Fresenius USA Manufacturing, Inc. *and* International Brotherhood of Teamsters, Local 445. Case 02–CA–039518

September 19, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

In this case, employee Kevin "Dale" Grosso, an open and active supporter of the Union, anonymously scribbled vulgar, offensive, and, in isolation, possibly threatening statements on several union newsletters left in an employee breakroom in an undisputed attempt to encourage his fellow employees to support the Union in an upcoming decertification election. In a good-faith response to female employees' complaints about those statements, Fresenius investigated the statements, questioned Grosso about them, and, upon confirming Grosso's authorship, suspended and discharged him for making the statements and falsely denying responsibility for them. For the reasons discussed below, we agree with the judge that Fresenius' investigation and questioning of Grosso did not violate the National Labor Relations Act. Contrary to the judge, however, we find that its suspension and discharge of Grosso did.[1]

I. FACTUAL BACKGROUND

Fresenius manufactures and distributes disposable dialysis products from several facilities, including a distribution center located in Chester, New York. In July 2008, the Board certified the Union as the collective-bargaining representative of two units of employees at the Chester facility, a drivers unit and a warehouse workers unit. The warehouse unit comprises seven male and five female employees. Following the election, Fresenius and the Union were unable to reach agreement on a collective-bargaining agreement for either unit. After the initial certification year had elapsed, a warehouse employee filed a decertification petition for the warehouse unit. The decertification vote was scheduled for September 23, 2009.[2]

On September 10, in the midst of the decertification campaign, three union newsletters with handwritten statements were found in the employee breakroom. The handwritten statement on the first newsletter read, "Dear Pussies, Please Read!" The handwritten statement on the second newsletter read, "Hey cat food lovers, how's your income doing?" The third newsletter bore the handwritten statement, "Warehouse workers, RIP." As indicated, each handwritten statement was anonymous.

Upon learning of those statements, several female warehouse workers complained to Fresenius that the statements were vulgar, offensive, and threatening. In response, Distribution Center Manager Shane Healy met

[1] On August 19, 2010, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, Respondent Fresenius USA Manufacturing, Inc., filed an answering brief, and the Acting General Counsel filed a reply brief. Fresenius also filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and Fresenius filed a reply 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Fresenius excepts to the judge's refusal to admit certain notes and file memoranda prepared by its managers for the truth of the matters asserted therein, under the business records exception to the hearsay rule, FedR.Evid. 803(6). We find it unnecessary to pass on these exceptions because, even if we considered the evidence in those documents for the truth of the matter asserted, it would not affect our conclusions. As the judge pointed out, both the individuals who prepared the documents and the individuals involved in the events in question testified at the hearing and testified specifically about those events. Thus, even if considered for its truth, the information contained in the notes and memoranda would add little if anything to the other, properly admitted evidence. Moreover, as discussed below, we find that some of Fresenius' conduct in this case was lawful, and our finding that other conduct was unlawful is based on credited testimony and documentary evidence that is consistent with the statements in the disputed documents. Accordingly, even if the judge erred in not admitting those documents for the truth of the matters asserted, the error did not prejudice Fresenius.

At trial, the judge granted the Acting General Counsel's motion to amend and clarify certain allegations of the complaint. Fresenius excepts. For the reasons discussed by the judge on the record at the hearing, we find that she did not abuse her discretion in granting the motion.

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

We agree with the judge, for the reasons she gives, that Fresenius violated Sec. 8(a)(1) when it encouraged Grosso not to speak to other employees about the investigation of his handwritten comments on the union newsletters.

We have amended the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and substitute a new notice to conform to the Order as modified. We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[2] Unless otherwise indicated, all dates refer to 2009. The Union ultimately lost the decertification election by a vote of 10 to 2.

with the warehouse employees that same day and promised to investigate the statements.[3] At the meeting, employee Barbara Moscatelli said that she recognized the handwriting on the newsletters as that of one of the drivers. Healy did not ask Moscatelli to identify the driver because he wanted to obtain advice from legal counsel first.[4]

On September 21, Fresenius Vice President Kevin King and Senior Director Douglas Maloney visited the Chester facility to discuss the upcoming decertification election with the warehouse employees. At the end of the meeting, King opened the floor to questions, and several female warehouse workers again expressed concern about the handwritten statements on the union newsletters. King promised to investigate the matter. At King's request, several female warehouse workers memorialized their complaints in written statements. Moscatelli also informed King that she recognized the handwriting on the newsletters. She later brought copies of the drivers' handwritten logs to King and directed his attention to the log of driver Dale Grosso, a known prounion employee. King and Maloney reviewed the logs and found significant similarities between the handwriting on Grosso's log and that on the newsletters.

Based on that review, King, Maloney, and Healy questioned Grosso in the facility's conference room later that day. They all knew each other and the discussion began with friendly sports conversation. At one point during the banter, Grosso said, "Hey, the Red Sox RIP." King then asked Grosso about the handwriting on the newsletters. Grosso denied seeing the newsletters before that time. King noted the similarity between the "Warehouse workers, RIP" statement on the third newsletter and Grosso's "Red Sox RIP" comment, but Grosso retorted that "RIP" is a common expression. When Grosso asked why King was questioning him, King replied that Grosso's coworkers had complained that the statements were vulgar, offensive, and threatening. Although Grosso initially disagreed, he later acknowledged during the questioning that the statements could be viewed as improper. He continued to deny responsibility for the statements, however.

The next day, Grosso attempted to call a representative of the Union to discuss the previous day's questioning, but he unwittingly dialed King's work telephone number instead. Mistakenly thinking that he was speaking to his union representative, Grosso admitted writing the statements on the union newsletters. King then identified himself and informed Grosso that he and other managers had heard Grosso's confession. After exclamations of disbelief, Grosso unsuccessfully attempted to deny his identity. King ordered Grosso to report to the facility. When Grosso arrived, King suspended him pending an investigation. King admonished Grosso not to speak with other employees about the matter while the investigation was ongoing.

On September 25, King forwarded the female employees' written complaints and other materials to a senior human resources manager. After reviewing the documents and after speaking with King, Maloney, and Healy, the human resources manager decided to terminate Grosso's employment. According to Fresenius, Grosso's discharge was based both on the newsletter comments and on his dishonesty during the investigation.

At the trial, Grosso testified that, based on his conversations with coworkers, he believed that the Union was losing support among his colleagues in the warehouse unit. On September 10, when he and a fellow driver came across several union newsletters in the employee breakroom, Grosso decided to write comments on three of the newsletters to encourage the warehouse workers to support the Union in the upcoming decertification election. He further testified that he spent only a few seconds writing those comments and that no one else contributed to the comments. Grosso explained that he referred to the warehouse workers as "pussies" because he thought they were spineless and needed to "man up." "Cat food lovers" was a play on the word "pussies." Grosso intended the phrase "RIP" to communicate that "if [the warehouse workers were] going the way [they] are, and how things are going, [they're] dead. [They've] just died. . . . [They've] lost [their] soul[s]."

In her decision, the judge observed that the testimony of the Acting General Counsel's witnesses and the testimony of Fresenius' witnesses seemed to describe two completely different facilities, one where profanity is commonplace and one where there is no profanity. The judge found little basis for substantially crediting either group of witnesses regarding the prevalence of profanity and found that the reality was somewhere in the middle. Fresenius' own witnesses acknowledged, however, that employees have used profanity in the workplace. It appears from the record that supervisors would issue minor reprimands to employees when they overheard or ob-

[3] In response to the safety concerns expressed by the female employees, Healy reminded them of the security cameras in the parking lot and stayed late himself to ensure that they left safely. He also contacted outside security firms, although Fresenius ultimately did not hire additional security.

[4] Under Fresenius' harassment policy, management will, upon receiving a complaint or obtaining knowledge of harassment, investigate and respond immediately. If harassment has occurred, management will administer corrective action up to and including termination of the individual engaging in harassment.

served profanity. For instance, a supervisor twice observed a sticker that read, "DON'T BE A DICK" on an employee's jack that was used around his colleagues and taken to medical facilities and patients' homes. The supervisor admonished the employee, but did not discharge or discipline him.

II. ANALYSIS

A. Fresenius' Investigation and Questioning of Grosso Were Not Unlawful

As stated, the judge found that Fresenius lawfully investigated the authorship of the handwritten comments on the union newsletters and lawfully questioned Grosso about his role in drafting those comments. The Acting General Counsel excepts to both findings, arguing primarily that Fresenius investigated and interrogated Grosso about protected conduct. The Acting General Counsel also disputes Fresenius' purported concern about avoiding liability under Federal equal employment opportunity laws. Fresenius counters that it had a duty under Federal law and its own harassment and equal employment policies to investigate these allegedly unprotected comments. For the reasons that follow, we agree with the judge that neither Fresenius' investigation nor its questioning of Grosso violated the Act.

1. The investigation

The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, including complaints of harassment. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). We find, based on the handwritten newsletter comments themselves and the multiple complaints it received, that Fresenius had a legitimate interest in investigating those comments. Fresenius' decision to investigate those comments, moreover, was fully consistent with its antiharassment policy. In addition, as Fresenius points out, under Federal regulations issued pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR 1604.11(d). In these circumstances, we agree with the judge that Fresenius did not violate Section 8(a)(1) by conducting an investigation of the comments.

2. The questioning of Grosso

We also agree with the judge that Fresenius' questioning of Grosso during the investigation did not violate the Act. The Board has recognized that, as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, even if that conduct took place during the employees' exercise of Section 7 rights. In *Bridgestone Firestone South Carolina*, for instance, the Board found that the employer lawfully questioned a union supporter about alleged vulgar language and threatening behavior in the course of making prounion remarks:

> The Respondent had a legitimate basis for investigating [the employee's] misconduct, and its investigation was entirely consistent with its policy . . . . Furthermore, the Respondent made reasonable efforts to circumscribe its questioning to avoid unnecessarily prying into [the employee's] union views, and the limitations on its inquiry were clearly communicated to [him].

350 NLRB 526, 528–529 (2007). Likewise, Fresenius' questioning of Grosso occurred during its legitimate investigation of employees' complaints about the newsletter comments. Fresenius never asked Grosso about his union views generally or any of his other union activity. Instead, it focused exclusively on the phrasing of the newsletter comments. In addition, when Grosso asked why he was being questioned, King truthfully explained that several employees had complained that the statements were intimidating, vulgar, and offensive, a characterization Grosso partially accepted. In these circumstances, we conclude that Fresenius did not violate Section 8(a)(1) by its limited questioning of Grosso during its lawful investigation of the newsletter comments.[5]

B. Fresenius Violated the Act by Suspending and Discharging Grosso

As indicated, although we find that Fresenius did not violate the Act by investigating and questioning Grosso, we find, contrary to the judge, that Fresenius did violate the Act by suspending and discharging him. Our analysis of the latter issue begins with two facts. First, as found by the judge, Grosso's handwritten comments encouraged warehouse employees to support the Union in the decertification election. We therefore conclude that, in writing them, Grosso was engaged in protected union activity. Second, Fresenius discharged Grosso for writing those comments.[6] Accordingly, the only question

[5] Given our dismissal of the Acting General Counsel's investigation and interrogation allegations, we find it unnecessary to pass on Fresenius' argument that these allegations are time-barred by Sec. 10(b) of the Act.

[6] Fresenius' discharge letter to Grosso also cited his false denial of responsibility for the comments, but Fresenius could not lawfully discipline him on that ground. Citing *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004), and

before us is whether Grosso's comments were so egregious as to cause him to lose the protection of the Act. In agreement with the Acting General Counsel, we find that they were not.

The Board and courts have long recognized that, in labor relations matters, feelings can run high and individuals sometimes make intemperate remarks. As the Supreme Court has observed, "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966). Indeed, such "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974). As a result, "[a]n employee's Section 7 rights 'may permit some leeway for impulsive behavior.' . . . Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'" *Honda of America Mfg.*, 334 NLRB 746, 747 (2001).

Where a respondent-employer defends a disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity, the Board typically analyzes the case under the four-factor test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), as did the judge in this case.[7] Under *Atlantic Steel*, to determine whether an employee who was engaged in otherwise protected activity lost the protection of the Act due to opprobrious conduct, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. Id. at 816. Applying those factors, the judge found that the subject matter of Grosso's "outburst" weighed in favor of continued protection, but that the place where Grosso's comments were published (the breakroom), the offensive and threatening nature of the comments, and the absence of any unlawful provocation by Fresenius all weighed against protection. She concluded that the latter three factors tipped the scale against continued protection, and thus Fresenius' discipline of Grosso did not violate the Act. As we explain below, we disagree with the judge's *Atlantic Steel* analysis in several material respects, leading us to the conclusion that his suspension and discharge were unlawful.[8]

Spartan Plastics, 269 NLRB 546 (1984), the Acting General Counsel argues that Grosso's dishonesty should be excused because Fresenius' interrogation of him was unlawful. Having found the interrogation lawful, we reject that argument. Nevertheless, Fresenius' questioning of Grosso put him in the position of having to reveal his protected activity, which Board precedent holds an employee may not be required to do where, as here, the inquiry is unrelated to the employee's job performance or the employer's ability to operate its business. See *Tradewaste Incineration*, 336 NLRB 902, 907 (2001). As a result, although Fresenius had a legitimate interest in questioning Grosso and lawfully did so, Grosso had a Sec. 7 right not to respond truthfully. We therefore find that Grosso's refusal to admit responsibility for the comments cannot serve as a lawful basis for imposing discipline.

[7] The judge alternatively analyzed the case under *Wright Line*, 251 NLRB 1083 (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 (1983). As the Board has previously explained, however, *Wright Line* is inapplicable where, as here, an employer undisputedly takes action against an employee for engaging in protected conduct; in such cases, the inquiry is whether the employee's actions in the course of that conduct removed the employee from the protection of the Act. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 (2006). Accordingly, we do not adopt the judge's *Wright Line* analysis.

The Acting General Counsel argues that the suspension and discharge of Grosso were unlawful under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). We find that the *Burnup & Sims* framework is not well suited to answer the question presented here. Under *Burnup & Sims*, an employer violates Sec. 8(a)(1) by disciplining an employee based on a good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. Thus, the issue under *Burnup & Sims* is whether (assuming the employer's good-faith belief) the employee actually engaged in the misconduct. The question in the present case is not whether Grosso engaged in misconduct, but whether the misconduct he admittedly engaged in cost him the protection of the Act. We acknowledge that, on occasion, the Board has applied *Burnup & Sims* when the issue was whether an employee's conduct constituted misconduct that lost the protection of the Act. See, e.g., *AT&T Broadband*, 335 NLRB 63, 67–69 (2001), enfd. mem. 53 Fed.App. 119 (D.C. Cir. 2002); *Twilight Haven, Inc.*, 235 NLRB 1337, 1341–1344 (1978). We need not decide whether the Board's analysis was appropriate in those circumstances because even if we were to apply *Burnup & Sims* here, we would still find that Grosso's suspension and discharge were unlawful. As discussed below, we find that the language used by Grosso was part of the res gestae of his protected conduct and was not so egregious that it cost him the protection of the Act. Thus, even if Fresenius had a good faith belief in its legal judgment that Grosso's conduct was unprotected (as, indeed, it apparently did), the discipline nonetheless would have been unlawful.

[8] The Acting General Counsel suggests that it is not entirely clear whether, or to what extent, some of the *Atlantic Steel* factors are relevant in a case like this one. The employee in *Atlantic Steel* was discharged for calling his foreman a "lying S.O.B." while discussing a grievance. The employee made that comment on the production floor, within earshot of another employee and without any provocation, in a workplace where such conduct was normally not tolerated. *Atlantic Steel*, supra, 245 NLRB at 816–817. In those circumstances, the Board deferred to an arbitrator's decision upholding the employee's discharge, distinguishing earlier cases in which the Board had found employees' similar references to supervisors, in the heat of grievance discussions away from the production floor, remained protected as part of the res gestae of the employees' protected activity.

As the Acting General Counsel points out, *Atlantic Steel* does not make clear whether the same four-factor analysis applies only where an employee has engaged in alleged misconduct toward a supervisor in grievance-related discussions or whether it applies in all cases, like this one, in which an employee engages in other alleged misconduct in the course of protected activity. Although *Atlantic Steel* could be read as

1. The *Atlantic Steel* analysis

As stated, the judge found that Grosso lost the protection of the Act because, although the subject matter of his comments weighed in favor of continued protection, that factor was outweighed by the location and nature of his comments and the absence of employer provocation. As explained below, we find that the location of Grosso's comments favors continued protection, or at least does not weigh against it. We also find that the subject matter and nature of his comments favor continued protection. Last, we find that the provocation factor is neutral in these circumstances. As a result, we conclude that Grosso's comments did not lose the protection of the Act under *Atlantic Steel*.

Location of the comments. The judge found that, in light of the anonymity of Grosso's comments, the location of those comments on newsletters left in the employee breakroom weighed against protection. The judge reasoned that, unlike in a meeting or conversation where other employees would have known the speaker, Grosso's coworkers were unable to "evaluate the pervasiveness of the sentiment or, more importantly, to ascertain the likelihood of future comments or threats." She thus concluded that the location and manner of Grosso's comments caused a greater impact on employees than an isolated comment in a meeting, and exacerbated their disruptive effect.

In our view, the judge's analysis erroneously conflates the location of Grosso's comments (the first *Atlantic Steel* factor) with the nature of his comments (the third *Atlantic Steel* factor), which we discuss below. Focusing on the location factor, the Board has recognized that an employee breakroom generally is an appropriate place for employees to distribute union-related literature and to discuss union-related matters, as it is an area unlikely to disrupt production. See, e.g., *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007).[9] Thus, we find that the location of Grosso's comments generally favors continued protection.

The Board has occasionally tempered its reliance on comments being made in a nonwork area when those comments were made in the presence of other employees. In *Beverly Health & Rehabilitation Services*, supra, 346 NLRB at 1322 fn. 20, the Board found that where one employee made a profane remark to a fellow employee in an employee breakroom in the presence of other employees, the location of the remark did not weigh for or against finding the comment protected. Even applying *Beverly Health* here, where Grosso's comments obviously were "heard" by other employees, the location factor is neutral.

Subject matter of the comments. As the judge found, in writing his comments Grosso was attempting to convey to the warehouse employees his concern over their faltering support for the Union. In so doing, Grosso was exercising his Section 7 right to attempt to organize, or more accurately, "re-organize," his fellow employees—a right that is at the very core of protected activity. As the Supreme Court long ago held, the "dominant purpose" of the Act is to ensure "the right of employees to organize for mutual aid. . . . This is the principle of labor relations which the Board is to foster." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). Accordingly, we agree with the judge that this factor weighs strongly in favor of continued protection.

Nature of the outburst. The judge found that the nature of Grosso's "outburst" weighs against continued protection. We disagree for the following reasons. First, Grosso's comments were essentially impulsive. Grosso took a moment to write his comments on the union newsletters, and there is no evidence that his conduct or the substance of the comments was premeditated. See *Kiewit Power Constructor Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) (observing that the employee's conduct consisted of a brief, verbal outburst in finding factor weighed in favor of protection); *Beverly Health & Rehabilitation Services*, supra, 346 NLRB at 1322–1323 (same).

Second, we recognize that Grosso's "Dear Pussies, Please Read!" comment was vulgar and could reasonably offend other employees. Indeed, Grosso admitted that it

applying in all such cases, the Board there distinguished a case in which an employee's use of an obscenity during an organizing campaign was held to be protected. *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024 (6th Cir. 1974). The Board found that situation "very different from the one herein." *Atlantic Steel*, supra, at 816 fn. 12. Moreover, the Board's post-*Atlantic Steel* decisions have not always been consistent. At times, the Board has analyzed cases of this sort under *Atlantic Steel*. See, e.g., *Beverly Health & Rehabilitation Services*, supra, 346 NLRB at 1322–1323. At other times, it has examined the totality of the circumstances without reference to *Atlantic Steel*, although employing some of the *Atlantic Steel* factors. See, e.g., *Honda*, supra, 334 NLRB 746; *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), enfd. 711 F.2d 1059 (6th Cir. 1983).

In these circumstances, we acknowledge the Acting General Counsel's point that Board precedent does not firmly establish whether cases such as this one should be analyzed under *Atlantic Steel* or under a totality-of-the-circumstances approach. We need not resolve this question here, however, because we find that Grosso did not forfeit the Act's protection under either analysis.

[9] Additionally, Grosso's comments were neither directed at nor referred to a supervisor. Thus, they likely would not undermine supervisory authority. Cf. *Aluminum Co. of America*, 338 NLRB 20, 22 (2002).

could be understood as demeaning to women.[10] It is settled, however, that an employee's use of vulgar or profane language does not necessarily cost the employee the protection of the Act, if it is part of the res gestae of otherwise protected activity. See, e.g., *Beverly Health & Rehabilitation Services*, supra, 1322–1323 (employee did not lose protection for telling fellow employee, in the presence of other employees, to "mind [her] fucking business"); *Traverse City Osteopathic Hospital*, supra, 260 NLRB at 1061–1062 (employee did not lose protection for referring to fellow employee as "a brown-nosing suck-ass" in a meeting with other employees). The use of such language must be evaluated in context.

In the circumstances presented here, we find that Grosso's use of the term "pussy" does not weigh against continued protection. In addition to serving as a crude anatomical reference, the term is also commonly employed to refer to a weak or ineffectual person—someone who is not a "man."[11] That clearly was the sense in which Grosso used the term in his attempt to encourage all warehouse employees—not any particular employee[12] or only female employees—to "man up" and support the Union in the decertification election.

Moreover, Grosso's action occurred at a workplace—a warehouse and loading dock—that was not unused to profane speech. As described, employees have used profanity at the Chester facility, drawing only minor reprimands from their supervisors. One example is particularly instructive. In 2009, one of Fresenius' supervisors observed a sticker that read "DON'T BE A DICK" on an employee's jack that was used, not only around other employees, but at medical facilities and in patients' homes. The supervisor orally admonished the employee for placing the sticker on his jack and instructed him to remove it, but took no disciplinary action. The employee removed the sticker but replaced it sometime later. When the supervisor again discovered the sticker on the jack, he again made the employee remove the sticker but did not discipline, let alone discharge, the employee. Although the Board—not the employer—determines whether particular language will render otherwise protected activity unprotected,[13] Fresenius' failure even to discipline an employee for using language comparable to Grosso's strongly suggests that Fresenius itself does not consider the use of such language to be particularly egregious. See *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (finding no loss of protection based on employee's profanity where similar language was common among employees and supervisors alike); cf. *Aluminum Co. of America*, supra, 338 NLRB at 22 ("Elliott's profanity far exceeded that which was common and tolerated in his workplace.").[14]

Third, with regard to Grosso's "Warehouse workers, R.I.P" comment, we agree with the judge that it could, in isolation, be construed as threatening. But context matters. Board precedent makes clear that, in the circumstances presented here, there is no reason to interpret Grosso's "RIP" comment as threatening death or serious physical harm to employees for failing to support the Union. In *Kiewit Power*, supra, 355 NLRB 708, for example, the Board found that employees' statements to a supervisor that, if they were terminated, "it was going to get ugly" and that supervisor had "better bring [his] boxing gloves" were ambiguous and, absent accompanying conduct, could not be construed as unprotected physical threats. Likewise, in *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988), the Board found that an employee's statement to a company official that "if you're taking my truck, I'm kicking your ass right now" to be "a colloquialism that standing alone does not convey a threat of actual physical harm." Those decisions guide us here, as Grosso's "Warehouse workers, R.I.P." comment was unaccompanied by any physical or otherwise threatening conduct that would warrant treating it as something other than a figure of speech suggesting that the warehouse workers were sowing the seeds of their own ruin. See *Wilkie Metal Products*, 333 NLRB 603, 617–618 (2001), enfd. mem. 55 Fed.Appx. 324 (6th Cir. 2003) (finding union picket sign with "R.I.P." and manager's initials to be a suggestion that "the Company's labor relations are threatening 'the very existence' of the Company and the positions of its managers," rather than a death threat).

Finally, we turn to the judge's concern over the anonymous nature of Grosso's newsletter comments. As described above, the judge found that the anonymity of the comments denied other employees the ability to "evaluate the pervasiveness of the sentiment or, more importantly, to ascertain the likelihood of future comments or threats." In her view, this circumstance caused

[10] Grosso's "cat food lovers" comment could be construed as offensive, if at all, only in the context of the "Dear Pussies" comment, to which it referred.

[11] Cf. *Neptco, Inc.*, 346 NLRB 18, 32 (2005).

[12] Cf. *Honda*, supra, 334 NLRB at 747–748 (remark directed at one identified employee suggesting that he admit being gay).

[13] Id. at 748.

[14] The judge discounted this sequence of events, noting that no employee complained to management about the sticker and that there was no evidence that any management official ever saw the sticker on the jack and allowed it to remain there without comment. Unlike in the case of Grosso's comments, however, the employee replaced the sticker on the jack in violation of an express directive to remove it, yet suffered no adverse consequences. It is therefore apparent that before Grosso wrote his comments, Fresenius did not consider the display of slogans containing vulgar references to (male) genitalia a firing offense.

a greater impact on employees than an isolated comment in a meeting, and exacerbated the disruptive effect. As a general matter, we think the judge's concern could be a legitimate one. In the particular circumstances of this case, however, we are not persuaded that it warrants holding the nature of Grosso's comments against continued protection of the Act.

First, Grosso's comment did not remain anonymous for long. As the judge acknowledged, at least one employee, Moscatelli, almost immediately recognized Grosso's handwriting. Moscatelli shared her identification with management. Moreover, although there is no evidence that other employees independently recognized Grosso's handwriting, there is evidence that Moscatelli told at least one other employee that she thought Grosso was the author, and it is not unreasonable to infer that Moscatelli shared her thinking with additional coworkers as well.

Second, we reject as unfounded the judge's speculation that the anonymity of the comments would lead warehouse employees to fear that other drivers shared Grosso's views. The judge's reasoning effectively assumes that other employees might be prone to violence in the absence of any supporting evidence whatsoever. In that respect, there were only 21 drivers in the drivers unit—a small enough number that, if there were such a concern, Fresenius or the warehouse employees would likely have identified it, but they did not. Further, we note that Fresenius quickly learned that Grosso, who had no record of violent activity, was the sole author of the statements. Last, we find irrelevant the judge's concern that, because Grosso's comments were anonymous, the warehouse employees could not ascertain the probability of future comments or threats. If conduct is protected by the Act, it may not be preempted by other employees' subjective reactions to it. Cf. *Arkema, Inc.,* 357 NLRB No. 103, slip op. at 3 (2011) (employer unlawfully encouraged employees to report protected activity they felt was harassing); *Manno Electric, Inc.,* 321 NLRB 278, 291 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997) (same).

For those reasons, we find that this factor weighs in favor of continued protection.[15]

Whether the outburst was provoked. There is no evidence that Fresenius engaged in any conduct that provoked Grosso's comments. In circumstances similar to this case—involving employee remarks directed toward coworkers, rather than the employee's superiors—the Board has concluded that a lack of employer provocation neither weighs in favor of nor against finding the conduct protected. See *Beverly Health & Rehabilitation Services*, supra, 346 NLRB at 1322. In accord with that precedent, we find the provocation factor to be neutral in this case.

In summary, we find that the location of Grosso's comments weighs in favor of continued protection, or is at least neutral, that the subject matter of his comments strongly favors continued protection, that the nature of the outburst also favors protection, and that the absence of provocation is neutral. Taken together, we find that the balance of these factors warrants a finding that Grosso did not lose the protection of the Act. As a result, Fresenius' suspension and discharge of him violated Section 8(a)(3) and (1) of the Act, as alleged.

2. The totality of the circumstances

As noted, even after *Atlantic Steel*, the Board has on occasion assessed statements made by one employee to another by looking at the totality of circumstances, without specific reference to the *Atlantic Steel* factors. Even employing that approach here, we find that Grosso's conduct did not lose the protection of the Act.

Necessarily, analysis of the totality of the circumstances encompasses the *Atlantic Steel* factors discussed above. To recap briefly, in the midst of a decertification campaign, Fresenius suspended and discharged Grosso for impulsively scribbling anonymous comments onto several union newsletters in an employee breakroom encouraging warehouse employees to support the Union in the upcoming decertification election. Although Grosso's comments were vulgar, offensive, and included the phrase "RIP," there is no basis for concluding that Grosso's comments would reasonably be perceived by employees as a threat of physical harm. There also is evidence (the "DON'T BE A DICK" incident) that Fresenius had previously dealt with vulgar employee conduct—unconnected to any protected activity—by issuing only minor discipline. Further, there is no evidence whatsoever that Grosso's commentary interfered with Fresenius' production, challenged any supervisor's or manager's authority, or otherwise undermined its ability to maintain order and discipline at the Chester facility. As we have found, Grosso's comments triggered a legitimate managerial interest for Fresenius in determining whether the anonymous comments constituted possible harassment in the workplace. But, as described, the circumstances indicate that Fresenius and the warehouse workers knew or reasonably should have known that Grosso's comments had nothing to do with harassment and everything to do with the upcoming decertification election in the warehouse unit.

[15] Even if we were to find that the nature of the outburst weighs against continued protection, we would find that it does so only slightly. We would, therefore, conclude that it does not outweigh the factors that support continued protection.

In all of those circumstances, we find that Fresenius has failed to establish that Grosso's handwritten comments on the union newsletters were so egregious as to cost him the protection of the Act. Cf. *Honda*, supra, 334 NLRB at 747–749 (employer's "typical" discipline of employee was not unlawful where his premeditated, vulgar, sexually explicit attacks on a particular coworker in a series of newsletters warranted a forfeiture of the Act's protection).

III. CONCLUSION

For the reasons discussed above, we find that Fresenius did not violate the Act when it investigated Grosso's anonymous newsletter comments and questioned him about those comments. We find, however, that Fresenius' subsequent suspension and discharge of Grosso, whether analyzed under *Atlantic Steel* or the totality of the circumstances, violated Section 8(a)(3) and (1) of the Act. Our dissenting colleague confirms that this case presents a "close question" concerning an "attempt to encourage support for the Union during a decertification campaign." Rather than acknowledging that, on such close questions, well-intentioned colleagues may legitimately reach different results, he reads a surprising, indeed startling, series of "implications" into our decision. We disavow them. After this decision, as before, employers will hardly be powerless to cope with workplace threats, harassment, or violence using the full panoply of resources and authority available to them. As we have done here, we will continue to examine carefully the particular facts of every case, balancing the rights and interests of employers against the right of employees to engage in protected activities.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 2 and renumber the subsequent paragraphs accordingly:

> "2. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Kevin "Dale" Grosso for engaging in protected union activity."

AMENDED REMEDY

Having found that the Fresenius violated Section 8(a)(3) and (1) by suspending and discharging Kevin "Dale" Grosso because he engaged in protected union activity, we shall order Fresenius to offer him 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 shall further order Fresenius to make Grosso whole for any loss of earnings and other benefits suffered as a result of the its unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). We shall additionally order Fresenius to preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due to Grosso. Further, we shall order Fresenius to remove from its files any and all references to Grosso's unlawful suspension and discharge, and to notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Fresenius USA Manufacturing, Inc., Chester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees for supporting the International Brotherhood of Teamsters, Local 445, or any other labor organization.

(b) Prohibiting employees from discussing disciplinary investigations with their coworkers.

(c) 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, offer Kevin "Dale" Grosso 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.

(b) Make Kevin "Dale" Grosso 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 this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

form, necessary to analyze the amount of backpay due under the terms of this Order.

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

(e) Within 14 days after service by the Region, post at its Chester, New York facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 2 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 September 22, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 2 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. September 19, 2012

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

[16] 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."

My colleagues go to great lengths to justify finding that employee Dale Grosso did not lose the Act's protection by his anonymous scrawling of offensive remarks on union newspapers in a puerile, ill-conceived attempt to encourage support for the Union during a decertification campaign. I specifically dispute their implication that greater latitude must be accorded to misconduct occurring in the course of organizational activity than for other Section 7 activity, that profanity in the course of labor relations is the presumptive and permissible norm in *any* workplace, that remarks by one employee to another which would be unprotected on the shop floor should be protected if made in the breakroom, that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection. Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline for misconduct that the Act neither requires nor warrants. Predictably, we will see these pronouncements unloosed from their factual foundation and applied broadly in future cases. Notwithstanding their disavowals, my colleagues thereby impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment, and verbal, mental, and physical abuse.[1]

Stripped of all the unwarranted analytical gloss—much of which originates with the Acting General Counsel's arguments in exceptions—what this case boils down to is the close question whether Grosso's remarks were so offensive in context as to remove the Act's protection. Whether viewed as the frequently determinative third factor of an *Atlantic Steel* analysis or under a totality of circumstances test, I agree with the judge that, in the con-

[1] While I am critical of my colleagues' analysis reversing the judge to find that the Respondent unlawfully discharged Grosso, I gladly join them in recognizing that legitimate concerns about sexual harassment justified the investigation and interrogation of Grosso. However, I disagree with their statement that an employee has a protected Sec. 7 right to lie during a lawful interrogation about alleged sexual harassment in order to conceal participation in union activity. Contrary to the majority, I find that sexual harassment by an employee in the workplace is clearly related to an employee's job performance and an employer's ability to operate its business within the requirements of Federal laws. I assume that my colleagues would not go so far as to state that an employee has a protected right to lie about actual unprotected harassment, even if it occurred in the context of otherwise protected concerted activity. Inasmuch as I would find that the Respondent lawfully discharged Grosso for the conduct discussed above, I need not pass on whether his untruthful responses during the interrogation about sexual harassment were a legitimate independent basis for his discharge.

text of this particular case and workplace, they were so offensive. I would therefore dismiss the complaint.

Dated, Washington, D.C. September 19, 2012

Brian E. Hayes, Member

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 suspend, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local 445, or any other labor organization.

WE WILL NOT prohibit you from discussing disciplinary investigations with your coworkers.

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, offer Kevin "Dale" Grosso 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 Kevin "Dale" Grosso whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

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

FRESENIUS USA MANUFACTURING, INC.

Julie Rivchin, Esq. and *Leah Z. Jaffe, Esq*., for the General Counsel.
Thomas G. Servodidio, Esq., for the Respondent.
Daniel E. Clifton, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in New York, New York, on May 4, 5, 6, 24 and 25, 2010. The original charge was filed by the International Brotherhood of Teamsters, Local 445 (the Union) on October 5, 2009, and an amended charge was filed by the Union on December 16, 2009.

On February 4, 2010, the Regional Director for Region 2 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing based upon allegations contained in the charges described above. The complaint alleges that Fresenius USA Manufacturing, Inc. (the Respondent), acting through three-named management officials, violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating Kevin (Dale) Grosso (Grosso) concerning his union activities and conducting an investigation concerning Grosso's union activity. The complaint also alleges that Respondent, acting through these same individuals, violated Section 8(a)(1) of the Act by telling Grosso not to speak with any employees about the investigation. Finally, the complaint[1] alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Grosso on September 22, 2009, pending the outcome of the investigation, and by terminating Grosso on September 25, 2009.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] The General Counsel moved to amend the complaint at the beginning of the hearing to allege that Grosso's suspension and termination were violations of both 8(a)(1) and (3) of the Act. Respondent opposed the motion to amend. Inasmuch as the original complaint included both the suspension and the discharge alleged as violations, I found nothing prejudicial in the General Counsel's proposed amendment to clarify the allegations with respect to the correct sections of the Act and the motion was granted.

[2] On June 29, 2010, Respondent filed a motion to correct the transcript. The motion contained a listing of 13 names that were misspelled throughout the transcript. The motion also contained a listing of 190 errors in the 1466 page transcript. In a written response on July 15, 2010, the General Counsel confirmed no opposition to Respondent's motion. Additionally, on that same date, Respondent and the General Counsel filed a joint motion to further correct the transcript. The joint motion contained 29 additional proposed transcript corrections because of either typographical or transcription errors. The joint stipulation also included one proposed correction in lieu of a proposed correction in Respondent's original motion. I have reviewed each transcript section identified in Respondent's motion and in the joint motion. The proposed changes involve corrections for typographical errors, misspelling, or the inadvertent omission of a word or words. None of the pro-

by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in Chester, New York, has been engaged in the business of the distribution of dialysis products. During the past 12 months, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Chester, New York facility, products, good, and materials valued in excess of $50,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Fresenius USA Manufacturing, Inc. (the Respondent) is a subsidiary of Fresenius AG; a multinational corporation. Respondent is engaged in the manufacture and distribution of disposable dialysis products to medical facilities and to home patients. Respondent's headquarters is located in Waltham, Massachusetts, and there are 4 manufacturing facilities and 14 distribution centers throughout the United States. One of the distribution centers is located in Chester, New York. This center is the site of the alleged unfair labor practices that are identified in the complaint. As a distribution center, the Chester facility is primarily a warehouse and trucking operation.

1. Respondent's supervisors

Three of Respondent's supervisors who were involved in this case are a part of Supply Chain Management; the portion of Respondent's operation that is responsible for procuring the products that Respondent does not manufacture and it includes the distribution centers. Their offices are located in Waltham, Massachusetts. As vice president of Supply Chain Management, Kevin King (King) reports to the senior vice president of Global Manufacturing Operations for North America and oversees all of the supply chain management functions for North America. Jason Tyler (Tyler) is Respondent's senior human resources manager and Douglas Maloney is Respondent's senior director of Supply Chain Management.

The remaining supervisors involved in this matter worked at the Chester facility in September 2009. Shane Healey served as Respondent's distribution manager for Respondent's Chester, New York facility, where he oversaw both the fleet department and the warehouse department. Anthony Dobkowski is the fleet supervisor at the Chester facility and is responsible for overseeing all aspects of the transportation department. Frank Petliski is the warehouse supervisor. Both Dobkowski and Petliski report to the distribution manager at the Chester facility. Based upon the parties' stipulations concerning the exercise and possession of certain indicia of supervisory authority, I find King, Maloney, Tyler, Healy, and Dobkowski[3] to be supervisors and agents within the meaning of the Act.

2. Collective-bargaining history

On July 8, 2008, the Union was certified as the exclusive collective-bargaining representative for Respondent's Chester, New York employees in two separate bargaining units. One bargaining unit included all full-time and part-time drivers employed at the Chester, New York facility. The second bargaining unit included all regular full-time and part-time warehouse workers, warehouse leads, administrative assistants, and transportation routers employed by the Respondent at the Chester, New York facility.

Following the Union's certification in 2008, Respondent and the Union began collective bargaining concerning the employees in the drivers' unit. King, Maloney, and Healey served on the Respondent's bargaining committee along with the Respondent's regional manager and the Respondent's attorneys. Because of his participation in the negotiations, King visited the Chester facility approximately once each month. Although there were regularly scheduled negotiations for the drivers' unit, there were no negotiations between the Respondent and the Union concerning the warehouse employees unit. In September 2009, there were 12 employees in the warehouse unit and 5 of the 12 employees were women. The women who worked in the warehouse bargaining unit were Janet Buxbaum, Stephanie Miller, Barbara Moscatelli, Joan Bernadino, and Virginia Germino. At that same time, there were 21 employees in the drivers' bargaining unit and none of those individuals were women.

On July 9, 2009, employee Janet Buxbaum filed a petition with the Board seeking a decertification of the Union as the bargaining representative for the warehouse bargaining unit. In the election held on September 23, 2009, a majority of the employees did not vote for the Union's continued representation of the warehouse unit and a certification of results issued on October 1, 2009.

3. Physical layout of the facility

There are two main areas in the Chester facility; the administrative office area and the warehouse area. The warehouse is 108,000 square feet and the office area is estimated to cover 6000 to 10,000 square feet. The administrative area contains offices, a conference room, a break room, and two desks used by the administrative assistants. The warehouse portion of the facility is the area where the products are stored and then loaded for delivery to Respondent's customers. All Chester employees, including the drivers, office, and warehouse employees share the same break room. There is an entrance from the warehouse directly into the break room.

posed corrections alter the substance of the testimony given. Accordingly, I grant Respondent's motion as well as Respondent's and the General Counsel's joint motion. In addition, I have noted that there are at least two references in the transcript to witnesses being sworn by a Notary Public of the State of New York. (See Tr. 638 and 780.) Inasmuch as I administered all the oaths and no witnesses were sworn by a notary public from the State of New York, the transcript should be corrected accordingly. Such correction is directed upon my own motion.

[3] Although Petliski appears to have comparable supervisory authority with Dobkowski, he was not alleged in the complaint as a supervisor and his supervisory status was not in issue.

B. The Events of September 10, 2009

1. Dale Grosso's union activity

Prior to his discharge on September 25, 2009, Grosso had been employed by Respondent for more than 12 years. Grosso was a route driver and reported to Dobkowski. Grosso's duties involved delivering dialysis materials to patients' homes, clinics, and hospitals. Following the Union's certification as the collective-bargaining representative for Respondent's drivers, Grosso volunteered to serve on the Union's negotiation committee. He estimated that he attended approximately 10 bargaining sessions.

After the filing of the decertification petition for the warehouse employees' unit, Grosso talked with other drivers about the status of the Union. Based upon his conversations with other drivers, Grosso concluded that the employees in the warehouse were withdrawing their support for the Union. On September 10, 2009, Grosso and driver Mark Huertas finished loading their trucks at roughly the same time and they walked together to the break room. When Grosso entered the break room, he noticed that there were union newsletters lying on the break room tables. Because Huertas was also on the Union's negotiating committee, Grosso asked Huertas if he thought that the warehouse employees would even read the newsletters. He recalled that they both laughed and commented that the employees probably would not.

Grosso sat down at one of the tables and began to write comments on the top of the newsletters. On one of the newsletters, he wrote the words: "Dear Pussies, Please Read!" On both direct and cross-examination, Grosso was asked extensively what he meant by writing those words. Grosso explained that it was a way of getting the warehouse employees' attention and he saw it as "a way of getting someone to man up a little bit." When asked why he used the word "Pussie," he explained that he did so to get the warehouse workers to read the newsletters and because he thought that they were spineless. On a second newsletter, Grosso wrote the words: "Hey cat food lovers, how's your income doing?" Grosso explained that this referred back to the comment in the other newsletter and was a play on words for his other comment "Dear Pussies." He testified that he was directing this second comment to all the warehouse employees. Grosso testified that income was a "sticking point" for warehouse employees and he wanted to reinforce this sentiment when he wrote the comment. He also testified that he did not want the warehouse employees to decertify the Union and he believed that they would be able to get something better for themselves with the Union. On the top of a third newsletter, Grosso wrote the words: "warehouse workers, R.I.P." Grosso testified that his writing this comment was a was of saying, "Well, if you're going to be the way you are, and how things are going, you're dead. You've just died. . . . You lost your soul."

Grosso does not deny that he wrote the comments totally on his own. He did not discuss the proposed comments with Huertas or any other employees prior to writing the comments and leaving them on the newsletters.

2. The responses by the female warehouse employees

Janet Buxbaum has worked for Respondent for 13 years and currently works as an administrative assistant in the warehouse, reporting directly to the Supply Chain manager. When she arrived at work on September 10, she walked through the break room on her way to the timeclock. It was at this time that she first saw the newsletters lying on the break room tables. Buxbaum testified that when she read the newsletters, she became angry. She explained that she found the comment "Hey pussies" as offensive because it referred to a part of a woman's body. She acknowledged, however, that she had not found the newsletter comment "Cat food lovers" to be as offensive. She further testified that she perceived the comment about warehouse workers R.I.P. to be a threat. She explained that if someone had written this comment, the individual would be willing to "actually do something." She went on to explain that she had felt that if someone in the workplace were angry and did not like her opinion, the individual might take it out on her. Buxbaum recalled that as soon as Healy came into the office that morning, she spoke with him about the newsletters. She told Healy that she took the one comment on the newsletter as a personal threat to her well-being in the office. She reminded him that the employee handbook addresses a safe work environment and that something needed to be done. She also told him that the other comments were offensive to the women who worked in that building. During her testimony, Buxbaum explained that she interpreted the comment about income to mean that the employees were to vote for the Union. She further explained that she viewed the R.I.P comment as a threat that something could happen to warehouse workers if they did not vote for the Union.

Virginia Germino has been employed at the Chester distribution center for approximately 4 years. As a picker for medical supplies, she is included in the warehouse bargaining unit. Germino recalled that she learned about the newsletters at or near the time that employee Joan Bernadino did so. Germino testified that she viewed the hand-written comments on the newsletters as intimidating and very offensive to her as a woman. She explained that the words "warehouse workers R.I.P." was like a threat to her because rest in peace means "death." After reading the newsletters, Germino and Bernadino spoke with Supervisor Frank Petliski. Germino told him that she found the comments in the newsletters to be intimidating and threatening and that Respondent needed to take the necessary steps to terminate the author of the comments. Germino recalled that she also spoke with Healy that same day about the newsletters and she told him that she did not feel safe and that action was needed. She recalled that when Healy told her about the security cameras at the facility, she felt a little safer and concluded that perhaps the Respondent did not have to hire outside security. Germino testified that she also told Healy that whoever wrote the comments should be fired.

Barbara Moscatelli has been employed by Respondent for 12-1/2 years. For the past 7 years, she has worked as a router in the warehouse. Moscatelli recalled that she first saw the newsletters with the handwritten comments on September 10, when the newsletters were pointed out to her by either Janet Buxbaum or Joan Bernadino. She testified that she was upset

when she read the comments. She recalled that the statement "Warehouse Workers R.I.P." upset her more than the other two comments. She explained that the statement concerning rest in peace indicated death to her. She viewed the comments in the other two newsletters as derogatory to women. Moscatelli recalled that when she voiced her concerns to Healey in an individual conversation, she told him that she was deeply concerned. She also added that these statements must have been written by a driver because the comments clearly specified warehouse employees. She recalled that Healy asked her if she would feel better if she had security or some sort of protection. She told him that she would consider it.

Dobkowski first became aware of the handwritten comments on the newsletters when Joan Bernadino gave them to him. She told him that she had found them on the break room tables. Healey recalled that Dobkowski told him about the newsletters as soon as he arrived at his office on September 10. Almost immediately after hearing about the newsletters from Dobkowski, Healey was approached by Buxbaum. She followed him into his office, talking about the newsletters. Healy recalled that she told him that the comments were offensive and vulgar and that she found them to be threatening. Buxbaum also told him that the women employees were upset over the comments that she would like an investigation to find out who was accountable. Healy recalled that he told her that Respondent would do everything possible to insure a safe work environment and Respondent would conduct an investigation. He also added that if needed, he would bring security into the building. Healy then sought out Germino, Bernardino, and Moscatelli to find out their response to the newsletters. Healy's testimony concerning his discussions with Buxbaum, Germino, and Moscatelli was consistent with the testimony of the three employees.

3. Healy's meeting with employees

Within a half hour after his conversation with the female employees, Healey held a meeting with all the warehouse employees. Both Dobkowski and Petliski attended as well. Healey explained that some inappropriate comments had been written on newsletters and left in the break room that morning. He added that several employees had told him that they were offended and felt threatened by the comments. He assured the employees that Respondent had a harassment policy and that the Company would take steps to insure their safety. He also told the employees that this was also an EEO issue and that he would take steps to find out who was responsible.

During the meeting, Moscatelli spoke and opined that the comments were clearly written by a driver and that she recognized the handwriting. Healy acknowledged that even though Moscatelli indicated that she suspected who had written the comments, he did not ask her to identify the individual and that he sought the assistance of Respondent's legal counsel. Healy testified that he wanted to make sure that his actions were appropriate and that is why he sought out the advice of counsel. When Healy was asked why he did not ask Moscatelli who may have written the letter, Healy testified that he viewed the circumstances as a "Catch 22" situation. He explained that because of the upcoming election, as well as his concern about EEO issues, he felt that he needed to seek the advice of legal counsel before he pursued the matter. He said that he didn't want it to be perceived as a witch hunt.

Healy testified that after he became aware of the newsletters on September 10, he contacted several security companies to find out what needed to be done if security in the building was deemed to be necessary. He stayed late at work to make sure that all women had left the building without any problems. He instructed employees as to where they could park in order that they could be in sight of the security cameras.

Moscatelli testified that after September 10, she took care to park her car within view of the parking lot security camera. She also confirmed that she made sure that she was not in the building alone.

C. The Events of September 21, 2009

1. King's meeting with employees

In advance of the decertification election on September 23, 2009, King held a meeting with employees on September 21, 2009. Ten of the 12 warehouse employees attended the meeting along with Petliski, Maloney, and Healey. King testified that he held the meeting with employees to talk with them one last time before the election. He wanted to remind them that the Union had been their bargaining representative for over a year and had not participated in any collective-bargaining sessions. King testified that he told the employees to judge the Respondent by its history and to vote their conscience.

After he spoke with the employees for approximately 15 or 20 minutes, he asked if there were any questions. The comments on the union newsletters then became a topic of the meeting with the warehouse employees. King recalled that employee Barbara Moscatelli spoke up in the meeting and stated that she had been very offended at the comments written on the newsletters; felt threatened, and that she wanted an investigation and someone held accountable. King recalled that employee Janet Buxbaum also spoke out in the meeting, stating that she thought that the newsletters were unprofessional, offensive, and vulgar and that she also wanted an investigation and corrective action taken. King additionally recalled that employee Virginia Germino also spoke out about the newsletters in the meeting. King recalled Germino's stating that the comments in the newsletters "crossed the line." She viewed the comments as vulgar, intimidating, threatening, and directed toward the female employees. She wanted an investigation and the person who wrote them to be held accountable. Germino testified that she asked King if there was a way for Respondent to find out who had written these comments and he told her that the Company was looking into it. Germino recalled that King ended the meeting by telling the employees that Respondent would investigate and provided security if needed.

Following the employee meeting, King asked Moscatelli and Buxbaum to memorialize their complaints in writing. They did so later in the day and submitted the written statements to King. When King asked Germino if she would put her comments and complaints into a written statement, she asked him if he could guarantee that her name would be kept confidential. When he told her that he could not make such a guarantee, she declined to provide a written statement. Although Joan Bernadino was

absent at the time of the September 21 meeting, she provided a written statement to King on September 25 in which she voiced her concerns and her reaction to the newsletter comments.

King ended the meeting by assuring the employees that he would investigate the matter. As the employees were leaving the room, Moscatelli asked King if he would be interested to know who she thought had written the comments. Although he told her that he would be interested, he did not ask her to disclose the information at that time. Moscatelli asked if she could speak with him later in private and he agreed. Later that same day when Moscatelli met with King in the conference room, she brought with her a stack of drivers' logs measuring about 12 inches high with the handwriting of approximately 20 drivers. When she handed the logs to King, she told him: "You may want to pay particular attention to the one on top." She had placed Grosso's log on top of the stack. Moscatelli testified that she was able to recognize Grosso's handwriting because her job requires that she review the drivers' logs before they are submitted to their supervisor. Moscatelli recalled that she compared the handwriting on the newsletters with some of the drivers' logs before giving them to King. Moscatelli explained, however, that she really didn't need to compare all the logs, because she knew by the penmanship who had written the newsletter comments.

King and Maloney reviewed the handwriting on Grosso's log as well as the handwriting on the other drivers' logs. King testified that he found significant similarities in some of the letters in the newsletter comments and Grosso's logs. King asked Healey to see if there was any handwriting sample in Grosso's personnel file that could also be used to compare the handwriting. Healey found a document that had been written by Grosso on May 11, 2009, and he gave it to King for review. In reviewing the document, King again found similarities to some of the letters contained in the newsletter comments.

2. Management's meeting with Grosso

After viewing the handwriting samples, King determined that he needed to meet with Grosso. When Grosso returned to the facility at the end of his deliveries on September 21, he met with King, Healey, and Maloney in the conference room. There is no dispute that in previous conversations, King and Grosso often joked with each other about their support for sporting teams. At the beginning of the meeting King and Grosso talked about the New York Yankees and the Boston Red Sox teams. King recalled that Grosso had spoken of the Red Sox having a particularly bad season. Grosso does not deny that at one point in the sports' discussion with the managers, he commented: "Hey, the Red Sox R.I.P." He testified that when he said this to King, he meant that the Red Sox's season was dismal and coming to an end without their being in contention for the pennant.

After the sports discussion, King asked Grosso to look at the May 11, 2009 letter from his personnel file and asked if he had written the letter. After Grosso acknowledged that he had written the letter, King showed him the three newsletters containing the handwritten comments. Grosso recalled that when King showed him the newsletters, he asked Grosso if he had seen them before. Grosso denied that he had. King also asked Grosso if he saw any similarities in the handwriting on the newsletters and the handwriting in Grosso's May 11, 2009 letter. King recalled that Grosso responded that he did not. King commented on the fact that the newsletter comment about "R.I.P." was similar to the expression that Grosso had used earlier in their conversation about the Boston Red Sox and he asked Grosso to again look at the documents to compare the writing. Grosso testified that when asked, he acknowledged that he could see similarities in the two writing samples.

King recalled that Grosso responded that he didn't see anything unusual about the similar wording because people often use that the expression "R.I.P." When Grosso asked King why there was a concern about the comments on the newsletters, King explained that several employees had complained; viewing the statements as intimidating, vulgar, and offensive. King testified that initially Grosso stated that he didn't agree, however, Grosso later acknowledged that he could see that some of the comments could be offensive to women. During his testimony, Grosso admitted that when King asked him if he could see how some people could become upset over the comments written on the newsletters, he had said, "Yes, I could see that." King asked Grosso if he had written the comments and Grosso denied the he did. King testified that after meeting with Grosso, he was reasonably certain that there were significant similarities in the writing comparisons.

Grosso does not deny that he lied to King about his involvement in the newsletter comments. He testified, however, that he did not tell King the truth because he realized the severity of the situation and he "did not want to do any harm" to himself.

D. The Events of September 22, 2009

Grosso recalled that the following day, he felt uncomfortable about the way the meeting had gone with King. When he tried to call Union Steward Kevin Farrell, Farrell could not talk with him. Grosso then decided to telephone Union Representative Jerry Ebert. Grosso had Ebert's business card in his wallet. When Grosso telephoned the telephone number that was printed on the bottom of the card, he was not able to reach Ebert. Grosso noticed that on the same card there was a handwritten phone number next to Ebert's name. When he telephoned the handwritten number, someone answered. Grosso testified that he began the call by saying, "Jerry, this is Dale Grosso." Grosso testified that the individual did not identify himself and responded with what Grosso described as a grunt-like sound. Grosso then began to describe the events of the previous day. He told the individual that he thought that management was trying to persecute him and to target him as the author of the newsletter comments. Grosso testified that because he had not spoken with Ebert in some time, he also covered some background information on an incident involving the union steward and one of the warehouse unit employees. Finally, at some point in the conversation, the individual responded, "So Dale, did you indeed write on those newsletters?" Grosso recalled that he asked the person if the conversation would be on the record or off the record. After receiving assurances that it was off the record, he admitted that he had written the comments on the newsletter.

King was in the conference room on September 22, 2009, when he received a call on his company cell phone. He recalled that he answered the call by simply saying, "hello." King testified that the person on the call did not identify himself and asked if King had a minute to talk. King did not ask the person to identify himself. King recalled that the individual then began describing the previous day's meeting and conversation with Grosso. The individual explained that he had been asked about the comments on the newsletter and he had repeatedly denied any knowledge of the comments and denied writing the comments. King recalled that he asked the individual if he had written the comments and the individual admitted that he had. Realizing that he was speaking with Grosso, King put his cell phone on speaker phone. Petliski and Maloney were standing at the door of the conference room and King "mouthed" for them to come into the room with him. King testified that he did so because he wanted witnesses to a confession that he believed that Grosso was in the process of giving. While on the speaker phone, Grosso admitted that he had written the comments on the newsletters. After Grosso did so, King identified himself to Grosso and told him that he was on the speaker phone and that Petliski and Maloney were in the room with him. He asked Maloney and Petliski to say good morning to Grosso. King recalled that Grosso responded by saying, "This isn't Dale, this isn't happening." Grosso recalled that he had been in shock to learn that he had been talking with King. He recalled that he told King, "Well, this is entrapment and this is harassment. And by the way, this isn't really Dale." King testified that at that point it was apparent that Grosso had not been aware that he was talking with King. He recalled Grosso saying that he thought that he had been talking with "Jerry." King recalled saying, "Come on Dale. You called me on my company cell phone from your company cell phone." During his testimony, Grosso acknowledged that he didn't know why he had written King's cell phone number on Ebert's card. He opined, "It may have been just one of those lapses of things I do sometimes. I am not regarded as having the greatest of organizational skills." King then asked Grosso to stop what he was doing and to return to the distribution center.

When Grosso returned to the distribution center, King, Maloney, and Petliski approached him at his truck. Grosso told them, "If this is what I think it is, I would like union representation." After Union Business Agent Adrian Huff arrived at the facility, King told Grosso that he was suspended pending the results of an investigation. Grosso removed his personal items from his truck and took them to his car. Grosso testified that as King walked with him to his car, King stated, "During this investigation, we appreciate that you don't talk [sic] anything about what just happened here. We'd prefer that you not talk about it."

E. The Events of September 23, 2009

The following day, Grosso again met with King and was accompanied by Union Representative Adrian Huff and Union Steward Kevin Farrell. King testified that at the time of this meeting, no decision had been made to terminate Grosso. During the meeting, Grosso admitted that he had written the comments on the newsletters and he explained why he had done so. He told King that in writing the comments, he had acted as a football coach, rallying the team. He told King that he didn't like bullies and that he was looking out for the "little guy." King also asked him about his cell phone call the previous day and why he had denied his identity at the end of the call. Grosso explained that he denied that he was Dale Grosso because he discovered that he was not talking with Ebert.

F. The Events of September 25, 2009

King emailed a number of documents to Senior Human Resources Manager Tyler on September 25, 2010. Specifically, he sent a summary of the meeting with employees on September 21, as well as a summary of his September 21 and 23 interview with Grosso. He also sent a summary of his telephone conversation with Grosso on September 22, and written statements from Moscatelli, Buxbaum, and Bernadino. Additionally, King sent Tyler written statements from Maloney and Petliski and a summary of the meeting on September 22, with Grosso and the union representative. During a conference call that same day, Tyler asked Maloney, Healey, and King to describe the events in their own words. Tyler testified that following his review of the documents and his conference call with King, Maloney, and Healy, he made the decision to terminate Grosso. He denied that he received any recommendations from King, Maloney, or Healy concerning Grosso's discharge and he testified that the decision was solely his own.

III. ANALYSIS AND CONCLUSIONS

A. Grosso's Suspension and Discharge

The General Counsel alleges that by writing on the union newsletters, Grosso encouraged warehouse unit employees to vote in favor of the Union in the upcoming decertification election and thus, he engaged in protected concerted activity. While this may have been his intent, it appears that his actions in all likelihood produced the opposite effect. Nevertheless, it is an employee's action rather than the result that is determinative in establishing protected activity. The General Counsel also alleges that Respondent not only unlawfully interrogated Grosso about his having written the comments, but that Respondent unlawfully conducted an investigation into whether Grosso wrote the newsletter comments and unlawfully directed Grosso not to speak with any employees about the investigation. Finally, the General Counsel alleges that both Grosso's suspension and his discharge are violative of the Act.

1. Whether Grosso's termination and suspension were violative of the Act

This is a case involving alleged protected concerted activity. There is no dispute that Grosso wrote the comments on the union newsletters and there is no issue concerning Respondent knowledge. Respondent asserts that Grosso was terminated because his writing the comments violated the company EEO and harassment policies and because he lied to management during the investigation. In cases where there is a dispute concerning an employer's motivation in taking an adverse action against an employee, the Board normally applies an analysis of the evidence under the framework of its pivotal decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st

Cir. 1981), cert. denied 455 U.S. 989 (1982). In cases, however, where the reason for the employee discipline is undisputed, the Board requires no analysis of motive under *Wright Line*. *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4 fn. 2 (1st Cir. 1983).[4] Once conduct is found to be concerted, the conduct will be afforded the Act's protection, except in the narrowest of circumstances when the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service. *Consumers Power Co*., 282 NLRB 130, 132 (1986). In order to assess whether an employee's otherwise protected conduct may have lost the protection of the Act, the Board has formulated an analysis that is set forth clearly in its decision in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979). While the Respondent's motivation does not appear to be a paramount issue in this case, I have nevertheless analyzed Grosso's suspension and termination under both the *Atlantic Steel* and the *Wright Line* analysis for purposes of completeness.

2. Whether Grosso engaged in protected concerted activity

a. Whether Grosso's conduct was concerted

Section 7 of the Act protects an employee's right to "engage in . . . concerted activities for the purpose of mutual aid or protection." 29 U.S.C. § 157. The Board has defined an employee's activity as "concerted" when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). As the Board has explained, this standard includes those circumstances where individual employees seek to initiate or to induce or to prepare for group action and not just simply those circumstances where employees bring group complaints to the attention of management. *Air Contact Transport, Inc*., 340 NLRB 688, 695 (2003).

The Respondent argues that Grosso's conduct was not concerted because Grosso neither acted with or on the authority of other employees, nor did he act to seek to initiate or induce group action. Respondent asserts that Grosso did not discuss the proposed comments with anyone before writing them and he wrote the comments without the authorization of other employees. Respondent further maintains that even though Grosso testified at the hearing that he wrote the newsletters to get the attention of the warehouse workers and to keep them from backing down in the upcoming decertification election, he never gave this explanation to Respondent during the investigation.

As pointed out by the General Counsel, the Supreme Court has long accepted the Board's view that the right of employees to self-organize and bargain collectively established by Section 7 necessarily encompasses the right effectively to communicate with one another regarding self-organization at their worksite. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). Contrary to Respondent's assertions, I do not find it significant that he failed to articulate his reasons for writing the comments during the course of the investigation. There is nothing to indicate that Respondent would have viewed Grosso's conduct any differently had he given a full explanation for his conduct. Overall, the record reflects nothing to contradict Grosso's assertions that he wrote the comments as a means of encouraging the warehouse employees to vote for the Union in the decertification election. Thus, his apparent purpose for writing the comments would clearly fall within the framework of Section 7 rights as envisioned by the Board and the Court. Additionally, there was no requirement that Grosso seek or obtain the authorization of other employees to write the comments. Clearly, the very act of writing the comments was an effort to communicate with other employees about their terms and conditions of employment and thus constituted concerted activity protected by the Act.

b. Whether Grosso's conduct was protected

Counsel for the General Counsel submits that Grosso's comments on the newsletters were evidence of protected union activity because (1) the comments were written on union newsletters; (2) the comments were written less than 2 weeks before a scheduled election; (3) the first comment encouraged employees to read the newsletters which contained articles about the Union's work on behalf of the Respondent's employees; (4) the second comment referred to the employees "income"; and (5) the third comment referred to "warehouse workers." The General Counsel asserts therefore that in light of those factors, Grosso's conduct was protected under the Act and that Respondent was well aware of all of those factors.

Citing two early Board decisions, the Respondent asserts that for an employee's conduct to be protected, it must be "for the mutual aid and protection of all the employer's employees similarly situation."[5] Respondent argues that because Grosso was a part of the driver's unit and not the warehouse unit, he was not "similarly situated" to the warehouse employees. I don't find that either the Board's decisions in the cases cited by the Respondent or any other Board or court decision supports such a

[4] The Board also followed this same rationale in its recent decision in *Texas Dental Assn.,* 354 NLRB No. 57, slip op. at 4 (2009). In citing this decision, I am mindful that this decision was rendered by a two-member Board. In *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Court held that under Sec. 3(b) of the Act, a delegee group of at least three members must be maintained in order to exercise the delegated authority of the Board. The case was remanded for further proceedings consistent with the Court's opinion.

[5] Respondent cites the Board's decision in *G.V.R., Inc*., 201 NLRB 147 (1973), where the Board, in affirming an unappealed trial examiner's decision, simply noted that an employee participating in a Federal compliance investigation of his employer's administration of a contract covered by Federal statute or an employee protesting his employer's noncompliance of the contract is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated. Neither the Board nor the trial examiner discussed the concept of "similarly situated." Respondent also cites the Board's decision in *Bron Construction Co.,* 241 NLRB 276, 279 (1979), where the Board affirmed the judge in finding that an employee engaged in protected concerted activity. In doing so the judge noted that the employer was advised of an employee's "protest on behalf of himself and other employees similarly situated of" the employer's noncompliance with a state statute. The employee in issue was a carpenter and his protest was made on behalf of other carpenters affected by the state statute. Neither the Board nor the judge provided any further discussion of the concept of "similarly situated."

mechanical dissection of employee tasks that would remove Grosso from the protection of the Act because he was a driver rather than a warehouse employee.

Clearly, the protection to be afforded an employee's conduct hinges upon its purpose. See *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949). It has long been recognized that protected concerted conduct includes employees' activities intended to induce group activity. *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 831 (1984). The Board has also held that the "object of inducing group action need not be express" but "may be inferred from the circumstances." *Whittaker Corp*., 289 NLRB 933, 933–934 (1988). As the General Counsel has pointed out, Grosso's purpose in writing the comments can be seen in the comments themselves. The comments were written on union newsletters addressing the warehouse employees who would be voting in a decertification election within 2 weeks and including an issue involving their pay. Accordingly, Grosso's actions in writing the comments fall within the parameters of protected concerted activity. I find that in writing the newsletter comments, Grosso engaged in protected concerted activity.

3. Whether Grosso's conduct lost the protection of the Act

Citing the Board's decision in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979), Respondent asserts that even if conduct may otherwise fall within the framework of Section 7 protected concerted activity, the Board and courts have also found that an employee may engage in conduct that is so opprobrious that it will be unprotected. As the Board has held, "when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Noble Metal Processing, Inc*., 346 NLRB 795 (2006), quoting *Stanford Hotel*, 344 NLRB 558 (2005).

a. The Atlantic Steel factors

In its decision in *Atlantic Steel*, the Board established certain criteria in its analysis of whether an employee's statements have crossed the line into unprotected conduct. The factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel,* above at 816.

(1) Location of the discussion

The General Counsel asserts that Grosso's comments did not have any disruptive effect on the workplace as the comments were written on newsletters and the employees had a choice as to whether they wished to read the comments. The General Counsel also submits that the conduct took place in the employee break room, a designated space for employees and not a work area. In contrast, Respondent relies upon record testimony demonstrating that employees walk through the break room on a daily basis in order to clock in and clock out as well as to obtain their handheld devices and to get their work instructions from their supervisors. The record also reflects that on occasion, employee meetings are scheduled in the break room. Respondent submits therefore that Grosso's comments on the newsletters and left on the tables and highly visible to employees entering the break room from the warehouse would have maximum impact on the work force.

With respect to this first factor, I find that the physical location of the activity weighs in favor of a loss of protection. Grosso's comments did not occur in the context of an employee meeting or even in an isolated conversation with a supervisor or another employee. These comments were written on newsletters that were visible to all employees in a common area that was accessible and used by both warehouse employees and drivers. The testimony of the warehouse employees reflects that the comments were easily visible to employees coming into the break room on September 10. Unlike a meeting or a conversation where the employees would have known the origin of the allegedly threatening and demeaning comments, employees were unable to ascertain their origin. While some of the employees suspected that the comments came from the driver's unit, there was no way for them to know whether the comments were initiated by one individual or a group of drivers who wanted them to vote for the Union. Thus, there was no way to evaluate the pervasiveness of the sentiment or more importantly, to ascertain the likelihood of future comments or threats. Accordingly, the location and the manner in which the comments were made known to the other employees caused a greater impact upon the employees than an isolated comment in a meeting or conversation. In that regard, the location and manner of distribution exacerbated the disruptive effect and weighs against the Act's protection for Grosso's conduct.

(2) Subject matter of the discussion

Citing the Board's decision in *Verizon Wireless*, 349 NLRB 640, 642 (2007), the General Counsel maintains that "the subject matter of Grosso's comments was urging his coworkers to stand up for themselves and to vote for the Union in the election, a central Section 7 right and thus weighs heavily in favor of protection." In its decision in *Verizon*, the Board analyzed the facts of the case based upon the four *Atlantic Steel* factors. In that case, the Board noted that the employee's comments in issue were made to encourage two other employees to support the union. While the Board noted that the subject matter favored a finding that the employee did not lose the protection of the Act, the Board went on to find however, that the three remaining *Atlantic Steel* factors weighed against a finding of protection and the employer's warning to the employee was not found to violate the Act.

Respondent asserts that the "subject matter of Grosso's comments was the use of vulgar and threatening words which are devoid of any substantive content or value." Respondent asserts that even though Grosso testified at length about what he "meant" in writing those comments, he also admitted at the hearing that people could read his comments and be offended by them. He also acknowledged that the comments could be demeaning to women and that readers could perceive the comments as referring to women in a derogatory manner.

With respect to this second factor, I find that the subject matter of the comments weighs in favor of protection. Despite the clumsily-composed wording, the apparent purpose of the comments was to communicate concerns to other employees about terms and conditions of employment (income) and concerns

about whether the warehouse employees would continue to have union representation.

(3) Nature of the outburst

As indicated above, the nature of the outburst in this case is different from most reported cases where there is more often an excited and exuberant outburst made in the course of a conversation or verbal interaction with other employees or a supervisor. There is no dispute that Grosso made the comments in response to what he perceived to be the warehouse employees' sentiments toward the Union and the decertification election. The comments were not made as a part of a conversation or a response to comments by any other employee or by a supervisor. Citing *Datwyler Rubber & Plastics, Inc*., 350 NLRB 669 (2007), the General Counsel submits that this *Atlantic Steel* factor weighs toward protection because the outburst was "spontaneous, brief, and unaccompanied by physical contact or threat of physical harm." While I note that the Board did not find that the employee lost the protection of the Act in *Datwyler,* the circumstances of the case were also distinguishable. In *Datwyle*r, an employee told a supervisor that he was a devil and that Jesus Christ would punish him and the employer for requiring employees to work a 7-day workweek. In finding that the nature of the outburst weighed in favor of protection, the Board noted that the outburst did not contain profane language and characterized the comment as spontaneous, brief, and unaccompanied by physical contact or threat of physical harm. In explaining its rationale, the Board in *Datwyler* also referenced its earlier decision in *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1322 (2006), where an employee's brief, verbal outburst of profane language was unaccompanied by insubordination, physical contact, or a threat of physical harm.

Unlike the circumstances occurring in either *Datwyler* or *Beverly Health*, Grosso's comments were not a brief response to a supervisor or a coworker without a threat of physical harm. The comments were memorialized on the newsletters for employees to read and circulate among themselves and contained wording that was arguably offensive to the five women warehouse employees and debatably threatening to all warehouse employees. Although there was no indication that Grosso planned in advance to write the comments, he nevertheless did so without any provocation by management or other employees. Although it appears that he took little time in choosing the wording, his comments were not a reflexive reaction to anything other than his own speculation about the potential outcome of the decertification election. See *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004).

(4) Whether the outburst was provoked

The General Counsel contends that even though the record contains no evidence of an unfair labor practice that provoked Grosso's conduct, "the issue of provocation is not relevant here." The General Counsel maintains that this factor is only relevant when an employee's arguably-egregious outburst is directed at a supervisor or provoked by a supervisor. The General Counsel concedes that Grosso's comments were not an outburst and were not directed toward a supervisor. While the General Counsel opines that this factor neither weighs for or against protection, I find otherwise. The very fact that his comments were unprovoked by management and were directed solely to employees weighs more in favor of a loss of protection. To the warehouse employees and the target of his communication, these comments came without warning from an unknown source. The wording suggested that the source was apparently displeased with the warehouse employees for having initiated a decertification election and the possible removal of the Union as the bargaining representative. Thus, I find that this factor weighs in favor of a loss of protection.

b. The use of profanity at Respondent's facility

In analyzing the *Atlantic Steel* factors and the issue of whether Grosso lost the protection of the Act, it is also helpful to look at the environment in which Grosso engaged in the conduct in issue. Counsel for the General Counsel very perceptively points out in her brief that a principal credibility issue in this case is the ancillary issue of the language used in the workplace. The record is replete with testimony concerning the use of words that could conceivably fall within the framework of "profanity." Rather than recounting the testimony of each witness, it is suffice to say that the testimony could be summarized into two distinct categories. All of Respondent's witnesses testified that profanity was not commonplace at the Chester facility and normally not stated in the presence of management. In contrast, the General Counsel's witnesses testified that profanity was commonplace and that it was not uncommon for the language to be used in front of supervisors. Respondent presented 11 supervisors and employees who testified that profanity and vulgarity were not commonplace in the Chester facility. In contrast, the General Counsel presented the testimony of Gross and negotiating committee member Lou Rathbun during the General Counsel's case-in-chief to testify about the use of profane language in the Chester facility. The General Counsel also presented the testimony of Union Steward Kevin Farrell to address the prevalence of profanity in rebuttal testimony.

I cannot give adequate attention to the testimony concerning the use of vulgarity and profanity without including a complete discussion of the testimony of employee Lou Rathbun. In a record where both parties devoted extensive testimony to the presence or absence of profanity in the workplace, the General Counsel presented Rathbun as the primary witness (other than Grosso) to demonstrate the prevalence of profanity at the Chester facility.

Lou Rathbun has worked for Respondent as a route driver since January 2008. In the course of his work, Rathbun uses an electric pallet jack to move dialysis supplies. About 6 months into his employment, the pallet jacks were in short supply and other employees began using the jack that he had been using. On one occasion, Rathbun wrote a note and placed it on the pallet jack that he was using. The note contained the wording "If your name isn't on it . . . leave it be and find <u>your own</u>." When he came in to work the next day, he found that someone had written the following at the bottom of his note: "Who are you!!??" In response, Rathbun left a counter note on the jack with the words: "Lou—whiny ass bitch—got something to say step to me." After he did so, he found a sticker on the back of his pallet jack. Rathbun described the sticker as approximately 4 by 6 inches in size and the sticker contained the printed words

"Don't be a dick." Rathbun testified that he then took the two notes to his Supervisor Anthony Dobkowski and told Dobkowski that he needed to get his drivers in check. Rathbun recalled that Dobkowski looked at the notes and told him that he would look into it. Rathbun testified that Dobkowski said nothing to him about the wording that he had used in the notes. Rathbun further testified that even though he made no personal notes to confirm the discussion with Dobkowski, he made notes in his driver's log. He contended, however, that because he is only legally required to keep the driver's log for a month, he shredded the log with the reference to the notes and the conversation with Dobkowski. Rathbun also testified that the sticker has remained on his pallet since it was initally placed there. He explained that he parks his pallet jack in the warehouse with the forks pointed toward the inside and the back of the jack facing out into the warehouse. Rathbun testified that no supervisor has ever said anything to him about the sticker or told him to remove it.

In contrast to Rathbun's testimony, Dobkowski testified that he had never seen either of the two notes that Rathbun alleged to have shown him and that he had never had any conversations with Rathbun about such notes. Dobkowski's testimony also contradicted Rathbun's assertion that he had documented the incident in his driver's log. Dobkowski explained that the purpose of the driver's log is to maintain a driver's activities over a 24-hour period in compliance with the Department of Transportation's regulations. Because a driver is only permitted to work 60 hours in any 7-day period, the logs are a means of recording time worked and time off. The logs are completed each day by the drivers. Dobkowski testified that he had personally reviewed all of the handwritten logs completed by Rathbun for the period of time from February 2009,[6] until the present and he had found northing related to notes concerning the sticker and Rathbun's jack. Dobkowski also testified that the logs are retained and are not shredded.

Dobkowski recalled that on July 10, 2009, he was walking through the warehouse while driver Mark Huertas was offloading his truck with the electric jack that he shares with Rathbun. Dobkowski observed the "Don't be a dick sticker" on the back of the jack. Before speaking with Huertas, Dobkowski took a photograph of the picture. Dobkowski then asked him if he had placed the sticker on the jack and Huertas confirmed that he had. Dobkowski told him that such a sticker was unprofessional and Dobkowski did not want him walking through clinics or into patients' homes with such a sticker on the jack. After some discussion, Huertas agreed that he would remove the sticker. Dobkowski testified that the next time that he saw this sticker on the jack was on November 18, 2009, when he again saw Huertas in the warehouse using the electric jack. Dobkowski explained that he rarely crossed paths with Huertas because the majority of the time, Huertas was out on the road. Normally, when Huertas returned the jack to the warehouse, the back of the jack was parked facing the wall. Dobkowski asserted that he would have needed to inspect each jack to have seen the sticker because a general warehouse walk-through would not have provided him the opportunity to see a sticker on the back of a jack. When Dobkowski saw the sticker in November 2009, he asked Huertas why the sticker was still on the jack. Huertas laughed and replied, "[I]t's not offensive unless your name is Dick." Dobkowski told him that he needed to remove the sticker and Dobkowski watched as Huertas did so. Dobkowski acknowledged, however, that he left the sticker in Huertas' possession.

Jeff Rogers has been the Distribution Center manager at the Chester facility since January 2010; succeeding Shane Healy in that position. Rogers testified that he walks through the warehouse three to four times each day. His last daily walk through the warehouse occurs at approximately 3:30 or 4 p.m. Rogers explained that in walking through the warehouse, he has observed that the drivers usually park their electric pallet jacks with the back against the wall in order that the jacks can be plugged into the electrical outlets on the wall. The General Counsel called driver and Union Steward Kevin Farrell as a rebuttal witness. Farrell testified that he first saw the sticker on Rathbun's jack in approximately July 2009, and the last time that he saw the sticker was approximately 2 weeks prior to his testimony. Although Farrell testified that he had also seen the sticker on the jack between July 2009 and May 2010, he did not identify the number of times or the dates of his observation. He also testified that the sticker was on the front of the jack and not on the back. Rogers testified that prior to May 5, 2010, he had never seen the "Don't be a dick" sticker on any of the electric jacks. On May 5, 2010 (and after Rathbun's testimony in the hearing), Healey specifically asked Rogers to examine the machines for stickers or similar materials. Rogers recalled that he had thought that it was a weird request, however, he did so. When he did so, he found the "Don't be a dick" sticker on the back of Rathbun's pallet jack. Rogers also testified that he had found Rathbun's jack parked with the back toward the wall with the forks facing into the warehouse. When he found the sticker, he contacted Healy and Healy told him to remove it.

Based upon the overall testimony concerning the sticker, and specifically with regard to the testimony of Dobkowski and Rogers, it would appear that the sticker was reapplied to the jack at least once or twice over the course of the year and despite Dobkowski's admonition to Huertas. There was, however, no testimony that any employee complained to management about the sticker. Although the sticker may have been in place on the jack for a prolonged period of time, the General Counsel presented no credible evidence that any manager observed it and allowed it to remain on the jack without comment. Overall, I credit the testimony of Dobkowski and Rogers rather than Rathbun. There is no dispute that the jack in question was used to move product into medical facilities and into patients' homes. It is incredulous that any management official would have knowingly allowed such a sticker to remain on the jack in view of Respondent's customers. Additionally, I do not credit Rathbun's testimony concerning his alleged discussions with Dobkowski about the sticker. His testimony that he shredded his driver's log is totally inconsistent with a reasonable need to preserve government required documentation.

[6] Dobkowski testified that prior to the time period covered by his review; Respondent had used an electronic system for the daily logs. Because the DOT regulations require that only one daily record is maintained, drivers cannot have a paper log if there is an electronic log.

In addition to testifying concerning the existence of the sticker, Rathbun testified at length about the profanity that he has used and heard other employees use at the Chester facility. Rathbun testified that he had heard employee Huertas use the word "pussies" in front of Bernadino and that he had also heard Germino use the word "pussies" in reference to employees who did not join the bargaining committee. Rathbun also testified that he had heard Moscatelli use profanity. Germino and Moscatelli both denied their use of profanity as did Buxbaum. While I do not believe that the working environment at the facility was as pristine and proper as Respondent's witnesses depicted it, I do not find Rathbun's overall testimony to be credible. There are a number of factors that lead me to suspect that Rathbun's testimony was biased and colored by his personal animosity toward Respondent's supervisors and legal counsel. On cross-examination, Rathbun admitted that he had been the subject of an unfair labor practice charge with respect to his conduct at one of the negotiating sessions. When asked if the charge did not in fact allege that he had tripped Respondent's chief negotiator, Rathbun responded, "I would say that the chief negotiator is clumsy enough to fall over my feet." Respondent's counsel then asked: "And that chief negotiator would be me, right?" Rathbun responded: "You got it, big guy." Rathbun also admitted that prior to his testifying, he received a verbal warning for attendance, a written warning for attendance, and a final written warning for attendance. Rathbun refused to sign or acknowledge any of the warnings.

Union Steward Kevin Farrell testified that he has used the term "pussy" in the workplace and that he has heard other drivers use the word in referring to each other. Farrell further asserted that he had heard Germino use the word in a heated discussion when she was thrown off the Union's negotiating committee. Farrell also admitted that when Petliski overheard Farrell using profanity to another employee, Petliski admonished him and told him to watch his mouth.

In listening to the testimony of the General Counsel's witnesses and Respondent's witnesses, it was as though there were two totally separate facilities; one where there is no profanity and one where profanity is commonplace. Because there are such marked discrepancies in the overall testimony, I find little basis to substantially credit either group of witnesses with respect to the prevalence of profanity or vulgarity at the Chester facility. It is reasonable that the reality lies somewhere in the middle. Respondent argues that even if profanity did occur in the workplace at the Chester facility, the simple fact that some profanity was commonplace does not mean that an employee's vulgar and threatening outburst will be excused and protected under the third prong of *Atlantic Steel*. I find merit to Respondent's argument. In the Board's decision in *Aluminum Co. of America*, 338 NLRB 20, 22 (2002), an employee used profanity when demanding to file a grievance concerning an alleged contract violation. The Board noted that there was no question that the employee's invocation of the terms of a collective-bargaining agreement and his participation in the filing of grievances were protected concerted activity. The Board also noted that some degree of profanity was quite common to the employer's facility. The Board explained however, that the degree and the manner in which the employee used profanity was not common or accepted by anyone in the facility. In the instant case, it is apparent that profanity is sometimes used by the employees in the Chester facility. As evidenced by Farrell's testimony, the language used by the drivers with each other and toward each other may possibly be more colorful than the language used by the supervisors and some of the employees in the warehouse. Nonetheless, it is reasonable that some profanity is used by the employees at the facility. I do not find, however, that such usage is sufficient to envelope Grosso's comments within the protection of the Act. Similar to the circumstances in *Aluminum Co*., Grosso's comments went beyond what was normal or tolerated.

c. Conclusions concerning the lawfulness of Grosso's suspension and discharge

Although Grosso testified that he used the word "pussies" in the newsletter to mean that the warehouse employees should "man up" and not be like wimps, he also acknowledged that the word may also refer to a woman's vagina. At the time that he wrote the comments, he was aware that there were five women in the warehouse who were eligible to vote in the decertification election. Although he testified that he was not specifically directing his comments to the female warehouse employees, he also acknowledged that the term he used could be demeaning to women. He also admitted that the reader of his comments could understand them to refer to women in a derogatory manner. Grosso further confirmed that his use of the words cat food lovers, he was simply using a play on words to again refer to "pussies." Grosso further acknowledged that a reasonable person could be offended by his play on the word "pussies." Grosso additionally admitted that the phrase "Warehouse workers R.I.P." was synonymous with saying "warehouse workers' death." Grosso admitted that he could understand that women could see "R.I.P." as threatening because it refers to death.

Overall, I find that the combination of the comments containing admittedly offensive and threatening wording were of a nature to remove Grosso's conduct from the protection of the Act. In making this determination, I am mindful that while an employer may lawfully discipline an employee for making prounion (or antiunion) statements that threaten fellow employees (for example, with physical harm), an employer may not lawfully discipline an employee for making prounion (or antiunion) statements that merely cause another employee to feel uncomfortable." *Chartwells Compass Group, USA*, 324 NLRB 1155, 1157 (2004). I am also cognizant that while an employer has a valid interest in protecting its employees, legitimate managerial concerns to prevent harassment do not justify discipline on the basis of other employees' subjective reaction to an employee's protected activity. *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000). On the basis of the entire record, I do not find that Respondent's adverse action toward Grosso was prompted merely by the employees' subjective reaction or asserted discomfort.

Although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, the Board has found that this leeway is balanced against an employer's right to maintain "order and respect" in the workplace. *Piper Realty Co*., 313 NLRB 1289, 1290 (1994). In its 2007 decision

in *Verizon Wireless*, 349 NLRB 640, 643 (2007), the Board dealt with an employer's discipline for an employee's comments while soliciting two particular employees to support the union. In one instance, the employee referred to a supervisor as a "bitch." In a second conversation, the employee referred to a union-related email and referred to her "f—ing supervisors." Because the employee was exercising his Section 7 rights to engage in self-organization and encouraging the employees to support the union, the Board noted that subject matter of the discussion favored a finding that the employee did not lose the protection of the Act. By contrast, the Board also found that the location of the discussion, the nature of the outburst, and the absence of unlawful provocation weighed heavily in favor of a finding that the employee lost the protection of the Act. Accordingly, when the Board applied all of the *Atlantic Steel* factors, the Board found that the employee lost the protection of the Act. In applying the *Atlantic Steel* factors to the present case, I must also find that Grosso's conduct also lost the protection of the Act.

In the earlier portion of this discussion, I noted that it is the employee's action rather than the result that determines whether the employee's conduct is protected activity. In that same vein, I note that it is also the action, rather than the motivation, that determines whether the employee loses the protection of the Act. After hearing Grosso's testimony and observing his demeanor in the hearing, I do not believe that he took the action that he did with the intention of offending or frightening the employees in the warehouse unit. Based upon the overall testimony, it is apparent that he wrote the comments with the intent of discouraging employees from abandoning their support for the Union. As his testimony reflects, he hastily wrote the comments without any thought as to the effect of his words. I believe that he genuinely meant no ill-will to any other employees. Nevertheless, his words communicated another message to the employees who read the newsletters. His well-intentioned motivation cannot dispel the nature of the conduct and its impact upon the warehouse employees reading the comments. Sadly, employees in today's work environment are sensitized to threats and dangers that were not even imagined years ago. Regrettably, there are periodic news stories about employees who injure and kill their fellow employees for reasons that are totally unpredictable. Thus, any potential threat from a fellow employee would reasonably be viewed by an employee in the context of heightened awareness and concern about workplace risks and dangers.

Accordingly, I find that Respondent did not violate the Act when it suspended Grosso on September 22, and when it terminated him on September 25. Accordingly, I find no merit to the complaint allegations relating to Grosso's suspension and termination as violations of Section 8(a)(1) of the Act.

d. The Wright Line analysis

The General Counsel submits that because there is no dispute as to the reasons for Grosso's suspension and discharge, this case is appropriately analyzed under *Atlantic Steel* rather than *Wright Line.* The General Counsel also submits, however, that it is clear that but for Grosso's protected union activity, he would not have been discharged. The General Counsel suggests that even though the Respondent's progressive disciplinary policy allows employees to be discharged on a first offense for serious misconduct, there was no evidence of anyone disciplined for similar conduct. Tyler testified that he has previously terminated an employee who threatened to kill employees in the fleet department at Respondent's facility in Kenosha, Wisconsin, and he has previously terminated two employees at a California facility for dishonesty during an investigation into kickbacks. The General Counsel maintains Respondent would not have investigated the written comments, much less discharged Grosso, had the newsletters not encouraged employees to vote for the Union in the upcoming election.

Respondent acknowledges that comparators offered to show discipline given to other employees are "not exactly analogous" to the instant situation or similarly situated to *the events* leading to Grosso's discharge. Respondent cites the Board's decision in *Merillat Industries, Inc.,* 307 NLRB 1301, 1303 (1992), where the Board noted that "it is rare to find cases of previous discipline that are 'on all fours' with the case in question."

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. *Consolidated Bus Transit, Inc.,* 350 NLRB 1064, 1065 (2007). If the General Counsel makes the required initial showings, the burden then shifts to the employer, to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

As discussed above, I find that Grosso engaged in protected activity. He wrote his comments on union newsletters with the purpose of getting employees to not only read the papers but also to support the Union in the upcoming election. There is also no dispute that Respondent was fully aware of his conduct when making the decision to terminate him. As I have also discussed above, his conduct was also of such a nature as to lose the protection of the Act. The establishment of a prima facie case is also hampered by the lack of evidence of animus. I find neither direct animus nor a basis upon which to infer animus sufficient to meet the requirements of the *Wright Line* analysis. See *Meritor Automotive, Inc*., 328 NLRB 813 (1999).

The record contains no evidence of antiunion animus by Tyler who appears to be the only individual who made the decision to terminate Grosso. The only evidence of antiunion animus related to an alleged statement by King in 2006; more than 3 years prior to Grosso's discharge. Grosso testified that during a meeting prior to the September 5, 2006 election for the drivers' unit, King referred to the Union as the "fucking union" or the "fucking Teamsters." King denied that he ever made such a statement in any of the meetings. Both Maloney and Respondent's Distribution Center Manager Mike Sereno also testified that they attended the employee meetings with King during this time period and they denied hearing him make such a statement. Grant Dopheide was director of human resources during

the time of the 2006 election. During the campaign period prior to the 2006 election, Dopheide visited the Chester facility almost weekly. He estimated that he visited the facility between 12 to 18 times during the summer and fall of 2006, and attended approximately 6 of Respondent's meetings with employees. He testified that he was aware of no meetings that King attended that he did not attend. Dopheide denied that he ever heard King use profanity in relation to the Union or make any threats about the Union during those meetings. Dopheide also confirmed that since that time, Respondent terminated his employment.

I find Dopheide to be a very credible witness. Despite the fact that he was involuntarily removed from his job by Respondent, he nevertheless corroborated the testimony of King, Maloney, and Sereno. Accordingly, I credit his testimony. Even if I fully credited Grosso's testimony and find that King made the disparaging remark about the Union in 2006, I do not find this remote statement sufficient to establish animus for Grosso's discharge in September 2009. Although King interviewed Grosso and participated in the investigation, there is no evidence that King had any role in making the decision to terminate Grosso. Additionally, I note that there is no evidence that King or any other manager made any statements during the investigation that disparaged the Union or reflected any animus toward the Union. Accordingly, the evidence as a whole does not support a finding that an unlawful discriminatory animus was a substantial or material factor in Respondent's motivation to terminate Grosso.

Furthermore, the overall record reflects that even if the General Counsel established a prima facie case of discriminatory motive, Respondent has met its burden of showing that it would have terminated Grosso even in the absence of any protected union activity. *Manno Electric, above at* 280 fn. 12. The Respondent's employee handbook contains a provision that prohibits verbal or physical behavior of a sexual nature that creates an intimidating, hostile, or offensive work environment. (Fresenius Medical Care North America (FMCNA) employee handbook at p. 45.) The handbook also prohibits abusive, threatening, or violent behavior. (FMCNA employee handbook at p. 51.) There is no dispute that employees Buxbaum, Moscatelli, Bernardino, and Germino all voiced concerns about the newsletter comments. Immediately upon finding the newsletters, female warehouse employees brought their concerns to management and requested that Respondent take action to locate and punish the source of the comments. To have condoned or ignored Grosso's conduct would have disregarded not only the provisions of the employee handbook, but also the concerns of the female warehouse employees. Additionally, Grosso lied about his involvement in the newsletter comments. He only admitted to his conduct after he inadvertently admitted to writing the comments during the telephone conversation with King. There is no evidence that Respondent has failed to discipline an employee under similar circumstances. Thus, the overall evidence supports a finding that Respondent would have terminated Grosso even in the absence of any protected union activity. Accordingly, I do not find that Respondent suspended or terminated Grosso in violation of Section 8(a)(3) of the Act and the complaint allegations alleging such should be dismissed.

4. Whether Respondent unlawfully commenced an investigation and unlawfully interrogated Grosso on September 21, 2009

There is no dispute that King, Healey, and Maloney met with Grosso on September 21 and questioned Grosso about his involvement in writing the comments on the newsletters. The General Counsel alleges that in doing so, Respondent unlawfully interrogated Grosso in violation of Section 8(a)(1) of the Act. The General Counsel further asserts that Respondent's effort to identify which of its employees were engaged in protected activity constituted impermissible surveillance and investigation and thus violated Section 8(a)(1).

The Board's applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," arising from the court of appeals decision in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

(1) The background, i.e., is there a history of employer hostility and discrimination?
(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e., how high was 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.

In analyzing the *Bourne* factors, the General Counsel asserts that the questioning took place 2 days before the decertification election by a company executive, who was at least two steps above Grosso's direct supervisor in a conference with two other managers present. The General Counsel submits that King's questioning clearly appeared to be seeking information on which to base disciplinary action against Grosso. Finally, the General Counsel suggests that "the fact that Grosso did not respond truthfully only makes more apparent the coerciveness of the interrogation."

As the Board has noted, the *Bourne* factors should not be mechanically applied or used as a prerequisite to a finding of coercive questioning, but rather used a starting point for assessing the totality of the circumstances.[7] *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In considering each of the factors, it is apparent that two of the factors weigh more favorably toward a finding of unlawful interrogation. Those are factors four and five as described above.

With respect to the *Bourne* factor relating to location and method of interrogation, I find that the location of the interview

[7] Citing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

weighs more favorably toward interrogation. Although Respondent contends that the conference room would have been a place where Grosso would be comfortable because he had attended meetings there in the past, this was also a command meeting for Grosso and attended by only Grosso and upper-level managers. Despite the fact that there was some light banter about sports at the beginning of the meeting, it is reasonable that any employee would have appreciated the gravity of the circumstances and would not have mistaken the meeting as casual or insignificant.

An additional *Bourne* factor that weighs more favorably toward a finding of interrogation is the fact that Grosso denied the conduct which was the subject of the meeting. Had he felt sufficiently comfortable and not threatened, it is reasonable that he may have told the truth during the interview. The fact that he responded untruthfully supports the inference that the questioning was coercive.

The remaining three factors, however, do not support a finding of unlawful interrogation. Although there was a decertification election scheduled within 2 days, there is nothing in the record to demonstrate a history of hostility and discrimination that would satisfy the first factor in the *Bourne* analysis. Grosso had served on the Union's negotiating committee and had a history of dealing with King and Maloney in their role as employer bargaining committee members. There is no evidence to show that this interaction was fraught with animosity or hostility. Certainly, because of his participation on the bargaining committee, Grosso's union sentiments were known to the Respondent. Furthermore, there is no dispute that Grosso was a known union supporter at the time of the interview.

Additionally, Respondent asserts that the questions asked by King were specifically geared toward obtaining information only regarding who had written the newsletter comments and nothing more, citing two relatively recent Board decisions. In *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007), an employee was questioned about his use of profanity and his conduct during a conversation with other employees concerning the union. Complaints were made to management that the employee in question had used profane language and acted in a threatening behavior. In finding that the employer did not engage in unlawful interrogation, the Board noted that the employer had a legitimate basis for investigating the employee's conduct and that the employer made reasonable efforts to circumscribe its questioning to avoid unnecessary prying into the employee's union views. In *DaimlerChrysler Corp.*, 344 NLRB 1324, 1328 (2005), a union steward prepared a draft information request for the employer concerning the discharge of a probationary employee. In one section of the information request, the steward sought a supervisor's medical history and requested information as to whether the supervisor had ever had a substance-abuse problem or had received treatment for "paranoid schizophrenia, hallucinations, repressed homosexuality, pedophilia, bestiality, etc." Although the steward ultimately realized that the request was inappropriate and removed the specific section from the final request form, the supervisor found a copy of the draft version lying on top of the office copier. Copies of the draft were also seen by other supervisors and employees. In an investigatory meeting, the employer's labor relations supervisor asked the steward questions about the draft information request and questioned the steward's as to the extent that it had been copied, distributed, circulated or saved. In finding that there was no unlawful interrogation, the Board noted that the interrogation focused specifically on the steward's involvement with the drafting of the one specific item in the request for information.

Respondent contends that King never asked Grosso about his views on the Union nor would King's questions elicit such information indirectly. I also note that other than the initial sports banter, there was no discussion of anything other than Grosso's handwriting sample from his personnel file and the handwriting in the newsletter comments. There was no discussion of the upcoming election or anything in any way related to the Union.

Accordingly, I do not find that Respondent unlawfully interrogated Grosso in violation of Section 8(a)(1) of the Act and the complaint allegation regarding an unlawful interrogation should be dismissed.

In further analyzing the record evidence in this case, I do not find that Respondent unlawfully initiated an investigation in violation of Section 8(a)(1). There is no dispute that on the same day that the newsletter comments were written by Grosso, female employees in the warehouse voiced their concerns to management. The employees told management that they were not only offended by the language, but more significantly, they told management that they felt threatened by the comments. Healy very candidly admitted that he did not initiate an investigation to find the author of the comments until he had a chance to get direction from counsel. Even though Moscatelli suggested that she recognized the handwriting, Healey was fearful of taking any action. When the female employees again raised the issue with King on September 21, and after Respondent had consulted with counsel, Respondent began an investigation to determine the author of the comments.

The General Counsel submits that Respondent's assertions that the comments represented a threat to warehouse employees are contradicted by the fact that Respondent did not initiate an immediate investigation. This argument is somewhat contradictory to the General Counsel's assertion that the commencement of the investigation was unlawful. As pointed out by Respondent, by the time that King interviewed Grosso and began the investigation, the female warehouse employees had complained three times, to two separate managers and twice publicly in front of other employees. Had Respondent not initiated an investigation on September 21, Respondent would have essentially ignored the concerns of the warehouse employees and neglected the duty to investigate a harassment complaint as imposed by the Respondent's harassment policy and employee handbook.

Accordingly, I do not find that the overall evidence supports a finding that Respondent unlawfully initiated an investigation in violation of Section 8(a)(1) and the complaint allegation regarding such investigation should be dismissed.

5. Whether Respondent unlawfully directed Grosso not to speak with other employees

The complaint alleges that during the September 22 investigative meeting, Respondent, acting through King, unlawfully directed Grosso not to speak with any other employees about the investigation. It is a well-established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of employment. *SNE Enterprises, Inc*., 347 NLRB 472 (2006). The Board has determined that an employer cannot, without a demonstrated legitimate and substantial business justification, lawfully instruct employees not to discuss among themselves issues relating to their terms and conditions of employment. See *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999) (employer's instruction not to discuss an employee's suspension with anyone violated the Act, particularly when the prohibition restricted employees "from possibly obtaining information from their coworkers which might be used in their defense").

Respondent asserts that Respondent's interests in having Grosso keep the investigation confidential as to other employees outweigh Grosso's interest in discussing the investigation and thus the confidentiality request was "lawful." Respondent cites the Board's decision in *Caesar's Palace*, 336 NLRB 271 (2001), where the employer imposed a confidentiality rule during an investigation of alleged illegal drug activity in the workplace. In that case, the Board found that the employer had established a substantial and legitimate business justification for its rule and the justification outweighed the rule's infringement on employees' rights. Respondent submits, that just as in the *Caesar's Palace* case, Respondent had a "legitimate and substantial business interest in protecting the safety of four witnesses who were afraid, threatened, and intimidated and in ensuring that they would not be subject to any retaliation."

Certainly, the Board has found that in deciding whether a rule unlawfully prohibits employee discussion of discipline or disciplinary investigations, it determines whether the employer's asserted business justifications for the prohibition outweighs employees' Section 7 right to discuss such terms and conditions of employment. *Caesar's Place,* above at 272. I find, however, that the circumstances of the instant case are distinguishable from those before the Board in *Caesar's Palace*. In *Caesar's Palace*, the employer imposed a confidentiality rule during the investigation of alleged illegal drug activity in the workplace. Additionally, the investigation involved allegations of a management cover up and possible management retaliation. The employer put the rule in place not only to ensure the safety of witnesses, but also to make sure that evidence was not destroyed or that testimony was not fabricated. In the instant case, Respondent was already in possession of the physical evidence; the newsletters containing the written comments. By the time of the statement to Grosso, Respondent was in possession of written statements from employees who had complained about the comments. Additionally, after his meeting with King on September 21, Grosso was already aware that he was a suspect in the investigation. Moreover, by September 22, Grosso knew that he had already inadvertently admitted to the conduct during his telephone conversation with King. The circumstances are more comparable to those found in *Mobile Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176, 178–179 (1997), where the Board found that the employer failed to demonstrate substantial confidentiality interest to justify discipline of employee where the target of the investigation had already been informed of the investigation. The Board noted that there was no possibility of prematurely alerting the target of the investigation and thereby compromising the investigation.

Respondent also argues that its infringement of Grosso's Section 7 rights were very slight because Grosso was only "encouraged" and not "mandated" to keep the investigation confidential from other employees. Grosso testified that on September 22, King told him that during the investigation, he would appreciate Grosso's not talking about what had just happened. Maloney testified that King "encouraged" Grosso not to speak with other employees. Certainly, there is no evidence that Grosso was threatened with discipline if he spoke with other employees or failed to maintain the confidentiality requested by King. Based upon the circumstances of the statement, the "request" was nevertheless just as restrictive as a directive with a threat of discipline. The request was given in conjunction with a notice of suspension and Grosso's expulsion from Respondent's property. Although King may have said that he would "appreciate" Grosso's silence, Grosso was well aware of the gravity of the situation. He had, in fact, written the comments and he had already admitted to having done so after an initial denial. His prospects for continued employment were tenuous. Any request by King was a directive under the circumstances.

Accordingly, I find that King's instruction violated Grosso's Section 7 right to consult with fellow employees for his mutual aid and protection and thus violated Section 8(a)(1) of the Act.

IV. ADMISSIBILITY OF INVESTIGATIVE NOTES

During the hearing, Respondent sought to introduce notes[8] that were written by Supervisors King, Maloney, Petliski, and Healy. Respondent asserted that these notes were "memos to the file" that memorialized various events or conversations in which the managers participated. Respondent asserts that these notes are admissible for the truth of the matter asserted and are exceptions to the hearsay as they are business records pursuant to Rule 803(6) of the Federal Rules of Evidence. Counsel for the General Counsel does not object to the admission of these documents for the limited nonhearsay purpose that they were purportedly relied upon by Tyler in deciding to terminate Grosso. The General Counsel does, however, object to admitting the notes for the truth of the matter asserted. I reserved ruling on the admission of these documents, allowing counsel to submit additional argument in support of their positions in their posthearing briefs.

Respondent asserts that memoranda written contemporaneously with an investigation which are kept in the regular course of business are business records which are admissible pursuant to Rule 803(6). Respondent submits that the Board has adopted this same rule with respect to the admissibility of managerial

[8] These notes were identified as R. Exhs. 13, 14, 15, 16, 17, 19, 20, 21, and 23.

notes taken during the course of investigations and interviews. In support of this argument, Respondent cites two administrative law judge decisions. In one case, the judge received an investigative report of an individual who did not testify in the hearing and prepared the report pursuant to a government agency. In the second case, the judge received a supervisor's memorandum finding that it was not prepared in anticipation of litigation and prepared in the regular course of business. In as much as administrative law decisions are not binding precedent; I do not find the judges' admission of investigative memoranda in these cases to be significant.

Certainly, the courts have found that various memoranda may be admitted as a hearsay exception under Rule 803(6). In its brief, Respondent cites the court's decision in *La Day v. Catalyst Technology, Inc*., 302 F.3d 474, 491 fn. 7 (5th Cir. 2002). In that decision, the court noted that investigative memoranda may be admitted as an exception to the hearsay rule if the document was prepared "at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the document. Ibid.

Respondent seeks to introduce the file notes that Petliski and Maloney prepared concerning the September 22, 2009 telephone conversation between Grosso and King, as well as the file notes prepared by Petliski and Maloney concerning King's conversation with Grosso when Grosso returned the truck on September 22. As counsel for the General Counsel points out in her posthearing brief, both Petliski and Maloney admitted that these documents were the first memos to the file of any kind that they had ever prepared during their tenure with the company. Petliski further testified that he printed out the hard copies of each memo, gave them to King, and then deleted the electronic file copy from his computer. He kept no copy and was unaware as to whether the documents were maintained anywhere in the company files.

Respondent also seeks the admission of King's memo to the file dated September 21, 2009. In the memo, King describes his meeting with employees and includes the various statements made in the meeting by Moscatelli, Buxbaum, and Germino. Not only did King testify in the hearing, but also the three employees whose statements he recited in the memorandum. Certainly, there can be no assertion that in giving these statements, these employees were "acting in the regular course of business." The inclusion of their out of court statements incorporated in King's memorandum can be nothing other than pure and simple hearsay. Thus, the overall evidence is insufficient to demonstrate that it was the regular business practice for Respondent to make the notes that it seeks to offer for the truth of the matter asserted.

Counsel for the General Counsel asserts that even if the documents in issue satisfied the threshold definition of business records, the documents cannot be admitted because their "circumstances of preparation lack trustworthiness." Fed.R.Evid. 803(6). Specifically, the General Counsel maintains that the documents are unreliable because the documents were prepared in anticipation of litigation. In contrast, Respondent argues that the memos to the investigative file and the notes of the September 23 interview were all recorded during the course of the investigation and prior to any recommendation or decision to terminate Grosso. Respondent submits that simply because memoranda are prepared during the course of an investigation which could potentially result in the discipline or termination of an employee, or an eventual legal action, does not exclude the document as a business record exception. Respondent cites the court's decision in *Crimm v. Missouri Pacific Railroad Co*., 750 F.2d 703, 709 (8th Cir.1984), where the court allowed the admission of handwritten notes and an investigative report that were prepared 9 months before any complaint or suit had been filed and the notes and report were maintained at the employer's office. Additionally, in admitting these documents, the court also noted that the documents were offered to demonstrate that the employer had conducted an investigation and to show the information that the employer relied on in making its decision. Specifically, the court noted that the records were not offered to provide the truthfulness of the statements contained therein. Ibid. In the instant case, the disputed documents are alleged to have been created during the course of the investigation and prior to Grosso's discharge or to the filing of any unfair labor practice charge concerning his discharge. Healy admits, however, that one of the first things that he did after learning of the newsletters was to contact legal counsel for direction as to how to proceed. All but one of the nine documents in issue show that both Respondent's corporate counsel and Respondent's outside counsel were copied. As counsel for the General Counsel suggests, Healy had good reason to believe that Respondent's actions could result in Board charges as the Union had previously filed charges against Respondent concerning other employees. It is not inconsequential that these newsletter comments were written in the midst of, and in response to, a decertification election that was to be held within days of the creation of these memoranda. Healy specifically mentioned his concern about handling the issue of the comments in light of EEO issues and the upcoming election. Thus, it was reasonable that Respondent's counsel was apprised of the documents as they were created. To assume that Respondent's managers prepared these documents without any consideration of potential litigation requires an incredible level of naïveté. Thus, the trustworthiness of these documents is most certainly reduced by the anticipation of litigation.

Respondent also seeks to introduce a memo prepared by Healy, describing the September 23, 2009 interview with Grosso in the form of a transcript. There is no evidence that the interview was mechanically recorded and the memo is simply Healy's recall of statements made by the various participants. Inasmuch as Healy testified in the hearing, his prepared transcript is not relevant to establish the substance of the interview.

Accordingly, I do not find a sufficient basis to admit these documents as business records within the meaning of Rule 803(6) and to receive them into the record to show the truth of the matters asserted in the memoranda. If accepted for the truth of the matter asserted, they can at best only serve as a means to bolster record testimony. All of the individuals who prepared the memoranda testified at the hearing and specifically testified concerning the incidents that are the subject of the notes. Thus, the additional notes tracking their testimony, is superfluous.

Respondent submits that even if the documents are not admitted as business records, they are admissible as nonhearsay to show the documents upon which Tyler reviewed and relied upon in making the determination to terminate Grosso. On that basis and that basis alone I will admit the documents in issue. I do not, however, receive the documents for the truth of the matter asserted. Thus, I receive Respondent's Exhibits 13, 14, 15, 16, 17, 19, 20, 21, and 23 for the limited basis identified herein.

In her posthearing brief, counsel for the General Counsel renews an objection to the admission of Respondent's Exhibit 46 that was received into evidence during the hearing. The document is a log of events for 2009 prepared by Dobkowski and relating to employee Huertas. Dobkowski testified that he maintains such a log on all of the drivers; documenting not only disciplinary actions, but any other events that are pertinent to the specific driver. The first entry in the log is March 2, 2009; documenting that Huertas went home early because of the weather. The last entry for 2009 is December 28, 2009; documenting that Huertas called in sick. Throughout the log are numerous other entries, including a documentation of Dobkowski's conversation on July 10, 2009, concerning the "Don't be a dick" sticker on the electric jack. The General Counsel asserts that this document should not have been admitted into evidence because it is maintained sporadically and not on a regular basis. The General Counsel also asserts that there is no company policy that mandates that Dobkowski maintain this log and that there was no practice of his sharing the information with others in the Company.

The fact that Dobkowski did not routinely share this information with other supervisors and did not prepare the log in accordance with a specific company policy does not negate its status as a business record. I credit the testimony of Dobkowski that he maintains this same kind of record with respect to each of the drivers that he supervises. Unlike the documents described above that were created solely to memorialize the events surrounding Grosso's discipline, this log was maintained by Dobkowski in the regular course of his supervision of Huertas and relates to a variety of matters involving Huertas. Accordingly, I find no basis to reverse my ruling as to the admissibility of Respondent's Exhibit 46.

CONCLUSIONS OF LAW

1. Respondent Fresenius USA Manufacturing, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By directing Kevin (Dale) Grosso not to speak with any employees about the investigation, Respondent violated Section 8(a)(1) of the Act.

3. I do not find that the Respondent violated the Act in any other manner.

REMEDY

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

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act and not prohibit their speaking with each other about their discipline and other terms and conditions of employment.

The General Counsel requests that the remedy includes a requirement for intranet posting of the notice. The General Counsel submits that there is record testimony confirming that company policies and the employee handbook are available to the employees on the intranet. Buxbaum also testified that she provides a password for the intranet to new employees starting at the facility.

While I have found that Respondent violated the Act, the violation committed by the Respondent is of the type normally remedied by a standard Board Order and physical notice posting at the location involved. In support of the request for intranet posting, the General Counsel cites the Board's decisions in *Nordstroms, Inc*., 347 NLRB 294 (2006), and *Valley Hospital Medical Center, Inc*., 351 NLRB 1250, 1250 fn. 1 (2007). In its decision in *Nordstrom, Inc*., the Board stated that it would be open to considering the merits of a proposed modification to the Board's standard notice-posting language in a particular case if the General Counsel or a charging party adduced evidence demonstrating that a respondent customarily communicates with its employees electronically and proposes such a modification to the judge in the unfair labor practice proceeding. The Board did not find, however, that such steps had been met in the case before them. In its decision in *Valley Hospital Medical Center, Inc*., the Board dealt with a request to order an email distribution of the Board notice. The Board noted that while there was some limited evidence that the Respondent had begun posting some of its policies on its intranet, the evidence was insufficient to find that the Respondent customarily communicated with employees electronically and the request was denied. In the instant case, there is evidence that certain policies and procedures are available to employees via the intranet and that employees are given access to the intranet upon employment. I am not convinced, however, that the evidence is sufficient to show that Respondent "customarily communicates" with employees electronically. The fact that certain employment related documents may be available to employees for viewing on the intranet does not establish that the intranet is the customary means of communication to employees. Accordingly, I deny the General Counsel's request for the intranet posting.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Fresenius USA Manufacturing, Inc., Chester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(a) Telling its employees that they cannot talk with other employees their discipline or other matters relating to their terms and conditions of employment.

(b) 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 after service by the Region, post at its facility in Chester, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 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 September 22, 2009.

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

Dated, Washington, D.C., August 19, 2010.

[10] 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 tell our employees that they cannot talk with other employees about discipline, or other matters affecting their terms and conditions of employment.

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

FRESENIUS USA MANUFACTURING, INC.