National Hot Rod Association *and* International Alliance of Theatrical Stage, Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, CLC. Cases 02–CA–185569, 22–CA–190221, 22–CA–192686, and 22–RC–186622

July 29, 2019

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On November 9, 2018, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party Union filed answering briefs. The General Counsel filed limited exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, and we agree, that during a union organizing campaign, the Respondent violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them,[4] and by advising employees that they could not be rehired for the following year until after the union election, and possibly even longer if the Union won. We also agree with the judge's decision to overrule the Respondent's objections to the election.[5]

The judge also found that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance, and Section 8(a)(3) and (1) when it discharged employee Nathan Hess. For the reasons explained below, we reverse the judge's decision in relevant part and dismiss these allegations. Additionally, because we find the discharge of Hess lawful, we sustain the challenge to Hess's ballot. We therefore certify International Alliance of Theatrical Stage Employees, AFL–CIO as the exclusive bargaining representative of the unit employees.[6]

[1] No party excepts to the judge's dismissal of the allegation that the Respondent threatened employees with unspecified reprisals by saying "there are consequences" to selecting union representation.

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

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

On May 17, 2018, counsel for the General Counsel moved to seal R. Exh. 10 to protect the privacy of employee addresses. We grant this motion and order that R. Exh.. 10 be placed under seal. We also grant the General Counsel's May 21, 2018 motion to correct transcript.

In affirming the judge's decision as modified, we do not rely on *Baptista's Bakery, Inc.*, 352 NLRB 547 (2008), or *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB 873 (2013), cited by the judge, as those decisions were invalidated as a result of the Supreme Court's decisions in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), and *NLRB v. Noel Canning*, 573 U.S. 513 (2014), respectively.

[3] We shall modify the judge's conclusions of law and recommended Order to conform to the violations found, and we shall substitute a new notice to conform to the Order as modified.

[4] We observe that there is nothing unlawful in the Respondent sending a human resources official to the workplace when its employees engage in unionizing activity to meet with employees and attempt to persuade them against unionizing. Here, however, the Respondent did more: during the on-site meetings, Vice President of Human Resources Marleen Gurrola asked employees for "an opportunity to fix issues," and the Respondent then followed through with its implied promise by remedying employee James Dean's per diem complaint. In these circumstances, we agree that the Respondent violated the Act.

[5] In its objections, the Respondent contended that the Region's handling of the mail ballot election deprived eligible voters of an adequate opportunity to vote. We agree with the judge that the Respondent presented insufficient evidence to support its claims of Board agent misconduct in the handling of the mail ballot election. We note, however, that the facts of this case—namely, the difficulties encountered by a few employees in timely receiving mail ballots—illustrate one reason why manual elections are, and should be, preferred. In saying as much, however, we do not mean to suggest that a mail-ballot election was inappropriate here.

[6] On October 20, 2016, the Union filed a representation petition. Pursuant to a stipulated election agreement, a mail ballot election was conducted between November 15 and 30, 2016. Following an agreement of the parties regarding certain challenged ballots, the Regional Director issued a revised tally of ballots on August 16, 2017, showing 35 votes in favor of the Union and 34 against. Hess's ballot was the last remaining challenged ballot. Because all of the challenged ballots have now been resolved, with no change to the August 16, 2017 revised tally of ballots, the Union has prevailed in the election. Accordingly, we will issue a certification of representative.

DISCUSSION

A. The 8(a)(1) impression of surveillance allegation

The Respondent is a racing association that stages drag race events, including the Mello Yello series for professional drag-racing drivers at the highest skill level. The Mello Yello series consists of 24 events a year. Prior to 2016, the Mello Yello series was produced for television by ESPN. In 2016, the Respondent began televising the Mello Yello racing series in-house, led by Executive Producer Kenneth Adelson. Adelson hired Producer Peter Skorich, Technology Executive Michael Rokosa, and Director Jim Sobczak to round out the leadership of the in-house production team.

In August 2016,[7] Union Representative John Culleeny heard that the Respondent's production employees were dissatisfied and began to conduct an organizing campaign. Culleeny held an organizing meeting on August 6 in Seattle, Washington, attended by six employees, all of whom signed union authorization cards. Culleeny held another organizing meeting during the weekend of August 18–21 in Brainerd, Minnesota, and two meetings between August 31 and September 5 in Indianapolis, Indiana. The meetings in Washington and Minnesota were held offsite. The meetings in Indianapolis were held at the hotel where production employees were staying, along with some members of management.

On Sunday, September 4, Creative Director Brian Stoll informed Adelson that he had overheard the production employees at his hotel talking about a union. Adelson informed Rokosa, who had heard the same information. Rokosa informed the Respondent's General Counsel, Linda Louis. At subsequent races, the Respondent's Vice President of Human Resources, Marleen Gurrola, engaged in discussions and gave speeches urging employees not to unionize. She met with groups of employees, asked whether they had any complaints, requested that employees "give us an opportunity to fix issues," and wrote down their responses. Although Gurrola had attended only one of the 17 races in the Mello Yello series in 2016 prior to learning about the union organizing campaign, she attended all of the remaining races of the 2016 season and met with employees about their complaints at each one.[8]

The next race after the Respondent learned of the Union's organizing campaign was held in Charlotte, North Carolina. On September 16, Gurrola convened a meeting at this event, attended by about 150 workers, including the production crew. During this meeting, Gurrola discussed the organizing campaign and stated, "I know that some of you have been approached and talked to about perhaps going in the union." The judge found that, by Gurrola's comment at the September 16 meeting, the Respondent violated Section 8(a)(1) by creating the impression among employees that their union activity was under surveillance. Specifically, the judge found Gurrola's statement unlawful because she did not explain how the Respondent acquired this information. For the following reasons, we reverse the judge's finding.

In determining whether an employer has unlawfully created the impression of surveillance, the Board asks "whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *United Charter Service*, 306 NLRB 150, 150 (1992). In applying this test, a relevant consideration is whether the employer's statement reveals detailed knowledge of specific activities. Id. at 151. Gurrola's statement did not do so. The statement disclosed a general awareness of organizing activities, not knowledge of who had been talked to or approached, or when, or what was said. Cf. ibid. (finding that manager created an impression of surveillance when he "went into detail about the extent of the [union] activities and the specific topics [employees] discussed").

Moreover, the record indicates that employees were open about the existence of an organizing campaign. Hess testified that he spoke about the Union in the production truck and television compound, places where managers and supervisors were present along with potential unit employees. And during the Indianapolis race weekend, the employees attended union meetings at the same hotel where some of the Respondent's supervisors were staying. In fact, the employees held one such meeting in a room adjacent to the hotel bar and were seen leaving the meeting by Director Sobczak.[9]

The employees were not conducting their union activities in secret, and Gurrola's statement did not suggest that she had detailed knowledge of those activities or of who was taking part in them, but instead indicated only general awareness of the union campaign.[10] Given these circumstances, we find that the employees would not

[7] All dates hereafter are in 2016.

[8] As previously stated, we have adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by soliciting employees' grievances and impliedly promising to remedy them.

[9] Sobczak was at the bar and nodded acknowledgment to employees as they exited the adjacent room.

[10] We do not suggest that an employer can never create an unlawful impression of surveillance where employees have not attempted to keep their union activity secret. See *United Charter Service,* above at 151. Here, however, the openness of the activity demonstrates that there were means other than surveillance for the Respondent to have learned something so vague and unspecific as the fact that employees had been approached about joining the Union.

reasonably assume their union activities were under surveillance. See *Waste Management of Arizona*, 345 NLRB 1339, 1339−1340 (2005) (manager did not create impression of surveillance where he stated that "he knew that employees had held a union meeting" but did not indicate that he had detailed information about the meeting, and there were "various other ways in which [the manager] might have learned of the nonsecret meeting"). Therefore, we dismiss this complaint allegation.

B. The 8(a)(3) discharge allegation

The Respondent hired Nathan Hess for the position of tape producer for the 2016 racing season. As tape producer, Hess was responsible for listening to the producer's directions, monitoring the "rundown," i.e., the anticipated sequence of the telecast's segments, and cueing the EVS operators to play certain pre-produced video clips and replays.[11] Hess worked closely with the EVS operators, including Eddie Dean. Dean was primarily responsible for operating a device called the Xfile 3, which converted pre-produced video files to a format compatible with the EVS software.

Monday, September 5—Labor Day—was the final day of racing at the Chevrolet Performance U.S. Nationals in Indianapolis, the most prestigious race of the year in the Mello Yello series. The production truck was locked before the morning production meeting, so Hess was unable to access the day's rundown prior to the meeting. As it happened, the rundown included a preproduced piece featuring a car designed by Mello Yello, the primary sponsor of the racing series. The Mello Yello clip was scheduled to air around 2:15 p.m. Shortly after 10 a.m. on September 5, Hess and Dean discovered the Xfile 3 would not convert certain content, including the Mello Yello clip, into the EVS format. Hess and Dean tried other ways to convert the videos, without success.[12] Hess requested help from William West, the engineer-in-charge for the mobile production trucks, and then notified Adelson, Skorich, and Rokosa that they were unable to convert the clips and that "it would not load video at the time." However, as the time approached for the broadcast to go live at 11 a.m., Hess did not inform anyone that there was still no clip loaded—nor did he do so at any time before 2:15 p.m., when the Mello Yello clip was to air.[13] The Mello Yello clip failed to air on September 5, and the Respondent had to scramble to fill what otherwise would have been dead air. Additionally, failure of the clip to air had broader implications for the Respondent's business because the clip was important to the racing series' chief sponsor, which was unhappy over the failure.

The problem with the Xfile 3 on September 5 was not continuous. Evidence was introduced showing that clips were converted and uploaded to EVS between 8:22 and 8:50 a.m., 10:13, and 11:44 a.m., and 12:57 and 1:04 p.m. It is unclear, however, whether the files that were uploaded to EVS were of the same type as the Mello Yello clip. In addition, although not mentioned by the judge, the Respondent's Director of Broadcasting Operations and Post-Production Supervisor, Rob Hedrick, testified without contradiction that if Hess had alerted him that there was a problem with uploading a clip, he could have fixed it in 10−15 minutes using a program called Adobe Media Encoder.

On about September 7 or 8, Rokosa received a call from Adelson and Skorich, who informed him that four clips, including the Mello Yello clip, did not air on September 5. Rokosa told Adelson and Skorich that he had seen the Mello Yello clip on the server and that its failure to air was not due to an equipment failure. The following week, Adelson and Skorich called Rokosa and notified him that they had decided to discharge Hess. Skorich telephoned Hess on Wednesday, September 14 and told him that he was discharged.[14]

Applying the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hess because of his union activities. The judge found that the General Counsel established the requisite initial showing under *Wright Line* that Hess engaged in union activity, that the Respondent was aware of that activity, and that its decision to discharge Hess

[11] As the judge found, EVS serves as the primary computer server for storing video content and feeding it to the telecast.

[12] When there had been conversion issues in the past with the Xfile 3, Hess had always been able to use his own computer to convert the files successfully.

[13] Hess sought to have the video content loaded before the broadcast went live because of the difficulty of loading the content after that time.

[14] The judge found that Rokosa testified he was on the call when Skorich terminated Hess's employment. Citing email evidence and Hess's testimony that Rokosa was not on the call, the judge found that Rokosa's testimony was not generally credible. However, Rokosa testified only that he and Skorich *attempted* to call Hess to inform him of his termination; Rokosa did not testify that he was on the call when Hess was discharged. Rokosa's testimony can be reasonably interpreted as stating that Rokosa was on the phone for the first attempt to call Hess but not for a subsequent attempt. We find that Rokosa did not testify that he was on the phone call with Skorich when Skorich discharged Hess, and therefore we do not adopt the judge's general discrediting of Rokosa's testimony. See, e.g., *Electrical Workers, Local 38*, 221 NLRB 1073, 1074 (1975) ("[W]here credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility."). However, the judge cited other reasons for discrediting portions of Rokosa's testimony, and we affirm those determinations.

was motivated by animus against that activity. The judge further found that the Respondent failed to establish its *Wright Line* defense that it would have discharged Hess even absent his union activities, finding instead that the Respondent's proffered defenses were pretextual. Contrary to the judge's decision, we find that even assuming the General Counsel satisfied his *Wright Line* burden of showing that union activity was a motivating factor in Hess's discharge, the Respondent established that it would have discharged Hess even in the absence of his union activities.[15]

To establish a defense under *Wright Line*, an employer must show by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or protected concerted activity. E.g., *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). In order to meet its burden under *Wright Line*, an employer need not prove that the disciplined employee had committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee had committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. See *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002) (citing, inter alia, *GHR Energy Corp.*, 294 NLRB 1011, 1012-1013 (1989), enfd. 924 F.2d 1055 (5th Cir. 1991)).

There is no dispute that a clip featuring a vehicle designed by the primary sponsor of the racing series, Mello Yello, did not air during the final day of the most important event of the series, the Chevrolet Performance U.S. Nationals. There is some dispute over the cause of this failure, including the extent of any technical malfunction that may have prevented the clip from being uploaded to EVS. Regardless, Hess, whose job as tape producer included staying ahead of the rundown, was ultimately responsible for making sure the clip played. In any event, Hedrick testified without contradiction that if there was a problem uploading a clip, he could have resolved it in short order. Hess neither ensured the clip played nor prepared the production truck as the time approached when the clip was supposed to play but would not. The Respondent reasonably believed that Hess failed to perform his duties on this occasion, either by ensuring that the clip played or, at least, conveying the seriousness of the situation to Adelson, Rokosa, and Skorich so as not to create an emergency.[16] Instead, the Respondent was unexpectedly faced with 90 seconds of air time to fill on the fly. Moreover, this was not just any clip. This was the clip the Respondent believed was the one the chief sponsor of the entire racing series most cared about. Understandably, the sponsor was displeased. The Respondent demonstrated both the importance of the clip and its reasonable belief that Hess was responsible for its failure to air. Accordingly, the Respondent sufficiently demonstrated it would have discharged Hess even in the absence of his union activities,[17] and we therefore dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging Hess.

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusions of Law 2b and 3 and renumber the remaining paragraphs accordingly.

2. Substitute the following for the judge's Conclusion of Law 6, renumbered as Conclusion of Law 5:

[15] Chairman Ring questions whether the General Counsel presented sufficient evidence to establish both knowledge and anti-union animus. The record contains no direct evidence and scant circumstantial evidence that the Respondent knew of Hess's union activities. Furthermore, the circumstantial evidence presented also does not clearly support a finding of animus. The judge based his finding in this regard on timing—i.e., the proximity of the discharge to when the Respondent learned of the organizing campaign—and the lack of a thorough investigation. Chairman Ring finds these rationales suspect. First, the timing of the discharge does not suggest animus precisely because the record lacks evidence that the Respondent knew of Hess's union activities. Additionally, timing is inconclusive at best because the discharge followed soon after Hess's serious lapse in performance: Hess failed to ensure that the Mello Yello clip played on September 5, and he was discharged within 10 days. Second, a brief investigation was reasonable given the clarity of the circumstances that led to Hess's discharge. Hess's duty as tape producer was to ensure that clips played in the order set by the producer. During the signature event of the Mello Yello racing series, it is undisputed that the clip the Respondent believed was most important to the sponsor of the entire series did not air. Under the circumstances, little investigation was needed. Nevertheless, the Chairman agrees that even assuming the General Counsel met his initial burden under *Wright Line*, the Respondent demonstrated that it would have discharged Hess even in the absence of his union activities.

[16] As mentioned previously, Hess did inform Adelson, Rokosa, and Skorich, shortly after 10 a.m., that the clip could not be uploaded to the EVS system, but there is no evidence that he stated the clip would not be ready to go at 2:15 p.m., when the clip was scheduled to air. To the contrary, the Respondent reasonably believed that he had failed in this respect, as demonstrated by the fact that Adelson and Skorich did not react to Hess's report that morning as though the matter was of significant concern. And given Hedrick's testimony regarding how promptly the issue could have been resolved, there was no good reason for Adelson and Skorich to believe that the clip would fail to air when the time arrived.

[17] We reject the judge's finding that the Respondent's justification for Hess's discharge was pretextual because the Respondent provided "inconsistent and shifting reasons." When an employer provides inconsistent or shifting rationales for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. mem. 165 F.3d 32, published in full 160 F.3d 353 (7th Cir. 1998). Here, however, the Respondent has consistently maintained that the reason for Hess's discharge was the failure to play the Mello Yello clip during the broadcast of the Indianapolis race.

"Since Hess was lawfully discharged, the challenge to his ballot should be sustained."

ORDER

The National Labor Relations Board orders that the Respondent, National Hot Rod Association, Glendora, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from selecting union representation.

(b) Advising employees that they could not be rehired for the next season until the election was held and, if the Union won the election, bargaining was conducted and completed.

(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 after service by the Region, post at its Glendora, California facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 16, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

[18] 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."

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Alliance of Theatrical Stage Employees, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All broadcast technicians employed by the National Hot Rod Association including technical directors (TD Technical Director), associate directors (AD Associate Director, AD Satellite Feed), assistant producers (PRD Pit Producer, PRD Video Board), camera operators (HC Hard Camera, HH Handheld Camera), audio technicians (A1 Audio Lead), audio assists/assistants (A2 Audio Assist, SUB Sub Mixer), replay producers, videotape operators, digital recording device operators (EVS Replay Operator), video technicians (V1 Senior Video, V2 Video Operator), video technician assistants (Video Assist), graphics operators (VIZ Graphics Operator), graphics coordinators (GPSC Graphics Coordinator), bug operators (Bug Operator), runners (RNR Runner), and utility technicians (UTE Utility) performing work in connection with telecasting of live or recorded racing events at remote locations; but excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C. July 29, 2019

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John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) 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 solicit grievances from you and impliedly promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT advise you that you could not be rehired for the next season until an election is held and, if the Union wins the election, bargaining is conducted and completed.

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

NATIONAL HOT ROD ASSOCIATION

The Board's decision can be found at www.nlrb.gov/case/02-CA-185569 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Evamaria Cox, Esq. and *Marcia Adams, Esq.,* for the General Counsel.

Daniel Murphy, Esq. (Constangy, Brooks, Smith & Prophete, LLP), for the Respondent.

Adrian D. Healy, Esq. (IATSE), for the Petitioner/Charging Party.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. A trial was conducted in this matter on December 7, February 27, 28, March 1, 2, 5, 13, 2018, in Brooklyn, New York.[1] The complaint, as amended on the first day of trial, alleged that the Respondent violated Section 8(a)(3) and/or (1) of the Act by discharging or declining to extend employment to employees Nathan Hess, James Dean, Timothy Glass, and Joshua Piner because of their protected activities. The complaint further alleged that the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and impliedly promising to fix them to discourage union support, threatening employees with unspecified reprisals by telling them there would be consequences to forming a union, creating the impression among employees that their union activity was under surveillance, and informing employees that union representation would delay job offers for the 2017 racing season. The Respondent has denied the substantive allegations.

By a September 8, 2017 order of the Regional Director of Region 22, the complaint was consolidated for hearing with certain objections, filed by the Respondent on December 9, 2016, to a mail ballot election conducted from November 15 to December 2, 2016, in representation Case 02–RC–186622. The Respondent's objections included a contention that four employees were denied the opportunity to vote due to election irregularities caused by the Region.[2] The Regional order also consolidated with the complaint the disposition of the challenged ballots of alleged discriminatees Hess and Piner. The Respondent contended that Hess and Piner were not eligible to vote because they were lawfully discharged for cause before the election. The Regional order overruled and did not consolidate for hearing certain additional objections filed by the Respondent on August 23, 2017, to the same election. The complaint allegation concerning the Respondent's separation of Glass was resolved prior to trial. After the record opened, the Union and the Respondent entered into non-Board settlements that resolved the allegations concerning the separations of Dean and Piner.[3]

As discussed at length below, I find merit to all the unfair labor practice allegations except the threat of unspecified consequences. I do not find the Respondent's objections to have merit as a basis for ordering a rerun election. Finally, since I find that Hess was discharged unlawfully, I recommend that the challenge to his ballot be overruled.

Posthearing briefs were filed by the General Counsel, the Respondent, and the Union.

On the entire record, including my observation of the demeanor of the witnesses, I make the following findings, conclusions of law, and recommendations.

[1] All dates refer to 2016, unless stated otherwise.

[2] The December 9, 2016 objections include additional objections that the Respondent did not argue in support of at trial or in its posthearing brief. I do not independently find merit to any of these unsupported objections and do not address them further herein.

[3] With regard to the 8(a)(3) allegations of Dean and Piner, I approve the General Counsel's withdrawal of the charge and dismiss the appropriate portions of the complaint (i.e., pars. 11, 12, and 14 as they pertain to Dean and Piner). Pursuant to the settlement of the Piner allegation, the Petitioner/Charging Party union (the Union) agreed to keep Piner's ballot sealed and exclude it from the ballot count in Case 02–RC–186622. Accordingly, I do not address the challenge to Piner's ballot herein.

JURISDICTION

The Respondent is a California corporation with an office and place of business located in Glendora, California, and is engaged in the business of sanctioning and producing drag racing events for telecast. During the 12-month period prior to the issuance of the complaint, the Respondent in the course and conduct of its business operation derived gross revenues in excess of $500,000 and performed services valued in excess of $50,000 in states other than the State of California.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

FINDINGS OF FACT[4]

The Respondent's Operation

The Respondent is a racing association that produces thousands of drag race events each year, including the Mello Yello Drag Racing Series and Lucas Oil Drag Racing Series. The Respondent's events consist of various vehicle classifications and participant skill levels with drivers racing head-to-head side-by-side down a quarter mile track. The Mello Yello series is for professional drivers at the highest skill level who complete for significant prize money. The Locas Oil series is the "Pro/Sportsman" series immediately below Mello Yello.

The Mello Yello racing series consists of 24 events from February to November. Prior to 2016, Mello Yello was produced for television by ESPN. Hess worked for ESPN on these productions in various positions between 2006 and 2016. He was a pit producer for the entire 2014 season and about half the 2015 season. From about July 2015 to the end of the 2015 season (about 11 or 12 races), Hess worked as the tape producer. Dean worked for ESPN as an EVS operator from about 2007 to 2016.[5]

In 2015, the Respondent prepared to take the Mello Yello television production in-house for broadcast of the 2016 season on FOX channels. On September 1, 2015, the Respondent retained Chief Accounting Officer and Executive Producer Kenneth Adelson to lead the transition. Adelson reported to Peter Clifford, the Respondent's CEO. Adelson hired producer Peter Skorich, technology executive Michael Rokosa, and director Jim Sobczak. In taking the telecast production in-house, the Respondent created an entirely new operation.

Adelson testified that he wanted someone for the tape producer position with significant experience on major live events. Accordingly, he went through a long deliberative process of finding someone suitable. The first two experienced candidates he attempted to recruit for the position of tape producer turned it down. Adelson initially spoke to Hess in 2015 about staying on from ESPN as a pit producer (not knowing Hess worked the second half of the season as the tape producer). When Adelson found out Hess worked as the ESPN tape producer (having been unsuccessful recruiting someone else), he offered Hess the position. However, Adelson did not immediately offer Hess the wage rate typically associated with the tape producer position. Rather, Adelson offered Hess the lower pit producer rate because Hess did not have much experience as a tape producer. Adelson promised to reevaluate the issue of Hess's pay midway through the season at some point during the summer of 2016.

Marleen Gurrola, the Respondent's vice president of human resources, testified that the Respondent employs a core group of personnel consisting of about 165 full-time and 20 part-time employees. The Respondent also employs about 1600 to 1800 event workers who work one or more events throughout the year. Gurrola works at the Respondent's headquarters in Glendora, California, but attends some racing events. Gurrola testified that, when she attends races, it is her practice to walk around and talk to event workers she does not have an opportunity to see on a regular basis. According to Gurrola, in talking to employees, she attempts to determine whether she can help with anything and takes notes of the employees' comments.[6]

Each competition is held over the course of a weekend from Thursday to Sunday or Monday (for large events held over a long weekend). The initial days of racing consist of qualifying heats to determine which drivers will compete in the final day of elimination racing on Sunday or Monday. Among the 24 Mello Yello events, the most prestigious is the Chevrolet Performance U.S. Nationals held in Indianapolis, Indiana over Labor Day weekend.

Preparations for televising Mello Yello events generally begin on Wednesday when production trucks arrive at the track and fiber optic cables are laid by a small utility crew. The Respondent uses two 53-foot tractor-trailer sized mobile unit trucks as production studios. The remainder and bulk of the production crew arrive on Thursday to set up the cameras and the trucks. Each day of racing is televised. In 2016, racing was televised by FOX on its national channel and FS1.

During the 2016 season, the Respondent rented its two mobile production trucks from F&F Productions, LLC (F&F). These mobile units were designated truck A and truck B. F&F also provided two engineers to maintain the trucks. The F&F engineer-in-charge was William West and the other F&F engi-

[4] My factual findings are based in part on credibility determinations and, in this decision, I have credited some but not all of the testimony of certain witnesses. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness's demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

[5] EVS operators are also referred to as tape or replay operators.

[6] Although it was not entirely clear, I understood Gurrola to state that this has been her practice before, during and after the 2016 racing season.

neer was Kevin Pingel.

Truck A was divided into two sides by a large wall of monitors that could swing open to allow people access from one side of the truck to the other. This monitor wall was generally kept ajar so people could walk through. The production side in the front of truck A had three rows of seats, including seats for Adelson, Skorich, Rokosa, and Sobczak. Skorich and Sobczak sat in the first row (closest to the monitors), Adelson sat in the second row, and Rokosa sat in the third row (closest to the front of the truck and farthest from the monitors). The "tape side" in the back of truck A included seats for Hess, Dean, and West.[7] Hess sat in front of a smaller wall of monitors and equipment which was perpendicular to the primary wall of monitors that divided the truck. Hess testified that Skorich sat about five feet from him. Two EVS operators sat on either side of Hess and three more EVS operators sat in a row on the other side of the monitors in front of Hess. Hess identified Dean, Dave Slain, Paul Lasky and Bob Brackens as EVS operators who routinely worked with him (among others who worked on a more sporadic basis). Dean was the lead EVS operator.

The equipment in the tape room of truck A included five EVS devices (also referred to as replay machines) and a device called the Xfile 3. The EVS devices function as the primary computer server for storing video content and feeding it out for broadcast. Video content can be loaded onto an EVS from various sources, including a live feed from cameras or pre-produced clips (i.e., not live) stored and uploaded from a UBS drive.[8] A UBS drive with pre-produced content is plugged into the Xfile 3 so the Xfile 3 can convert the video file to a format compatible with EVS software. The converted file can then be saved to a designated path location on an EVS. Dean was primarily responsible for operating the Xfile 3.

Hess testified that the Xfile 3 was a "touchy system" which had problems about three or four times throughout the first half of the 2016 season. The initial demo unit that came with truck A failed during an event in early-February and F&F had to be swap it out for a new one. In particular, the Xfile 3 would not always convert files into the EVS format. Hess found that mp4 files always converted to the EVS format, but other files did not. Therefore, when they had a conversion problem, Hess used his own computer to convert the file to mp4 before, in turn, using the Xfile 3 to convert the mp4 file to the EVS format. Hess and Dean testified that this worked until September 5 (as described more fully below).

Truck B housed equipment for graphics (among other things) and graphics coordinator Piner was stationed there. Truck B also contained equipment called master control. Hess testified that truck B was generally positioned about 10 or 15 feet from truck A.

The anticipated sequence of each show was prepared and plotted by the Respondent on a document called the "rundown." The rundown included a description of each segment of the telecast, when the segment was expected to air, and the estimated duration.

On each day of broadcast, the Respondent held a morning production meeting attended by the on-air talent and the mobile unit production crew. At these meetings, Adelson generally reviewed certain key story lines and reminded the crew to capture the feeling and energy of the event. Skorich then walked through the rundown line by line. Each member of the production crew received a hard copy of the rundown to follow and use during the telecast.

During the actual show, Skorich called out directions for each segment through the communication system. Production crew members listened to Skorich with their headsets, but also looked ahead on the rundown to anticipate and be ready for each segment as the show progressed. Nevertheless, unanticipated events occur on live broadcasts (e.g., a car crash) and adjustments have to be made quickly. Hess was responsible for listening to Skorich's direction, monitoring the rundown, and cueing the EVS operators to play pre-produced clips or replays.

The Respondent hired local employees to work at events, but many employees travelled to races from other locations. The Respondent compensated employees for their time in transit, provided lodgings, and paid employees a per diem. Managers generally stayed in one hotel while production employees stayed in another. However, during the entire 2016 season, Sobczak and Brian Stoll, the Creative Director, stayed in the production crew hotel (instead of the hotel with other managers).

The transition from ESPN was accompanied by a number of employee complaints regarding their working conditions. Production employees expressed dissatisfaction with the number, quality and variety of meals that were provided. Among several employees, Hess and Dean complained to management about the food at the first race of the season in Pomona, California. Skorich told Hess that lunch would not be provided. Hess responded that this was a problem and Skorich needed "to fix that."[9] The Respondent also received complaints from production employees about such things as their uniforms (employees wanted to wear shorts due to the heat), the per diem, sharing rental cars, and certain safety issues (e.g., personnel proximity to the track). Dean testified that he complained to Gurrola about the per diem at the Charlotte, North Carolina race (held September 16-18) and that the per diem policy was changed as of the next race in St. Louis, Missouri (held September 23–25).[10]

Gurrola testified that she attended the first race of the 2016 season in Pomona, California (about a 15-minute drive from the

[7] Although "tape" is a word still used to describe video and sound recordings, such content is no longer stored on analog tape. Rather, it is stored digitally.

[8] Preproduced content includes features and B-roll or filler. A feature is a lengthy clip which is central to a narrative of the telecast, while B-roll is supporting material (such as pictures of the crowd or a sunset over the track). For each event in 2016, a folder was created on an EVS for "on site features."

[9] Dean testified that he complained about the food at races in Houston, Texas (April 29-May 1) and Epping, New Hampshire (June 3–5). According to Hess, almost all the employees complained about one particularly poor meal at the Houston race.

[10] The Respondent also changed its policy of prohibiting camera operators from wearing shorts, but the record evidence does not indicate when this change occurred.

Respondent's headquarters in Glendora). At this race, as others, she walked around and asked employees whether everything was alright and if anyone needed assistance. Gurrola did not attend another event until the race in Charlotte, North Carolina held September 16–18. Nevertheless, Gurrola testified that she learned of employee complaints (referenced above) early in the season (during the first few months) from managers who reported those complaints to her. Gurrola attended the last six races of the 2016 season beginning with the Charlotte race.

During the first half of the season, Hess had a few discussions with Skorich about receiving the potential wage raise Adelson referred to when Hess was hired. In about early-April, Skorich told Hess he wanted a few things done differently before they would be willing to give him the raise. In particular, Skorich wanted more fan friendly "bumps to break" and shots of driver access to fans (e.g., drivers signing autographs). In about early-June, Skorich told Hess he would work on getting him the raise because Hess had done everything he was asked to do in April. At the Denver race held July 22 to 24, Skorich told Hess "everything looked good" for him to receive a raise from $50 per hour to $55 per hour effective August 1.

A job memo dated August 1, from Adelson to Hess, indicates that Hess was to receive a pay raise from $50 to $52.50 per hour. Hess was given and signed this job memo on September 1. The pay raise was not made retroactive to August 1. Adelson testified that he considered Hess's performance to be adequate as of the date Hess received the raise.

The Union Organizing Campaign

In early-August, Union representative John Culleeny learned from a friend that the Respondent's production employees were unhappy. Accordingly, Culleeny began to organize them. On August 6, during the weekend of a race in Seattle, Washington, Culleeny held a meeting at a restaurant near the hotel where production employees were staying. Six employees attended the meeting, including Hess and Dean. All six employees signed authorization cards.

Thereafter, Culleeny gave Dean and Hess blank authorization cards to distribute to other employees. The Union also created an electronic link to a blank authorization card. Hess did not distribute paper cards, but did send the electronic link to about four employees by text. The record contains one such text exchange between Hess and freelance EVS operator Paul Kent.

Culleeny held a second organizing meeting during the weekend (August 18–21) of the race in Brained, Minnesota, and about 20 employees attended. This meeting was held at a restaurant after work and was not particularly close to the production crew hotel. In fact, employees had to take a boat to the meeting.

Culleeny held two more organizing meetings over Labor Day weekend (August 31—September 5) at the drag race nationals in Indianapolis. These union meetings were held on Saturday (September 3) and Sunday (September 4) after work at the hotel where production employees were staying. More specifically, the meetings were held in a party room off to the side of the hotel bar. About 20 employees attended each meeting with people coming and going throughout. The party room was situated about 20 feet from the bar and could only be accessed or exited by walking past the bar. Culleeny, Dean, and Piner testified that Sobczak was sitting at the bar while the meeting was being held and in a position to see people walking in and out. Piner testified that Sobczak nodded toward employees in acknowledgment as they left the meeting. Hess attended both the union meetings in Indianapolis, but did not testify that he saw Sobczak at the bar.

Throughout the organizing campaign, Hess invited employees to union meetings and spoke up in support of the Union at those meetings. Hess also spoke to employees in support of the Union in individual conversations with other employees. According to Hess, he had these conversations "a little bit of everywhere," including the hotel, in the car on the way to work, the production truck, and the television compound. Hess did not testify that any manager, supervisor or other agent of the Respondent was present at the union meetings or was otherwise in a position to overhear him talking about the Union. Likewise, the record contains no direct evidence that any agent of the Respondent saw the text messages Hess sent to employees with links to the union authorization card or was otherwise in a position to witness any other union activity engaged in by Hess.

On the morning of Sunday, September 4, Stoll told Adelson he overheard production employees at the hotel talking about a union. Adelson asked Stoll for more information, including who was involved. However, Stoll was vague and did not say anything more. Adelson immediately told Rokosa, who happened to be waiting to tell Adelson he had heard the same thing.[11] Adelson directed Rokosa to notify Linda Louis, the Respondent's General Counsel, and Rokosa did so at about 1 p.m.

The Events of Labor Day, Monday, September 5

On Monday, September 5, the final day of racing at the U.S. nationals in Indianapolis, the crew came in early (about 7 or 7:30 a.m.) for a production meeting. However, the trucks were still locked from the night before. Normally, Hess would notify Skorich if there were any problems with a segment on the rundown (e.g., a clip was unavailable). However, Hess did not have access to any information on September 5 because the trucks were locked.

The rundown for September 5 included the following segments:

[11] Rokosa testified that he learned about potential union activity among the employees third hand from Frank Wilson of FOX. Wilson told Rokosa he heard this from FOX colleague Greg Oldham, who in turn heard it from Stoll.

Page	Segment	Estimated Duration	Time
5.2	Visitor's Guide to Indianapolis Feature	1:15 minutes	1:45:22 PM
7.3	Mello Yello in the Spotlight – JR Todd and Crampton Workout Feature	2:00 minutes	2:07:24 PM
7.13	Del Worsham's Mello Yello Car Feature	1:30 minutes	2:15:49 PM
10/6	Tony P Races Worsham in Toyota Feature	1:05 minutes	2:55:41 PM

Adelson testified that segment 7.13, Del Worsham's Mello Yello Car Feature, was particularly important because it was about a special car designed to run in the race by the Respondent's primary sponsor.[12] Rokosa testified that, on September 5, he was not aware that the Mello Yello feature was especially important, but "came to find out later."

Hess testified that, shortly after 10 a.m., on September 5, he attempted to load certain video content onto the EVS system using the Xfile 3, but the Xfile 3 would not convert the video to the EVS format. Dean was normally the person who operated the Xfile 3, but he was on a meal break. Hess went to find Dean and had him try to load the video, but Dean was unsuccessful. Hess then attempted to use his own computer to convert the file to an mp4 format before using the Xfile 3 to convert the file (as he had done successfully in the past), but this failed as well. Hess and Dean notified West, but West was unable to load the content. Hess walked to the front of the truck and told Adelson, Skorich, and Rokosa (who happened to be standing together) what happened. Rokosa immediately walked back toward the tape room. Adelson and Skorich did not react as though the matter was of significant concern. Hess did not recall the substance of the clips that were not converted or how many there were. According to Hess, Stoll was ultimately able to load one or two of the clips on the system using the master control in truck B, but the other clips were lost.

Dean testified that, on the morning of September 5, the Xfile 3 was unable to convert video files to the EVS format. According to Dean, he notified Hess and West of the problem around 8 or 9 a.m. Hess attempted to convert the files to an mp4 format before loading them into the Xfile 3, but this did not work. West attempted to bypass the Xfile 3 by running a line to a different source computer, but this failed as well. According to Dean, he told Skorich about the problem and Skorich would have known because he sat so close to them. Dean recalled Rokosa asking whether there was anything he could do. Dean did not know of anything Rokosa could do since Rokosa was not an Xfile expert.

Adelman and Rokosa denied they were made aware that clips were unavailable before those clips were scheduled to air. Adelman and Rokosa also denied they were aware on September 5 that the Xfile 3 had a problem converting the missing clips to an EVS format. Adelson testified that, without prior notice, four clips (segments 5.2, 7.3, 7.13, and 10.6) were not played on September 5. Rokosa testified that he was only aware of the missing Mello Yello clip and did not know three other clips were missing. Skorich was not called as a witness.

Among the Respondent's managers, only Rokosa provided details as to what allegedly happened in truck A when a clip failed to air on September 5. Rokosa testified that Skorich called for a 2-minute clip to be played and there was panic when someone reported that the clip was unavailable. Rokosa did not know what the problem was or why the clip was missing. Further, Rokosa did not recall Hess telling Skorich that the clip could not be played because of an equipment malfunction. However, in an affidavit Rokosa provided during the Regional investigation, he stated, "Skorich asked Hess to play a clip during the live air show. Hess could not produce the clip. Hess told Skorich it was a hardware problem." At the end of the day, associate director Katie Stoll told Rokosa that the "clip existed." Rokosa asked Stoll what she meant, and she told him the Mello Yello clip was on the server. Rokosa asked Stoll to show him where and she played it for him.[13]

The General Counsel introduced an F&F technical report completed by West for the race in Indianapolis, which states in part as follows:

> X-File 3 was not able to upload or download a MP-4 file we could trans code a MOV file both ways, thinking that we may need to re-install the trans coding software will talk with EVS in Charlotte Tac-12 Fiber cables we ripped apart by sweeper (note Rokosa wants to keep damaged fiber).

During the trial, Rob Hedrick, the Respondent's Director of Broadcasting Operations and Post-Production Supervisor, printed screen-shots of portions of the computer folder referred to as a "melt." According to Hedrick, a "melt" is essentially a highlight reel of the best clips of the day in a single piece that is sent to headquarters. I understood Hedrick to say that the particular screen-shots in evidence show a list of segments in the melt for September 5 and the time the Xfile 3 was used to convert and upload each segment onto the system. The list contains about 31 segments with times that range from 8:22 to 8:50 a.m., about 59 segments with times that range between 10:13 and 11:44 a.m., and about 31 segments with times that range between 12:57 and 1:04 p.m. However, the list does not indicate any segments with times in the range of 8:50 to 10:13 a.m. or the range of 11:44 a.m. to 12:57 p.m. Further, the list does not contain the Mello Yello clip which failed to air on September 5.

Hedrick testified that Hess prepared the melt after each race. However, his basis for this statement is not clear and a position statement submitted to the Region during the investigation indicates that "Dean did 'melts' of video clips at the end of each weekend."

[12] The segment was referred to on the record as the Mello Yello clip.

[13] The parties' respective witnesses were not entirely consistent with regard to the events of September 5. Hess and Dean appeared to have opposite recollections as to which one of them initially attempted unsuccessfully to load the clips on the server and told the other. Meanwhile, unlike Rokosa, Adelson did not testify that there was any panic in the production truck when the clips could not be played. Indeed, Adelson did not otherwise evince a strong recollection of the events of September 5.

The Respondent's Discharge of Hess

On about September 7 or 8, Rokosa received a call from Adelson and Skorich, who told Rokosa that four clips did not air on September 5. Rokosa said at least one of the clips was on the server and, for that clip, it was not a failure of the equipment.

In about the following week, Adelson and Skorich called Rokosa again and said they had made the decision to discharge Hess. Adelson and Skorich wanted Rokosa to notify Hess of the decision, but Rokosa demurred. Rokosa thought Adelson or Skorich should notify Hess because they supervised him and he did not. Rokosa testified that he was on the phone call as a witness while Skorich notified Hess of the discharge.

On Wednesday, September 14, the day before Hess was scheduled to leave for the race in Charlotte, he received a call from Skorich. According to Hess, Rokosa was not on the call. Hess described the conversation as follows:

> He called me and he said, hey, Nate, this is Pete. I said, hey, what's going on? He said, I hate to do this, but we're going in a different direction as far as the tape producer position. I said, effective when? He said, effective immediately. I replied, you are aware the Xfile went down and that's why we didn't have the video we needed for the Indy race? He said, yeah, but there were some other issues on Friday and Saturday. And they felt things could have been organized better. I said, okay. He said, again, I hate to do this, but this is the way we're going. And said that he wasn't sure about getting paid for that weekend because it was last minute. But that Rokosa and/or Marleen would be in touch, and we would get that worked out.

On September 14, management had the following email exchange regarding Hess's discharge:

> On Sep 14, 2016, at 7:16 AM, Pete Skorich wrote:
>
> Hello Team,
>
> Mike and I tried to conference in Nate this morning but were unsuccessful in our initial attempt to gain phone access with him. Mike subsequently left him a voicemail and then I successfully got him on the phone at 6:05am solo.[14]
>
> I told him that I had some bad news to deliver to him. After our struggles in Indy with the tape room we have decided that we are going to make a change and unfortunately he is no longer part of our future, He asked effective when? I told him effectively immediately. He said "you do know we had a major equipment malfunction on Sunday morning", I told him that I was aware of that but our difficulties were present as early as Friday, things were not able to be found, there was a lack of organization and we never want to go through that again.
>
> I told him he could follow up with Mike and or Marleen with any questions.
>
> He seemed very calm about the situation, almost like he knew it was coming. The call lasted about three minutes.
>
> From: Ken Adelson
> Date: Wed, 14 Sep 2016 07:29:59 -0700
> To: Pete Skorich
> Cc: Mike Rokosa, Marleen Gurrola, Linda Louie
> Subject: Re: NATE HESS
>
> Thanks Pete. I'll follow up with you later.
>
> From: Ken Adelson <kadelson@nhra.com>
> Date: Wed, 14 Sep 2016 07:46:26 -0700
> To: Pete Skorich <pskorIch@nhra.com>
> Cc: Mike Rokosa, Marleen Gurrola, Linda Louie <LLoulOinhre.com>
> Subject: Re: NATE HESS
>
> For Marlene and Linda, FYI, I spoke with Frank Wilson from Fox last night and we have his support on this as well.
>
> From: Ken Adelson
> Date: 9/14/16 10:48 AM -(6MT-05:00)
> To: Mike Rokosa
> Subject: FW: NATE HESS
>
> Did anything new happen on Sunday? Beyond what we know about the X files from earlier in the weekend? And also, Frank mentioned, Steve Onosku (sp) was not happy about something, can you please find out.
>
> From: Mike Rokosa
> Sent: Wednesday, September 14, 2016 10:50 AM
> To: Ken Adelson
> Subject: RE: NATE HESS
>
> No just the XFile. I will call Steve.

In an affidavit provided during the Regional investigation, Adelson stated that he "was not aware of any problems with the Xfile 3 during Indianapolis." At trial, Adelson's testimony was less clear. However, upon being presented with this email exchange, Adelson did appear to say that he was aware of a problem with the Xfile 3 during the Indianapolis weekend.

According to Adelson, Hess's failure to have certain clips available for airing "was out of norm" and, in his 35 years of experience, had never happened before. Although hearsay, Adelson testified that Clifford advised him that the primary sponsor (Mello Yello) was very upset.

Dean was not disciplined or discharged in September and he worked for the remainder of the 2016 season.

Hess was replaced by Kent. Kent was a freelance EVS operator who worked in 2016 for both the Respondent on racing events and for FOX on Detroit Piston games. Kent had no prior experience as a tape producer before he replaced Hess.

The record does not clearly indicate how many races Kent worked for the Respondent in 2016. Adelson testified that Kent

[14] This email corroborates Hess's testimony that Rokosa was not on the call when Skorich notified him that he was being discharged. It would be less surprising to me if Rokosa failed to recall the phone call than for him to "recall" a conversation in which he did not participate. His testimony in this regard makes me question the accuracy of Rokosa's testimony about the events of September 5 to the extent his testimony was not corroborated by other managers. Likewise, although Hess and Dean were not completely consistent in their testimony regarding the events of September 5, I find their accounts more credible than then testimony of Adelson and Rokosa.

worked as an EVS operator "for most of the year," but Hess did not identify Kent as one of the EVS operators who worked for the Respondent on a regular basis. Kent was promoted to tape producer for the race in Charlotte, North Carolina (held September 16-18) and worked in the capacity the next two races before returning to FOX for the Piston broadcasts.[15] The record does not indicate who replaced Kent as tape producer for the last three races of the 2016 season.

The Respondent's Response to the Union Organizing Campaign

Gurrola attended the race in Charlotte. On the morning of September 16, a large meeting was convened in the meal tent and was attended by about 150 event workers, including the production crew. Clifford and the event management team also attended. Gurrola gave a speech at this meeting and it was recorded by Dean. Gurrola's comments included the following:

> I wanted to come out … and find out really how . . . it all the works and I 'll try to do my best. I'll be here till Sunday to get an opportunity to do that. But I also wanted to talk about another really important thing that has come up and that is the union 'cause I know that some of you have been approached and talked to about perhaps going in the union and I wanted to have the opportunity to tell you what we think about it . . . .
>
> You all have every right, and I don't want to make any qualms about it, you have every right to talk to a union rep, to engage in conversations with them and [unintelligible] and even vote the union if that is what you chose to do. But . . . I want to tell you what NHRA thinks about it or what I think about it as a matter of fact in human resources. We don't feel it is . . . a productive thing to a relationship to get into. For starters . . . there are consequences, okay?
>
> A lot of you may or may have not been asked to sign a card to join the union, and by doing so, you should know a couple of things. One is that you are giving them the right to represent you whether there is a vote or not a vote.
>
> And we don't want you to sign the card. We don't feel there's a need to do that. Once you entered into – once there's a union, there's now a third party in our relationship. If I right now, if you have issues or anything you wanted to discuss, you can come to me. Bring them to our attention and we'll . . . look into it. . . . That's what I do. You know, we've been . . . in existence for 65 years. We built this business without a union. . . . [Y]ou can contact me via . . . my office phone, email, I'll get back to you confidentially. I mean, give us an opportunity to fix issues. . . . [W]e have good practices, good policies in place to help the employees, that's what my job is. I'm a hundred percent for you guys out there. To make this a good working relationship between the two of us. When you bring the union in, that model goes out the door. Just so you know.
>
> There's a lot of you that are here, that may have been in a union at some point and if so, you know, talk to your peers and find out whether a union worked for them or not. There's a reason only seven percent of the private sector has unions representing them. You know, do you really want to pay them to . . .
>
> If they're making promises to you, get them in writing. Because . . . you wanna know what are they going to do for you for the money you're going to pay them. I mean that's how they stay in business, with dues, and you know, I guess back in the olden days and in some industries, perhaps unions played a part in it and that is back in the personnel days when you just sign papers. Now, we have a very interactive process, and I want you to know that. I wanted to make sure you know... I'm not going to remember all of you by name other than some of my employees that I have, you know, full time that I know you know, talk to me. I'll be around if you have anything privately you want to talk about or you wanna corner me somewhere, I'm around. . . . That's one of the reasons why I came out. I typically go to Indy but I had surgery, couldn't do it. Now, here this weekend . . . and that's what 'I wanted to tell you. I really wanted to come in and communicate that message to all of you . . . that you know what our position was on that and . . . . to thank you for all of your hard work and doing a tremendous, tremendous job and working very hard.

After she gave this speech, Gurrola walked around and met with groups of employees. She asked employees whether they had any complaints and took notes on their responses. According to Gurrola, she did not ask employees about the Union, but did write down what employees said about a union if they mentioned it. Gurrola attended the last six races of the 2016 season and took notes of her conversations with employees at each one. The notes contain certain references to a union.

On October 20, the Union filed a representation petition in Case 22–RC–186622.

In addition to in-person speeches and discussions, Gurrola sent emails to employees on October 25, November 7, 10, and 15, which urged employees not to unionize. The Respondent also produced an antiunion video at some point in which Gurrola and Kent appeared.

The Representation Case

As noted above, on October 20, the Union filed a representation petition.

On November 3, a stipulated election agreement was approved and described the bargaining unit as follows:

> All broadcast technicians employed by the [Respondent] including technical directors (TD Technical Director), associate directors (AD Associate Director, AD Satellite Feed), assistant producers (PRD Pit Producer, PRD Video Board), camera operators (HC Hard Camera, HH Handheld Camera), audio technicians (A1 Audio Lead), audio assists/assistants (A2 Audio Assist, SUB Sub Mixer), replay producers, videotape operators, digital recording device operators (EVS Replay Operator), video technicians (V1 Senior Video, V2 Video Operator), video technician assistants (Video Assist), graphics operators (VIZ Graphics Operator), graphics coordinators (GPSC Graphics Coordinator), bug operators (Bug Operator),

[15] After Charlotte, Kent worked as the tape producer for the Dodge NHRA Nationals in Reading, Pennsylvania held September 29 to October 2 and the AAA Insurance NHRA Midwest Nationals in St. Louis, Missouri held September 23 to 25.

> runners (RNR Runner), and utility technicians (UTE Utility) performing work in connection with telecasting of live or recorded racing events at remote locations; but excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

An employee in a unit classification was eligible to vote if he/she was employed during two events for a total of 40 or more working hours over the 2016 racing season. The voter list prepared by the Respondent contained the names of 99 employees. The Respondent did not include Hess on the list because he had been discharged.

A letter dated November 8 from the Regional Director of Region 22 to Adelson contained copies of the official Corrected Notice of Election. This contained "instructions to employees voting by U.S. Mail," and the following paragraph regarding ballots not received by employees:

> Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, November 22, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (973) 645-2100 or our national toll-free line at 1-866-667-NLRB (1-866-677-6572).

The notice also included the following paragraph regarding the due date of ballots and whether they would be counted:

> All ballots will be commingled and counted at the Region 22 Office on Friday, December 2, 2016 at 10:00 a.m. In order to be valid and counted, the returned ballots must be received in the Region 22 Office prior to the counting of the ballots.

On November 15, the NLRB mailed ballots to the production crew by United States mail.

Rokosa Email Regarding Hiring for the 2017

On November 15, Rokosa sent an email to the production crew which stated as follows:

> Thank you for your work on NHRA TV during 2016!
>
> The 2016 season was a new beginning for our sport. We created a strategic plan and our number one goal was to improve TV. A big part of that plan was for a team of NHRA employees to produce NHRA's TV, instead of an outside party. You all came through and produced great TV this year. Thank you.
>
> Now, we're talking about 2017. We've learned so much this year and we want to make next year even better. It is a jigsaw puzzle to schedule people for events based on availability, needs, regions of the country, etc. The first step is your availability.
>
> By November 23, 2016 (if you haven't done so already), please tell us by e-mall to me (mrokosa@nhra.com) your availability for work next year, by event, or simply say "all events" if that is the case (see our 2017 schedule here: http://www.nhra.comi/schedules/2017.aspx).
>
> If we do not receive an email with your availability by November 23, 2016, we will understand that you do not want to work for NHRA in 2017.
>
> Because we are In the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when we can schedule you to work during 2017, based on your availability and our needs. We will also be able to confirm new terms for 2017. If the union wins the election, we will be obligated to bargain certain terms for the 2017 season and we do not know how long that might take.
>
> When we are able to provide specific offers, we will do our best to make clear the specific expected schedule of travel days and work days so that everyone can plan accordingly.
>
> Have a fantastic holiday season and again, thank you for all of your great work.

The Mail Ballot Election

Hess was not named on the voter list the Respondent prepared for the election and did not immediately receive a ballot. On about November 21, Culleeny sent an email to employees, including Hess, indicating that they should call the Region if they did not receive a ballot. This email included the Region's main telephone number—(973–645–2100). Accordingly, on November 21, Hess called the Region and requested a ballot. Phone records indicate that this call took two minutes. He subsequently received the ballot and mailed it back. Since Hess's name was not on the voter list, his ballot was challenged.

On December 2, the Region counted the mail ballots and prepared a tally of ballots. This original tally of ballots showed 33 votes for the Union and 22 votes against representation. An additional 17 ballots were challenged. Thus, 72 ballots were cast.

On August 16, 2017, pursuant to an agreement of the parties as to the resolution of challenged ballots, 14 of the previously challenged ballots were counted and an amended tally of ballots was prepared. The amended tally of ballots showed 35 votes for the Union and 34 against representation.

In support of its objections, the Respondent called unit employees Todd Veney, Robert Logan, and Paul Kent to testify regarding troubles they had with their mail ballots. Although Patrick Ward did not testify, the Respondent relies on records from the Board in asserting that Ward was denied an adequate opportunity to vote as well.

Todd Veney

Veney did not receive his ballot from the Region until he returned from traveling after the Thanksgiving weekend.[16] On November 28 at 1:48 p.m., Veney mailed his ballot to the Region by two-day priority mail and received a receipt with a tracking number. The receipt reflects a "(USPS Tracking #) (9505 5126 7092 6333 0382 96)" and designates the "(Expected Delivery Day)" as "(Thursday 12/01/2016)." The ballot was not stamped received by the Region until December 5 and it was not counted. The record does not indicate that Veney or anyone else attempted to use the postal service tracking number

[16] The record does not indicate when Veney left to go on this trip.

to track the parcel and determine when it was actually delivered to the Region. Veney's ballot was not counted.

Patrick Ward

Board records indicate that Ward requested replacement ballots on November 22 and 29, and the Region mailed replacement ballots to him on November 22 and 29. Ward's return ballot was postmarked December 1 and stamped received by the Region on December 9. The ballot was not counted.

Robert Logan

On about November 7, Logan was among a group of employees who received an email from Gurrola regarding the process of the election. This email indicated, among other things, that ballots would be mailed by the Board on November 15 and that "[b]allots received in New Jersey later than November 30, 2016 will not be counted." (emphasis in original.)

Logan was aware that ballots were being mailed by the Region on November 15 and testified as follows with regard to his failure to receive one:

> November 15th. And I waited about four of five days. And the weekend came, and I still hadn't received my ballot. And when I found the number that they provided us, I called the number and left a voicemail. And I was hoping that somebody would respond. And then we got into the holiday season. And in Detroit, I'm very busy with the parades and, you know, the Lions football game. And then Friday and Saturday, I have high school championship games. I cover four or five of the regional Fox sports. And so I finally called again on Monday.

Phone records show that Logan called the Region's main number twice on Wednesday, November 23 at 11:31 and 11:55 a.m. (1 and 3-minute calls, respectively) and once on Friday, November 25 at 3:21 a.m. (2-minute call). According to Logan, these calls went directly to voice mail and he left voice mail messages each time indicating he had not received a ballot.

Logan emailed Gurrola and Culleeny to inform them that he had not received his ballot. On Saturday, November 26, Gurrola emailed Logan and suggested he "try emailing it AND sending it to them via email so hopefully your vote will count. If you could mail it 2-day priority it would be best." Gurrola also prepared and included in her email to Logan a draft email from Logan to Board agents Frank Flores and Eric Pomianowski (with the email addresses of those agents). The draft email indicated that Logan had not received his ballot, but wanted to vote against union representation. Logan did not send the email to the Board agents as Gurrola suggested.

Logan later received an email from Culleeny with the direct number of Flores. On about Monday, November 28, Logan called Flores. Logan claims that Flores told him the voice mail associated with the telephone number Logan called on November 23 and 25 was not monitored and that the Board was having problems getting ballots out nationally to the right people because "addresses were messed up." Flores told Logan he would send out a new ballot. Board records indicate that the Region mailed a replacement ballot to Logan on November 28.[17]

Logan testified that he did not receive the first ballot until December 5 and the second ballot until December 7. Logan did not testify that he returned those ballots and Board records do not indicate the receipt of any ballot from Logan. Logan resides with his wife and daughter.

Paul Kent

By the time of the election, Kent had left the Respondent's employ and returned to work for FOX on the Detroit Piston productions. According to Kent, he was not paying attention to the receipt of his ballot until he heard from other people in Detroit that they had received their ballots and returned them. Kent contacted Skorich and Skorich suggested he email or phone the Board. Skorich gave Kent the email address of Pomianowski and a phone number. According to Board records, Kent left Pomianowski the following voice mail message on Friday, November 25, 2016, at 11:32 a.m.:

> Hey Eric my name is Paul Kent and, ah, I did not receive a ballot of the NHRA union. I was hoping you could overnight me one [TEXT REDACTED IN ORIGINAL] so again my name is Paul Kent. I'm sure you have all the information but I did not receive my ballot for the NHRA union vote so I need one hopefully in the mail today and I can either get it tomorrow or Monday and sent it right back out Monday, so my phone is [TEXT REDACTED IN ORIGINAL].
> Thank you.

Kent testified that he also sent Pomianowski an email requesting a replacement ballot.

Between November 25 and December 4, Kent was travelling away from home. His neighbor generally collects his mail when he is not home.

Board records indicate that a replacement ballot was mailed to Kent on November 29.

Kent was home from December 4 to 6 and claims he did not receive the replacement ballot during that time. He went back on the road December 6 and returned home on December 9. When he returned home, the ballot was among his mail. Kent mailed the ballot out on December 10, but the ballot was not counted.

ANALYSIS AND CONCLUSIONS

8(a)(1) Allegations

Gurrola Speech on September 15

1. Solicitation of employee grievances and implied promise to fix them

The General Counsel contends that the Respondent began soliciting employee grievances during the Union organizing campaign and impliedly promised to fix them. I agree. The

[17] Logan initially testified that he called Flores on November 28, but subsequently testified that he called him on November 30. Logan's phone records for this time period were introduced into evidence, but he did not attempt to identify on those phone records the call he placed to Flores. Since a replacement ballot was mailed to Logan on November 28, I find it likely that he called Flores that day.

mere solicitation of grievances during an organizing campaign is not unlawful and the "Board will not draw an inference of implicit promise where solicitations are simply a continuation of an ongoing established practice of soliciting employee grievances." *Manor Care of Easton, PA, LLC*, 356 NLRB 202, 220–21 (2010). However, the Board has rejected such a defense in the following situations:

> The Board has ruled in the following situations that an employer cannot rely on past practice to justify solicitation of employee grievances where the employer significantly alters its past manner and methods of solicitation: soliciting grievances more frequently than regularly done in the past, *Grede Foundries, Inc. (Milwaukee)*, 205 NLRB 39 (1973); searching out grievances more carefully than before, *Rotek, Incorporated,* 194 NLRB 453 (1971); initiating group discussions of employee grievances where the employer had merely discussed grievances on an individual basis previously, *Flight Safety, Inc.*, 197 NLRB 223 (1972); and the installation of a suggestion box where one had not previously been located, *H. L. Meyer Company, Inc.*, 177 NLRB 565 (1969).

"The Board has long held that the essence of the violation in solicitation of grievances is not the solicitation itself but the inference that the employer will redress problems." *Ace Hardware Corp.*, 271 NLRB 1174 (1984). Thus, "[c]rucial to a conclusion of implied redress is a finding that the employer interfered with, restrained, and/or coerced employees in their union activities, which is manifested by such factors as change in past practice, announcement of new policy, and timing and context of such change." Id. Further, "an employer is not free during a union campaign—regardless of its past solicitation practice—to solicit new grievances and tell employees as to their grievances, 'they would try to fix them'; '[t]hey were going to try and solve them in a timely manner'; '[t]hey were going to come up with solutions for these'; that some issues 'would not be fixed overnight' but '[o]ther things, they were going to try to fix.'" *Manor Care of Easton, PA, LLC*, 356 NLRB 202, 220–221 (2010).

Here, the totality of the circumstances warrant a finding that the Respondent unlawfully solicited grievances and impliedly promised to correct them. However, preliminarily, I do not agree with the General Counsel's factual assertion that the Respondent began an entirely new practice of soliciting grievances at the race in Charlotte, North Carolina. Gurrola testified that it was her practice to walk around at events and ask employees whether she could be of assistance. According to Gurrola, she always did this at events, including the first race of the 2016 season in Pomona (prior to the union organizing campaign).

Nevertheless, the manner in which the Respondent addressed employee concerns in response to the organizing campaign was considerably different than anything it had done in the past. Gurrola gave a speech to all the event workers with CEO Clifford and other managers present. The evidence does not indicate she has done this before or that Clifford previously came with her to events. The sudden appearance of the CEO and the vice president of human resources, who asked employees to "give us an opportunity to fix issues," in the context of an antiunion speech, would suggest to employees that the Respondent was taking their complaints more seriously as a result of the organizing drive. Indeed, employees raised complaints about their working conditions early in the season and the Respondent did not seek to address those complaints until the Union arrived on the scene months later. Gurrola only came to one (the first) of the first 18 races from February to September, but came to the last six races after learning that employees might unionize. Further, after Dean complained to Gurrola about the per diem policy (at the race Charlotte), the Respondent changed that policy as of the next race in St. Louis. Under these circumstances, a reasonable employee would understand the Respondent to be signaling a more receptive approach to resolving employee complaints if they rejected the Union as their bargaining representative.

Based on the foregoing, I find that the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and impliedly promising to fix them.

2. Threat of unspecified reprisals

The General Counsel contends that the Respondent unlawfully threatened employees with unspecified reprisals by telling them there would be consequences if they joined the Union. I do not agree. The broader context of Gurrola's comment about "consequences" are as follows:

> You all have every right, and I don't want to make any qualms about it, you have every right to talk to a union rep, to engage in conversations with them and [unintelligible] and even vote the union if that is what you chose to do. But . . . I want to tell you what NHRA thinks about it or what I think about it as a matter of fact in human resources. We don't feel it is . . . a productive thing to a relationship to get into. For starters . . . there are consequences, okay? Once you entered into—once there's a union, there's now a third party in our relationship. If I right now, if you have issues or anything you wanted to discuss, you can come to me.

Gurrola expressly assured employees that they have the right to unionize before mentioning that there would be consequences for doing so—i.e., the introduction of a third party into the relationship between the Respondent and its employees. The consequences were not unspecified and, as defined by Gurrola, did not constitute an unlawful threat. Gurrola did proceed to unlawfully solicit grievances as a carrot for not unionizing, but did not suggest that unionizing would be met with a retaliatory stick. Quite the contrary, as noted above, she assured employees that they could talk to union representatives and vote for the Union. Accordingly, I will dismiss the allegation that the Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they unionized.

3. Impression of surveillance

The General Counsel contends, and I agree, that the Respondent created the impression among employees that their union activity was under surveillance when Gurrola made the following comments (emphasizing portions in italics):

> I wanted to come out … and find out really how . . . it all the works and I'll try to do my best. I'll be here till Sunday to get

> an opportunity to do that. But I also wanted to talk about another really important thing that has come up and that is the union '*cause I know that some of you have been approached and talked to about perhaps going in the union* and I wanted to have the opportunity to tell you what we think about it . . . .
>
> You all have every right, and I don't want to make any qualms about it, you have every right to talk to a union rep, to engage in conversations with them and [unintelligible] and even vote the union if that is what you chose to do. But . . . I want to tell you what NHRA thinks about it or what I think about it as a matter of fact in human resources. We don't feel it is . . . a productive thing to a relationship to get into. For starters . . . there are consequences, okay?
>
> A lot of you may or may have not been asked to sign a card to join the union, and by doing so, you should know a couple of things. One is that you are giving them the right to represent you whether there is a vote or not a vote. And we don't want you to sign he card. We don't feel there's a need to do that.

"The Board's test for determining whether an employer has created an impression of surveillance is whether an employee would reasonably assume from the statement in question that his or another employee's union activities had been placed under surveillance." *Flamingo Las Vegas Operating Co.*, LLC, 359 NLRB 873 (2013) citing *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001) and United Charter Service, 306 NLRB 150 (1992).

The primary comment at issue is Gurrola's statement, "I know that some of you have been approached and talked to about perhaps going in the union . . . ."[18] The comment is troublesome absent an explanation from the Respondent as to how it learned this to be so. Significantly, at the previous race in Indianapolis, employees walked in and out of a meeting with Culleeny and saw Sobczak sitting at the bar. The General Counsel does not contend that Sobczak was engaged in unlawful surveillance. However, employees could reasonably believe from Gurrola's comments and Sobczak's presence outside the most recent union meeting that their activity was under surveillance. Under these circumstances, the onus was on the Respondent to explain how it knew employees had been approached and talked to about going union. *United Charter Service, Inc.*, 306 NLLRB 150, 151 (1992) (employer did not explain to the employees or show at the hearing that it ever was voluntarily given or had lawfully obtained knowledge of union activity). It failed to do so and, accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by creating the impression among employees that their union activity was under surveillance.

Email from Rokosa to Crew

The General Counsel contends that the Respondent acted unlawfully when Rokosa stated in a November 15 email to the production employees that offers of reemployment for the 2017 season would not be made until that status of the union representation was resolved. The relevant portion of the email reads as follows:

> Because we are In the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when we can
>
> > schedule you to work during 2017, based on your availability and our needs. We will also be able to confirm new terms for 2017. If the union wins the election, we will be obligated to bargain certain terms for the 2017 season and we do not know how long that might take.

The Respondent contends that the statement by Rokosa is compatible with Board law, but I disagree. The email indicates that the Respondent could not send 2017 job offers to employees who worked during the 2016 season until the election was conducted and, if the Union won, bargaining was concluded. However, the Respondent was legally entitled to make job offers whenever it desired upon employees' previous terms and conditions of employment. The email as written would give employees the false impression that they could not be rehired immediately because the Union petitioned for an election and, if the Union won, they would be subject to an additional indefinite delay. In my opinion, this is a powerful and inaccurate antiunion message. Accordingly, I find the that the Respondent violated Section 8(a)(1) of the Act by advising employees that they could not be rehired for the 2017 season until the election was held and, if the Union won the election, bargaining was completed. See *Atlantic Forest Products*, 282 NLRB 855, 857-859 (1987) cited with approval in *Lake Mary Health Care Associates, LLC*, 345 NLRB 544, 548 (2005).

8(a)(3) Allegation—Hess Discharge

The General Counsel contends that the Respondent discharged Hess because of his union activities. I agree.

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 that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549 fn. 6 (2008). The elements of the General Counsels initial burden "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014). Circumstantial evidence may be used by the General Counsel to meet its burden of showing employer knowledge and animus. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253-1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Such circumstantial evidence may include the timing of alleged dis-

[18] In my opinion, the subsequent comment that "[a] lot of you may or may have not been asked to sign a card to join the union" does little to add to the General Counsel's case since it is speculative and does not necessarily reflect something the Respondent knew.

criminatory action, general knowledge of and animus toward employees' union activities, failure to follow past practice, disparate treatment of discriminatees, shifting or irrational explanations for the treatment of discriminatees, and other contemporaneous unfair labor practices. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (May 31, 2018); *Novato Healthcare Center*, 365 NLRB No. 137 (2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

Here, the record contains significant evidence that Hess engaged in union activity, including the solicitation of support for the Union at meetings and elsewhere, the distribution by text of electronic links to a union authorization cards, and the dissemination of information regarding union meetings.

The record also contains significant circumstantial evidence that the Respondent knew of Hess's union activity and discharged him on that basis.[19] Initially, I note that the Respondent admittedly wanted to identify employees who were engaged in union activity. When Adelson learned from Stoll at the Indianapolis race that employees were discussing a union, he asked Stoll which employees were involved. We also know the Respondent did not want its employees to unionize and made certain comments to employees which exceeded the bounds of legality. These facts tend to support a finding of knowledge and animus.

The timing of the Respondent's discharge, shortly after it learned of the union organizing campaign, also suggests knowledge and a discriminatory motive. The Respondent learned about the organizing campaign on about September 4 and made the decision to discharge Hess about a week later.

The timing is particularly suspicious because the discharge was implemented in an abrupt and rushed manner without significant investigation. Adelman testified that the failure to play four clips on September 5 was an extraordinary event that upset the Respondent's primary sponsor. Accordingly, it is reasonable to conclude that the Respondent would want to avoid this ever happening again. Nevertheless, the Respondent did not talk to Hess, Dean, or West about what happened. Adelman and Rokosa summarily dismissed any concerns about mechanical (as opposed to human) error without much explanation and despite the fact that they knew there was a problem with the Xfile 3 over the weekend. That Rokosa allegedly found the Mello Yello clip on the server after the conclusion of the show on September 5 does little to explain the Respondent's response to the situation.[20] Three other clips which did not air were not found on the server and no attempt was made to determine when the Mello Yello clip was uploaded or how.[21] Hess testified to his understanding that one or two of the missing clips were ultimately uploaded through master control in truck B instead of the Xfile 3 in truck A. Even at trial, Adelson and Rokosa were unable to explain exactly what happened to the missing clips on September 5. The Respondent's rush to discharge Hess without a reasonable investigation of the incident, shortly after it learned of an unwanted union organizing campaign, strongly suggests knowledge of his union activity and a discriminatory motive for doing so.

Given that the Respondent was so rushed to be rid of Hess, it is not particularly surprising that it failed to provide Hess with a contemporaneous reason for the discharge that was consistent with its defense at trial. Skorich called Hess on September 14 and did not contest Hess's explanation that there was a major equipment malfunction. Rather, Skorich ambiguously attributed the discharge to a lack of organization and an inability to find "things" earlier in the weekend. Internal management emails following this call indicate that Adelman and Rokosa were aware of a problem with the Xfile 3 at some point during the Labor Day weekend. West's event report also stated that there was a problem with the Xfile 3 during the Indianapolis race. Yet, at trial, the Respondent attributed Hess's discharge to his failure to play the clips and rejected (without significant explanation) the issue of equipment malfunction. The Respondent's inconsistent and shifting reasons for discharging Hess are strong evidence of pretext and, in turn, its knowledge of and animus toward Hess's union activity.

The abrupt and ill-explained discharge of Hess is all the more suspicious given his replacement—i.e., Kent. Adelson testified that, before the 2016 season, he took considerable time to try to hire an experienced tape producer and considered Hess relatively inexperienced even though he (Hess) spent half the previous year as tape producer on the same production for ESPN. Adelson only hired Hess as the tape producer after two more experienced individuals turned down the job. Therefore, it is considerably surprising that Hess was so quickly replaced by Kent, who was an EVS operator with no tape producer experience. And although Adelson testified that Kent was familiar with the Respondent's operation, the record failed to indicate

[19] I do not find it appropriate to, as the General Counsel urges, apply the Board's "small plant doctrine" for the purpose of attributing knowledge of Hess's union activity to the Respondent. The drag races were staffed by a large number of event employees dispersed throughout the track and Hess engaged in most of his union activity outside the production truck (or away from the event entirely). The truck was a small space that housed a small staff, but the record contains little information regarding Hess's protected activity inside the truck. Hess did not testify how often he spoke to people inside the truck, to whom, and/or whether he did so openly without concern about the presence of management. Although I do conclude herein that the totality of the circumstances warrant a finding that the Respondent was aware of Hess's union activity and discharged him on that basis, I do not rely on the small plant doctrine to do so. *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564, 575 (2005); *Synergy Gas Corp.*, 290 NLRB 1098, 1102 (1988); *Aim Distribution System*, 282 NLRB 485, 492 (1986); *Volt Information Sciences*, 274 NLRB 308, 311 (1985).

[20] It is notable, particularly in light of other questions I already have regarding Rokosa's credibility, that the Mello Yello clip was not on the list or "melt" of segments uploaded from the Xfile 3 to the EVS server before the show on September 5. However, I do not find Rokosa's testimony to be significantly exculpatory even if it is credited.

[21] Screen shots of the melt, which were obtained by the Respondent during the trial, indicate that content was not loaded from the Xfile 3 to the EVS system from 8:50 to 10:13 a.m. This is about the time period that, according to Hess and Dean, they had trouble with the Xfile 3. Admittedly, the same document indicate that content resumed, sporadically, being loaded from the Xfile 3 to the EVS system after 10:13 a.m. However, the Respondent did not even look at this information until the discharge of Hess was being litigated. Accordingly, the Respondent did not determine what actually happened and consider whether those facts warranted discharge in the first place.

how many shows Kent worked for the Respondent in advance of the Charlotte race (when he replaced Hess). Hess did not identify Kent as an EVS operator who worked regularly on the show. Moreover, Kent was only available to work as the tape producer for three out of the last six events of the 2016 season because he returned to work for FOX. That the Respondent suddenly promoted a person with no tape producer experience and limited availability, without having thoroughly investigated the incident which purported to disqualify Hess for the tape producer position, is confounding and suggestive of pretext.[22]

I credit the testimony of Hess and Dean in their testimony that they notified management of the Xfile 3 malfunction early in the day. First, the Respondent did not call Skorich to testify and offered no explanation for its failure to do so. Its failure to explain the absence of a critical corroborating witness undermines the credibility of the witness it did call and, in turn, suggests that the Respondent has presented a pretextual defense. *Automated Business Machines*, 285 NLRB 1122, 1123 (1987).

However, one need not determine that Adelson testified in an intentionally false manner to determine that the General Counsel's theory of the facts is more likely. Adelson did not appear confident in his recollection that Hess failed to provide advance notice of the missing clips and did not specifically describe when or how he learned the clips were missing. Adelson may simply have a poor recollection of this subject because he did not take significant note of the problem at the time. This would be consistent with Hess's testimony that Adelson did not appear concerned when he was told about the missing clips and the Respondent's failure to mention the missing clips in explaining to Hess the reason for his discharge. Rokosa also testified that he was unaware, on September 5, that the Mello Yello feature was especially important and that three other clips were missing. Indeed, the evidence suggests that the Respondent has attempted to elevate what, at the time, was a relatively minor incident that did not warrant significant investigation into a dramatic act of misconduct for purposes of presenting a pretextual defense at trial.

Based upon the foregoing, I find that that the General Counsel established a prima facie case that the Respondent was aware of Hess's union activity and discharged him on that basis. This conclusion is warranted given the timing of the discharge shortly after the Respondent learned of the organizing campaign, the abrupt nature of the discharge without significant investigation, the sudden promotion of an EVS operator with no tape producer experience and limited availability, the failure to offer a consistent explanation for discharging Hess, and other evidence of pretext.

Having found that the General Counsel established a prima facie case, I consider and reject the Respondent's *Wright Line* defense. Adelson admitted that Hess's performance was adequate as of September 1, when Hess was granted a wage increase. The record does not specifically indicate that Hess did anything wrong from September 1 to 5 other than, arguably, his failure to air the missing clips. However, the Respondent cannot successfully claim it would have discharged Hess because of the missing clips, regardless of his union activity, since the Respondent did not actually attribute his discharge to those clips at the time. Rather, the uncontested evidence indicates that, both internally and in talking to Hess, the Respondent accepted Hess's explanation that the clips were missing because of an equipment malfunction. The Respondent is also, admittedly, in a difficult position to establish that its treatment of Hess was consistent with prior discharges since the operation was new. Nevertheless, the Respondent has the burden of establishing a *Wright Line* defense. Moreover, the second step of a *Wright Line* analysis is not necessary if the Respondent's stated reason for discharging the discriminatee, as found above, has been rejected as pretextual. *Parkview Lounge, LLC*, 366 NLRB No. 71 (2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

Based on the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hess because of his union support and/or activities.

Respondent's Objections

The Respondent contends in its objections that four employees were denied the opportunity to cast timely votes due to election irregularities caused by the Region and that the election should be set aside because the disenfranchised employees were sufficient in number to effect the election.[23] More specifically, the Respondent contends that the Region's mail intake process failed since Veney sent his ballot by two-day priority mail on November 28 and it was not stamped received by the Region until December 5. The Respondent also contends that the Region failed to send replacement ballots to Logan and Kent in a timely manner even though the employees attempted to contact the Region regarding their missing ballots. Finally, the Respondent objects to the Regions handling of requests by Ward (who did not testify) for replacement ballots. As discussed below, I reject the Respondent's objections as a basis for ordering a rerun election.

In *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 1389 (1998), the Board stated as follows:

> It is well established that when the conduct of a party to the election causes an employee to miss his opportunity to vote, the Board will set aside the results of the election if the employee's vote would have been determinative of the outcome of the election. [*Versail Mfg.*, 212 NLRB 592, 593 (1974); *Sahuaro Petroleum*, 3066 NLRB 5886, 586-587 (1992).] When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to

[22] It is also noteworthy that the Respondent did not offer the position to Dean (an alleged discriminatee in the original complaint and participant in the organizing campaign) as Dean was the lead EVS operator.

[23] The Board's rule on late mail ballots permits the counting of ballots that arrive after the due date and before the ballot count, but excludes mail ballots that arrive after the count is conducted. *Classic Valet Parking Inc.*, 363 NLRB No. 23 (2015). The Board has acknowledged that this may result in the exclusion of determinative ballots. ΦIn its brief, the Respondent cites Board decisions which have held that certain challenged ballots have been counted. However, this case involves objections (not challenges) and a request for a rerun election with everything that a rerun election entails, including the expungement of all ballots and additional delay.

> vote is not a basis for setting aside the election. *[Versail Mfg.*, supra.] The burden is on the objecting party, in this case the Employer, to come forward with evidence in support of its objection. [*Sahuaro Petroleum*, supra at 587.]

An employee, having been advised of the procedure and timing of the vote, maintains some responsibility for overcoming obstacles and casting a ballot. *Versail Mfg*., *Inc.*, 212 NLRB 592, 593 (1974). Thus, in *Waste Management of Northwest Louisiana, Inc.*, supra, the employer instructed an employee who was returning to work from disability to arrive for work at 8 a.m. (even though an election was scheduled to end at 7:30 a.m.). The employee arrived at 7:40 a.m., too late to vote. Nevertheless, the Board found that the employer was not to blame for disenfranchising the employee because its sole obligation was to post the election notice. The employer was not responsible for the employee's failure to arrive earlier than 7:30 a.m. in order to vote. In *Visiting Nurses Association of Metropolitan Atlanta, Inc.*, 314 NLRB 404 (1994), an employee arrived at the voting site 15 minutes before the close of the polls (after returning from work away from the facility). Before the employee could vote, she was called in for a brief discussion with her supervisor. The Board found that the employee was not disenfranchised by the employer because she did not make every effort to proceed directly and expeditiously from her brief conversation with her supervisor to the polling area. The Board has long reasoned that there "must be some degree of finality to the results of an election, and there are strong policy considerations favoring prompt completion of representation proceedings." *Versail Mfg., Inc.,* 212 NLRB 592, 593 (1974).

Veney

The record contains no evidence that the Region failed to mail Veney's ballot on November 15 and we do not know when the ballot was delivered to Veney's house (since we do not know when he left home to travel for Thanksgiving). We only know the ballot was waiting for Veney when he returned home on November 28.

The evidence does suggest that either the U.S. postal service or the Region erred in its handling of Veney's ballot. Either the postal service took more than two days to deliver the ballot to the Regional office or the Region failed to process the ballot in a timely manner. Interestingly, the evidence failed to establish that Veney or the Respondent attempted to use the tracking number on the postal receipt to track the package and determine when the ballot was delivered to the Regional office. I do not note this to establish an inference that the ballot was received by the Region, as stamped, on December 5. However, the burden of proving that an employee was disenfranchised by the Board is on the objecting party and we do not have evidence that could be expected to resolve the matter (or, at least, some discussion on the record as to why such evidence is missing). Under the circumstances, I do not find that the Respondent met its burden of establishing that the Board's mail intake process was the reason that Veney's ballot was not counted and I will not order a rerun election on that basis.

Logan

The evidence indicates that Logan was notified and aware of the time period allotted for the Region's receipt of mail ballots. The election notice specifically directed employees to call the Board if they did not receive their ballots by November 22 and provided two phone numbers for doing so. One was the Regional phone number which Logan first called on November 23 and the other was a national number that Logan did not call. Logan did not explain why he did not call the national phone number. Likewise, Logan did not email two Board agents directly after he was given their email addresses by Gurrola on November 26. Nevertheless, the Region did mail Logan a replacement ballot on November 28. Logan testified that he became busy around Thanksgiving because of work.

I do not find it optimal that Logan left voice mail messages for the Region on Wednesday, November 23 and Friday, November 25, and a replacement ballot was not mailed until Monday, November 28. However, Hess was able to successfully place a 2-minute call to the same Regional phone number Logan used and receive a replacement ballot in time for him to vote. Given Logan's knowledge of the deadline for voting and the directive that employees call for a replacement ballot if the original ballot was not received by December 22, it is hard to argue that he could not have made additional efforts to reach the Board. Further, the Region did mail a replacement ballot to Logan on November 28 in advance of the ballot count on December 2. Under the circumstances, I do not believe that Logan's failure to vote can be attributed to the Board, and any issue regarding his failure to do so is outweighed by the interest in a prompt completion of the representation proceeding.

Kent

It is my opinion and I find that the same rational which applies to Logan applies to Kent in that the situation required Kent to make more than a single call and send a single email to obtain a replacement ballot. Like Logan, Kent did not attempt to call both numbers listed for the Board on the election notice. As with Logan, although Kent was busy with work on a trip between November 25 and December 4, it is hard to believe he had no opportunity to place an additional call or calls to the Board during this time period. Further, since the evidence does not indicate that Kent was making arrangements to obtain his mail between November 25 and December 4, it does not appear that Kent would have been able to mail a timely ballot for receipt before the December 2 count (even if a replacement ballot was mailed to him much earlier). Finally, the Region did mail a replacement ballot to Kent on November 29 in advance of the ballot count on December 2. Under the circumstances, I do not believe that Kent's failure to have his vote counted can be attributed to the Board, and any issue regarding his failure to do so is outweighed by the interest in a prompt completion of the representation proceeding.

Ward

Ward requested replacement ballots on November 22 and 29, and the Region immediately mailed ballots on those same dates. Ward did not testify and the record is silent as to when he received the ballots or why he failed to mail a ballot earlier than December 1. Although it does seem somewhat odd that the Region did not receive the ballot until December 9, the

delay cannot be attributed to the Board. Further, the lengthy period between the ballot being postmarked (December 1) and being stamped received (December 9) matters little since it is highly unlikely that a ballot mailed on December 1 would arrive at the Regional office in time for the count on December 2. Accordingly, I do not find the evidence sufficient to establish that the Board disenfranchised Ward and I will not order a rerun election on that basis.

CONCLUSIONS OF LAW

1. The Respondent, National Hot Rod Association, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent engaged in the following unfair labor practices within the meaning of Section 8(a)(1) of the Act:

(a) Solicited employee grievances during a union organizing campaign and impliedly promised to fix them.

(b) Created the impression among its employees that their union activity was under surveillance.

(c) Advised employees they could not be rehired for the 2017 season until the election was held and, if the Union won the election, bargaining was conducted and completed.

3. The Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act by, on September 14, discharging Nathan Hess because of his union support and/or activity.

4. The unfair labor practices committed by the Respondent affect Commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent's election objections are rejected and do not constitute a basis for rerunning the election conducted in Case 29–RC–186622.

6. Since Hess was unlawfully discharged, his challenged ballot should be counted.

REMEDY

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

The Respondent, having unlawfully discharged Nathan Hess, must offer him reinstatement to his former job or if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges enjoyed.

The Respondent shall make Hess whole for any loss of earnings and other benefits suffered as a result of his discriminatory discharge. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Scoopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Hess for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Hess for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 22 a report allocating Hess's backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent will be required to remove from its files any reference to the unlawful discharge of Hess and notify him in writing that his unlawful discharge will not be used against him in any way.

The Respondent shall be ordered to post the notice attached hereto as "Appendix."

As I have found that the Respondent unlawfully discharged Hess, who cast a determinative challenged ballot, I will recommend that the challenge to his ballot be overruled and that it be opened and counted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, National Hot Rod Association, Glendora, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in union activity and/or supporting the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, CLC (Union) or any other union.

(b) Creating the impression among employees that their union activity is under surveillance.

(c) Advising employees that they could not be rehired for the 2017 season until the election was held and, if the Union won the election, bargaining was conducted and completed.

(d) In any like or related manner interfering, 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 Hess reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Hess whole for any loss of earnings and other

[24] 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.

benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Compensate Hess for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Glendora, California facility copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 22, 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, or are otherwise prevented from posting the notice at 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 14, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22 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.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you for engaging in union activities and/or supporting the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL–CIO, CLC (Union) or any other union.

WE WILL NOT solicit your grievances during a union organizing campaign and impliedly promise to fix them.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT falsely advise you that you cannot be rehired for the next racing season until an election is conducted among employees to determine whether you will be represented by the Union or any other union, or falsely advise you that, if a union wins the election, you cannot be rehired for the next racing season until bargaining is conducted and completed.

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.

WE WILL, within 14 days from the date of this Order, offer Nathan Hess full reinstatement to his former job or, if his 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 Hess whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Hess for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

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

NATIONAL HOT ROD ASSOCIATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-185569 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[25] 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."