of this case, I believe it is appropriate to ascribe some significance to the fact that Gordon and Pirtle had similar protected activity but the Respondent only discharged Pirtle.

This fact interlocks with other "pieces of the puzzle" to produce a consistent picture of an employer under such time pressure to complete a project that an employee's reliable attendance, not protected activity, is the deciding factor.

For the reasons stated above, I have concluded that the government has not made the required initial showing and, therefore, the Respondent bears no rebuttal burden. However, even assuming that the Respondent had such a burden, I would conclude that the evidence establishes that it would have decided to discharge Pirtle in any event, regardless of protected activity.

Accordingly, I recommend that the Board dismiss the allegations that Pirtle's discharge violated the Act. Moreover, because the Respondent lawfully discharged Pirtle on March 31, 2016, he was not entitled to vote in the June 2016 representation election. Therefore, I recommend that his challenged ballot not be counted.

Complaint Paragraph 8(b)

Complaint paragraph 8(b) alleges that about June 2, 2016, Respondent discharged its employee Robert Rhodes. The Respondent denies this allegation and also the allegation in complaint paragraph 9 that it discharged Rhodes because of his union activities and to discourage other employees from engaging in such activities.

After the Respondent discharged Pirtle, it hired Robert Rhodes to take his place. Rhodes began work for the Respondent in early April 2016. His last day of employment there was June 2, 2016. During his employment, Rhodes spoke with both fellow employee Gordon and with Union Organizer Johnson concerning the prevailing wage issue.[7]

When Rhodes arrived at the jobsite on June 2, 2016, he gave Owner Johnston a letter captioned "NOTICE OF INTENTION TO STRIKE" (the full text appears below). Only Rhodes and Johnston provided significant testimony about what happened on this occasion, and their accounts differ.[8] To the extent that Johnston's testimony directly contradicts that of Rhodes, I credit Johnston's. However, I credit Rhodes' testimony that, in response to Rhodes' question about being discharged, Johnston replied "no, you're not being fired. You just won't be needed anymore." Johnston did not explicitly deny making this statement. Moreover, "not needed anymore" appears to be a circumlocution Johnston uses to mean termination of employment. Thus, Johnston testified he told Pirtle, "Mike, I don't need you anymore." However, both Johnston and Rhodes do agree that Rhodes got his tools, left the jobsite, and hasn't worked for the Respondent since that time.

The General Counsel argues that the letter constituted protected activity and that the Respondent unlawfully discharged Rhodes because of it. The Respondent asserts that it was going to discharge Rhodes for attendance problems, but that Rhodes effectively resigned when he left the jobsite with his tools. It characterizes Rhodes' letter as a charade, the result of a scheme to allow Rhodes to take another job but still vote in the coming representation election. Were Rhodes considered a striker, it could be argued that his work for the other company was merely interim employment and that he remained eligible to vote in the Johnston Fire Services election.

As noted above, Rhodes began work for the Respondent in early April 2016. The record does not establish that he took an active part in either the Union's organizing drive or in the prevailing wage lawsuit.[9] Rhodes did sign a union authorization card but the record does not establish that the Respondent knew that he had signed one.

On May 31, 2016, the Union filed its representation petition in Case 10–RC–177308. Also, on that date, Union Organizer Johnson provided Rhodes the language to place in a letter which Rhodes would give to Owner Johnston. The letter which Rhodes gave Johnston on June 2, 2016 reads as follows:

NOTICE OF INTENTION TO STRIKE

David Johnston
Johnston Fire Services, LLC
P.O. Box 1691
Paducah, Kentucky

Dear Mr. Johnston,

After discussing the improper wages with my co-workers, we have determined that if you do not properly pay us the mandated Sprinklerfitters rate for work on this Marshal County school a strike will begin as of this Friday June 3, 2016. Please note that this decision to engage in concerted activity for our mutual aid and protection is protected by Federal Law.

Should you wish to discuss this issue with us, we are available.

Sincerely,

The letter also bore Rhodes' signature and the handwritten date May 31, 2016. However, Rhodes did not go to work on May 31 or June 1 and gave the letter to Johnston on June 2.

Did Johnston Discharge Rhodes?

Rhodes and Johnston agree that both were at the middle school jobsite when Rhodes gave Johnston the letter on June 2. They also agree that after receiving the letter, Johnston asked Rhodes for Rhodes' key to the gang box where workers kept their tools, that Johnston accompanied Rhodes to retrieve his tools, that Rhodes gave Johnston the key, that Johnston walked with Rhodes back to Rhodes' vehicle, and that Rhodes then left.

However, the two witnesses do not agree on what each said. Rhodes testified, in part, as follows:

> Q. Okay. When you showed up and you handed him this letter, what happened next?
>
> A. I handed him the letter, told him it was my letter of intention to strike. He looked at the letter. I don't know that he read it, but he looked at it for a minute, said okay, and kind of tossed it on the seat of his truck.
>
> Q. And what'd you do next?
>
> A. I turned to him, was headed toward the school, toward the job. He asked what I was doing. I told him I needed my tools to work. And he asked if I had the key to the gang box.
>
> Q. So what is the gang box?
>
> A. That's the box, the toolbox where we keep the tools in.
>
> Q. And so your tools were in the gang box?
>
> A. Yes, ma'am.

[7] The Union contends that the Respondent had been paying its sprinkler installers at the lower wage rate for laborers. However, the correct applicable wage rate is not an issue in this proceeding and I do not make any findings with respect to it.

[8] Johnston testified that employee Zebulon Gordon was with him when Rhodes arrived at the jobsite, but Gordon testified "I don't recall." Gordon's testimony does not shed any light on the exchange between Johnston and Rhodes.

In response to a number of questions, Rhodes said that he did not recall. In view of the state of his memory, I have somewhat less confidence in Rhodes' testimony than in Johnston's testimony.

[9] According to Union Organizer Johnson, Zebulon Gordon, and Glen Michael Pirtle were the named plaintiffs in that lawsuit against the Respondent, which was filed about May 5, 2016.

> Q. Okay. So he—what happened after you said you were going to the gang box?
>
> A. He asked if I had the key for the gang box. I said yes, I did. I asked if I was being fired, and he said no, you're not being fired. You just won't be needed anymore.

As noted above, Johnston's account does not include the statement— "you're not being fired. You just won't be needed anymore"—which Rhodes attributed to him. However, Johnston did not expressly deny making such a statement and I find that he did.

Johnston's own testimony about what he said to Rhodes piques curiosity as much as it illuminates. The portion below makes me wonder what Johnston might have said if his attorney had not interrupted:

> Q. Okay. And June 2nd is the day that--what occurred on June 2nd?
>
> A. June the 2nd, Robert Rhodes—well, at 7:30 he wasn't at work. . .I see a pickup— not a pickup, but a SUV pulling a U-Haul trailer, which I thought was kind of odd, but so—and then it kind of pulls up, not in a parking spot, but just in the middle of the parking lot. I notice Robert get out of the vehicle and had a piece of paper. He handed me the piece of paper. It was—I didn't look at it very closely. It just said, intent to strike. I said okay. Ask him for my key back to the gang box in the job trailer. And he said, well, I need to get my tools. I said, okay, I'll walk you back to the gang box to get your tools. So went back to the gang box. He got his tools. Walked him almost out of the school, and so he's—I got my key back. And he said, so you're firing me because I talked to Todd Johnson. I said no, I'm firing you—
>
> Q. Did you fire him?
>
> A. No. No, no, I didn't. I didn't. No. I did not fire him. He—so he got his tools and walked on out. But he asked me that three times. It was almost like he was rehearsed to say that. So he got his tools and left the jobsite.

In determining whether Respondent discharged Rhodes, I consider Johnston's words and actions from the employee's perspective. *Accurate Wire Harness*, 335 NLRB 1096 (2001). Under Board law, an employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001).

The determination of whether or not an employee has been discharged does not turn on a respondent's choice of words. *Ridgeway Trucking Co.*, 243 NLRB 1048, 1048–1049 (1979). However, when Johnston told Rhodes that he was not "needed anymore," those words sent a pretty clear signal that Rhodes' employment was over. Even though Johnston prefaced those words by telling Rhodes he wasn't fired, the message remained clear that Rhodes would not be working for the Respondent.

Johnston's actions also communicated that same message. Telling Rhodes to get his tools, at the start of the workday, certainly implies that his further services would not be welcome that day. Requiring Rhodes to return his key to the gang box implies that he would not be using them at this jobsite in the future.

Moreover, Johnston's accompanying Rhodes to get his tools and then walking with him to his vehicle, also is consistent with a conclusion that the Respondent was discharging Rhodes. A reasonable observer might well conclude that Johnston was escorting Rhodes off the premises, a common practice when an employee is discharged.

Respondent's Argument: Rhodes Effectively Quit

The Respondent argues that when Rhodes showed up at the jobsite on June 2, 2016, he did not intend to work but only to pick up his tools. According to the Respondent, the "notice of intention to strike" letter was part of a scheme to allow Rhodes to go to work for another company without losing his status as a Johnston Fire Services employee and. along with that status, his eligibility to vote in the representation election.

The evidence clearly establishes Union Organizer Johnson gave Rhodes the language to place in the "notice of intention to strike" letter. Indeed, Johnson admits it.

The Respondent notes that strikers retain their status as employees. It argues that Rhodes and Union Organizer Johnson reasoned as follows: By pretending to be a striker, Rhodes could accept the job he wanted at the other company while claiming it to be merely interim employment, thereby preserving his right to vote in the election. Moreover, the Respondent contends, if the "intention to strike" letter resulted in Rhodes' discharge, such a discharge arguably would be unlawful, which similarly would preserve Rhodes' status as an employee and his right to vote in the election.

In view of this scheme, the Respondent argues, Rhodes was just performing a "charade" when he arrived at the jobsite on June 2, 2016, and actually had no intention of working that day. Thus, Johnston testified that Rhodes was wearing clothes that ordinarily would not be worn to work. Rhodes disputed that testimony.

The record does not establish that Respondent's employees wore a particular uniform to work. Likewise, I cannot conclude that Rhodes had a practice of working in special clothing, such as bib overalls or trousers with loops to hold tools. Absent such separate work apparel, it would be speculative to assume that casual clothes of a particular quality would be worn to work and casual clothes of a different quality would be worn to social events. Drawing such a line would be arbitrary and subjective.

Moreover, although Johnston expresses the opinion that Rhodes was not in work clothes, the record provides insufficient detail to evaluate that opinion. Therefore, I do not.

Johnston also testified that Rhodes did not park his vehicle in a regular parking spot, but rather closer to the jobsite, as if he intended to fetch his tools and then leave. However, Johnston also testified that Rhodes' vehicle was towing a trailer. Rhodes did not recall towing a trailer on that occasion, but acknowledged it was possible. His daughter has a disability requiring her to use a powered chair, which he sometimes transports in a trailer.

In view of the trailer, it is possible that Rhodes could not park in a regular spot. Therefore, I draw no inference about Rhodes' intentions from where he chose to park.

However, in several ways, the testimony of Union Organizer Johnson does shed some light on Rhodes' intentions. For one thing, it establishes that Johnson had been helping Rhodes find work at another company, Tri-State, which had a bargaining relationship with the Union.

Although Rhodes testified that such employment "was being discussed, but it was not set in stone," Johnson's testimony did not indicate there were any impediments to Rhodes taking the job.

As noted above, Rhodes would retain his eligibility to vote either if he really were a striker or if his "notice of intention to strike" letter resulted in his unlawful discharge. Union Organizer Johnson did not deny discussing this latter possibility with Rhodes:

> Q. Did you ever talk to him about the need to be terminated so he could vote?
>
> A. I'm sure we discussed it.

Ordinarily, an employee wishes to avoid being discharged because it carries a stigma. Therefore, it is significant that Johnson and Rhodes even discussed his *needing* to be discharged so that he could work for Johnston's competitor while still voting in the election.

Moreover, Johnson's testimony establishes that the June 2, 2015 letter he drafted, and Rhodes signed was misleading, to say the least. It began by indicating that Rhodes had discussed the matter with his coworkers and that "*we* have determined that if you do not properly pay *us* . . . a strike will begin as of this Friday June 3, 2016." [Italics added.] However, Johnson admitted that no other employees were planning to strike, and Rhodes would be the only employee involved:

> Q. BY MR. KELLY: Was he going out on strike himself? No other employees would follow him?
>
> A. No.
>
> Q. No what?
>
> A. No other employees were going out on strike at the time.
>
> Q. So this was his own individual action?
>
> A. Yes.

In view of Johnson's testimony, I conclude that Johnson drafted the letter artfully to make Rhodes' contemplated individual action appear to be concerted action within the protection of Section 7 of the Act.[10]

The careful wording of the letter displays the artifice. It starts in the active voice, using the plural pronouns "we" and "us"— "we have determined that if you do not properly pay us"—but then switches to the passive voice, stating "a strike will begin. . ."

If Rhodes had continued to use the active voice, to be factual he would have had to write "I will begin a strike . . ." thereby revealing that he alone intended to strike. Use of the passive "a strike will begin" avoided such a disclosure. Thus, although the letter stops short of saying that "we" will strike, it creates that impression.

In these circumstances, I find that on June 2, 2016, Rhodes did intend, at some point, to leave his work at Johnston's Fire Services and take a job with one of the Respondent's competitors. However, the record is insufficient to support the conclusion that he did not intend to work that day, June 2. The "notice of intention to strike" letter stated that the strike would begin on June 3, so Rhodes might well have intended to work on June 2.

Respondent relies on surmise in arguing that Rhodes only intended to retrieve his tools, but not to work, on June 2. However, such conjecture does not suffice. Accordingly, I decline to find that Rhodes did not intend to work on June 2 and instead will presume that he did.

To summarize, I conclude that Rhodes did intend to quit work, under the pretense of going on strike, and then begin working for the unionized company. However, because the "intention to strike" letter stated that the strike would begin on June 3, 2016, I believe it likely that Rhodes intended to work for the Respondent through June 2.

Rhodes held an unannounced intention to cease working for the Respondent, but such an intention is far from saying "I quit." As long as Rhodes kept his plan to himself, he could abandon it at any time. Rhodes remained an employee at the moment that Johnston told him that he would not be needed anymore. Notwithstanding the Respondent's argument, I find that Johnston discharged Rhodes on June 2, 2016.

Did Rhodes Engage in Protected Activity?

The General Counsel alleges that the Respondent discharged Rhodes because of his union and protected concerted activities and to discourage other employees from engaging in such activities. Therefore, to evaluate the lawfulness of the discharge, I must determine whether Rhodes had, in fact, engaged in union and other protected activities and also whether the Respondent knew about such activities.

The record establishes that Rhodes had discussions with Union Organizer Johnson, but I believe the evidence is insufficient to establish that the Respondent's owner knew about such activities at the time Johnston discharged Rhodes on June 2, 2015. Therefore, any protected activity which influenced the Respondent's decision to discharge Rhodes must concern the "notice of intention to strike" letter which Rhodes gave Owner Johnston just before Johnston discharged him.

The discussion above touched on the careful wording which Union Organizer Johnson chose for this letter. The letter mentioned that Rhodes had talked with other employees about the prevailing wage issue. Section 7 of the Act protects such discussions. The letter's use of "we" and "us" also suggested that Rhodes was engaging in protected concerted activities with other employees rather than unprotected individual action solely on his own behalf. See *Hitachi Capital America Corp.*, 361 NLRB 123 (2014) (use of plural pronouns as an indication of concerted activity).

Generally, with some exceptions not relevant here, the Act

[10] Indeed, one sentence in this letter mirrors almost exactly some of the statutory language included in Sec. 7. The letter stated:"Please note that this decision to engage in concerted activity for our mutual aid and protection is protected by Federal Law." Sec. 7 itself refers to concerted activities "or the purpose of collective bargaining or other mutual aid *or* protection." (Italics added.)

protects the employees' right to engage in an economic strike. Announcing an intention to strike likewise is protected.

If an employer holds a mistaken belief that an employee has engaged in union or protected concerted activity, and discharges that employee because of its mistaken belief, that discharge violates the Act. It does not matter that the employee had not engaged in the protected activity. *United States Service Industries, Inc.*, 314 NLRB 30 (1994). Similarly, it does not matter here whether Rhodes actually had spoken with other employees about going on strike or actually intended to go on strike.[11]

Additionally, I do not consider whether the scheme might constitute "misconduct in the course of protected activity." That issue could possibly arise under certain analytical frameworks, such as that applied in *Atlantic Steel Co.*, 245 NLRB 814 (1979). However, for reasons discussed below, I conclude that *Wright Line*, above, provides the appropriate guidance in this case.

In the absence of evidence to the contrary, I will presume that Johnston believed the statements in the "intention to strike" letter. Moreover, the very act of giving the letter to Johnston itself constituted protected activity because the letter expressed not merely Rhodes' concerns but also those of other employees. In view of the prevailing wage lawsuit and the Union's representation petition, Johnston would have no doubt that other employees really were concerned about these matters.

In sum, I find that Rhodes engaged in protected concerted activity on June 2, 2016. Further, I find that the Respondent knew about this protected concerted activity.

Lawfulness of Rhodes' Discharge

Because of my findings that Owner Johnston discharged Rhodes on June 2, 2016, after observing him engage in protected activity, I must determine whether the Respondent acted lawfully. Procedurally, before I can weigh the lawfulness of the discharge, I must decide which analytical framework will guide me. Do I follow the *Wright Line* framework applied above in examining Pirtle's discharge or some other standard?

The *Wright Line* procedure, followed in cases where both lawful and unlawful motives are present, determines whether the employer would have taken the same disciplinary action in the absence of the protected activity. However, the Board does not apply this framework when an employer *undisputedly* takes action against an employee for engaging in protected conduct. In such cases, where an employer manifestly imposed discipline because the employee exercised Section 7 rights, the inquiry is whether, during the course of that protected activity, the employee also engaged in misconduct egregious enough to forfeit the protection of the Act. *Fresenius USA Mfg., Inc.,* 358 NLRB 1261 (2012), citing *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1322 (2006).

[11] In the circumstances of this case, the protected nature of the "intention to strike" letter is not affected by the fact that Rhodes was using the letter in a scheme to allow him to vote in the representation election even though working for another employer. The record does not establish that Johnston knew about the scheme or considered it at the time he discharged Rhodes. As I understand the Respondent's arguments, it is not claiming that Johnston discharged Rhodes for engaging in such a scheme.

Immediately after Rhodes gave Johnston the "intention to strike" letter, Johnston discharged him. That tight sequence certainly creates the impression that Respondent discharged Rhodes because of his protected activity. But is this conclusion *indisputable*?

The Respondent contends that Johnston had become so frustrated with Rhodes' absences from work that, on June 1, 2016, he decided to terminate Rhodes' employment. At Johnston's request, she drafted a letter notifying Rhodes that he was discharged. This letter stated, in pertinent part, as follows:

> Please allow this letter to notify you that effective today, June 2, 2016, your employment with Johnston Fire Services LLC shall be terminated. You have been repeatedly talked to regarding absences from work. You have only been an employee of the Company for a short period and your attendance during this short time period is unacceptable. Most recently, on Friday May 27 you reported to work an hour late. You failed to report to work on Tuesday, May 31 and June 1, 2016.
>
> We are a small company and your absences negatively impact our business and project performance.

Although the letter was dated June 2, 2015, Oliver prepared it earlier. However, neither Johnston nor Oliver gave the letter to Rhodes.

Respondent argues that Johnston did not have the opportunity to present the letter to Rhodes because of what happened between them on the morning of June 2. (Although the Respondent interpreted this event as Rhodes quitting, for the reasons discussed above I have concluded that Johnston discharged Rhodes.)

As noted above, I believe Oliver's testimony to be particularly reliable. Based on that testimony and on the letter, she drafted, which is in evidence, and on Johnston's testimony, which is consistent with Oliver's, I find that on June 1, 2016, Johnston decided to discharge Rhodes because of his attendance problems.

Accordingly, this case involves mixed motives, one of them being Rhodes' absences from work, and the other being his giving Johnston the "intention to strike letter," which falls within the Act's protection. Therefore, *Wright Line* provides the appropriate analytical framework.

Wright Line Analysis

As discussed above, the General Counsel bears an initial burden of showing that an employee's union and/or protected concerted activities were a motivating factor in the decision to impose discipline or discharge. Here, I conclude that the General Counsel has carried this burden by establishing the three elements required.

The government has proven that Rhodes engaged in protected activity. His "intention to strike" letter enjoys the Act's protection.

The record also clearly establishes that the Respondent knew about the protected activity. Rhodes handed the letter to the Respondent's owner.

Further, I conclude that the sequence of events, the discharge following immediately after Johnston received the letter, suf-

fices to establish animus. Where warranted, the Board may infer animus from timing. *North Fork Services Joint Venture*, above.[12]

Accordingly, the burden of proceeding shifts to the Respondent to establish that it would have taken the same action even in the absence of protected activity. I conclude that the Respondent has carried this burden.

The evidence establishes not only that the Respondent would have discharged Rhodes even if he had engaged in no protected conduct, but also that Respondent was going to do just that. At the time he directed Oliver to draft the discharge letter, Johnston could not have known about Rhodes' future protected activity. Even if Rhodes and Union Organizer Johnson already had prepared the "intention to strike" letter before Owner Johnston told Oliver to draft the discharge letter, Johnston did not know about the letter until he received it on June 2, 2016.

Concluding that the Respondent has carried its rebuttal burden, I recommend that the Board dismiss the allegations related to Rhodes' discharge.

In view of the finding that the Respondent lawfully discharged Rhodes, he was not an employee when he later cast the challenged ballot, and that ballot should not be counted.

Summary

The evidence does not establish any unfair labor practice alleged in the complaint. Therefore, I recommend that the complaint be dismissed in its entirety. Additionally, I recommend that the Board sever the representation case and remand it to the Regional Director with instructions not to count the challenged ballots cast by Pirtle and Rhodes.

Conclusions of Law

1. The Respondent, Johnston Fire Services, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party, Road Sprinkler Fitters Local Union 669 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[13]

ORDER

Case 10–RC–177308 is hereby severed and remanded to the Regional Director for Region 10 for issuance of a certification of results of the election.

The consolidated complaint in Cases 10–CA–175681 and 10–CA–177542 is dismissed.

Dated Washington, D.C. March 3, 2017

[12] My inference that Johnston acted with animus on June 2, 2016, when he discharged Rhodes, does not conflict with my conclusion that Johnston did not act with animus when he discharged Pirtle on March 31, 2016. Two events in May—the filing of the prevailing wage suit and the filing of the representation petition—may well have sensitized Johnston to protected activity and made him more allergic to it. Indeed, the Union filed the representation petition on May 31, 2016, just 2 days before Johnston discharged Rhodes.

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