National Captioning Institute, Inc. *and* National Association of Broadcast Employees & Technicians—Communications Workers of America, AFL–CIO. Cases 16–CA–182528, 16–CA–183953, 16–CA–187150, 16–CA–188322, and 16–CA–188346

October 29, 2019

DECISION, ORDER, AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On September 18, 2017, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision, Order, and Order Remanding.[3]

FACTS

1. The Union begins to organize, and the Respondent learns of Janice Marie Hall's union activity.

The Respondent is a nonprofit corporation that provides closed-captioning, subtitling, and media services. At the time of the events at issue in this consolidated proceeding, it had offices in Santa Clarita, California, Chantilly, Virginia, and Dallas, Texas. In early 2016,[4] the National Association of Broadcast Employees & Technicians—Communications Workers of America, AFL–CIO (CWA or Union) began a union organizing campaign among employees at the Respondent's Dallas and Santa Clarita offices. This proceeding involves the Respondent's actions allegedly in response to that campaign, including the discipline and discharge of active union supporters Janice Marie Hall and Mike Lukas.

In early May, shortly after learning that employees, including the steno captioners and voice writers[5] at the Dallas and Santa Clarita offices, were in contact with the CWA, the Respondent's president and chief operating officer, Jill Toschi, took the admittedly unusual step of searching the Respondent's in-house chat platform, Spark, for Hall's conversations.[6] Toschi testified that she initially searched Spark for evidence regarding an alleged rumor that Hall and a coworker were planning to quit and set up a competing business with one of the Respondent's clients. The judge did not explicitly credit or discredit this part of Toschi's testimony, although he elsewhere characterized Toschi's overall credibility as "deeply undercut." In any event, Toschi's Spark searches did not uncover information concerning any such plan. Instead, Toschi found messages by Hall vocally supporting the Union and holding herself out as a leader of the organizing campaign. For example, in a May 24 Spark log reviewed by Toschi, Hall told a coworker:

> [W]e are starting a union.
>
> All I can say is vote 'yes'!
>
> [M]e and a voice writer and a scheduler began this as soon as I returned from san antonio. We have found out sooooooooooo much stuff on our corrupt ceo and president and marketers.
>
> [I] have been in constant contact with the nlrb.[7]

Toschi sent several of Hall's Spark logs, including the May 24 log quoted above, to vice president for administration and HR Beth Nubbe. In this same May 24 Spark log, Hall complained about having to commute to the office to cover for a coworker who had recently un-

[1] Member Emanuel is recused and took no part in the consideration of this case.

[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.

[3] We shall adopt the judge's recommended Order as modified and set forth in full below. We shall substitute a new notice to conform to the Order as modified.

[4] All dates are 2016 unless otherwise specified.

[5] Steno captioners and voice writers both caption live and prerecorded television programs, but they do so in different ways. Steno captioners have received stenography training and convert voice to text in that manner. Voice writers use voice recognition software to convert spoken words into captions. Voice writers build a dictionary of computer macros (including broadcast-specific names) to enable less-common words to be quickly converted to text. Hall was a steno captioner and Lukas was a voice writer.

[6] Spark is a web-based chat platform, similar to group text messaging. Employees use Spark to converse with each other about both work and non-work topics. Employees frequently keep Spark running during non-working as well as working time.

[7] Spark also revealed Lukas's prounion stance, as he used the CWA logo as his Spark icon.

dergone surgery. Hall wrote in some detail about the surgery and asserted that the Respondent had underestimated the coworker's recovery time (and, consequently, Hall's in-office time as the coworker's substitute). Hall complained that she now worked full time in the office but without the higher in-office salary.[8] Spark logs also revealed that in April Hall attempted to learn how to connect her personal laptop to the Respondent's network. Nubbe flagged this portion of Hall's conversation and wrote "violation of policy" in the margin of her printout.

2. The Respondent disciplines Hall, promotes Lukas, and discovers a private employee Facebook group.

Hall had been employed by the Respondent as a steno captioner since 2001. She was the third most senior employee in the Dallas office, and she had trained many of the steno captioners working in and out of that office. Beginning in 2009, Hall generally worked remotely, either full time or in a "hybrid" position, i.e., with one in-office day per week.

Hall was known as a squeaky wheel who tenaciously pursued work-related issues. President Toschi and VP Nubbe were well acquainted with this fact, having recently addressed Hall's requests for insurance coverage for her domestic partner, corrections to her leave accrual rate, and permission to bring her service dog to the office. On June 12, Nubbe vented her annoyance in an email to Toschi, describing Hall's repeated requests and complaints as "insolence." Nubbe asked Toschi for "guidance on what disciplinary action we can take at this time to send the message that [Hall] needs to stop behavior that attempts to undermine management's authority." At Nubbe's request, Toschi provided Nubbe with Hall's Spark logs.

On June 13, an employee complained to Nubbe that Hall had inappropriately discussed the employee's medical information over Spark. Nubbe was already aware of Hall's disclosure because Toschi had sent her the Spark transcript of this (or a similar) conversation.[9] Two days later, Nubbe issued Hall a written warning for violating what, according to the judge, was the Respondent's "Unacceptable Behavior Policy" by

> 1) Accusing NCI management of dishonesty and acting in bad faith, in both direct communications to NCI management and to others in the company.
>
> 2) Complaining in an aggressive and hostile manner to management and co-workers about having to fill in temporarily for another co-worker and demanding an increase in your pay and benefits, notwithstanding the fact that as a Hybrid In-house Steno Captioner you are required to fill in for absent employees.
>
> 3) Spreading inaccurate and personal information about NCI employees.

In addition, Hall's warning reproduced the Respondent's Telecommunications and Computer Systems policy and stated:

> In addition to making changes to your method of communication, you must also follow NCI policies, including NCI's Telecommunications and Computer Systems policy . . . . The policy makes it clear that connecting a personal device to NCI's network without authorization is not allowed. . . . You are on notice that any violation of this policy will result in disciplinary action, including termination.

Turning to employee Lukas, the Respondent hired Lukas as a voice writer trainee in October 2015 along with Aaron Greenberg and Kenley Hoover. Like all new voice writers, Lukas, Greenberg, and Hoover had to pass a series of examinations to progress to intermediate on air (IOA) status, a prerequisite to captioning live television. The examinations test captioning speed and accuracy and require substantial practice and dictionary preparation. Manager Meredith Patterson testified that new voice writers should take about three months to achieve IOA status. However, the Respondent's workload at the time interfered with exam preparation, and Lukas complained that his work assignments did not help him prepare for his tests. Although it took them longer than expected, all three trainees ultimately passed their examinations and were promoted to IOA status. Hoover passed in late April, Lukas in June, and Greenberg a couple of weeks after Lukas. Greenberg in particular had difficulty passing the IOA exam. In a July 5 weekly-update email, manager Patterson reported to Toschi that while Lukas had passed his IOA exam, "[Greenberg] is likely to be let go because he hasn't been in the ballpark and he's well overdue now." Ultimately, Greenberg and Lukas were promoted to IOA status in July.

On June 28, President Toschi sent an email marked "Company Confidential" to all employees about the organizing drive (Toschi's union email). In it, Toschi referred to the CWA as an "outside force" attempting to intervene between the Respondent and employees. Toschi's union email listed a number of problems with unionization, such as mandatory dues and increased bu-

[8] Hall generally worked from home.

[9] There was some initial confusion as to how this coworker's medical information was disseminated because Director of Steno Captioning Darlene Parker and another supervisor had also openly discussed the employee's medical information with employees. Parker apologized to the employee for her inappropriate disclosure.

reaucracy that could threaten the Respondent's ability to reinvest its revenue in its own company and employees. Toschi urged employees to ask tough questions of the Union and to make the best decision for themselves, stating that "NCI is better for everyone without the CWA."

Meanwhile, in late May, employee Crystal Anderson had reported to Manager Patterson that at least one employee had posted prounion articles on Facebook. Patterson forwarded Anderson's information to Toschi. Anderson contacted Patterson again on June 23 to report that employees had been in contact with the CWA and formed a private Facebook group called the VW Bus. That same day, Patterson called Anderson for additional information, and Anderson supplied the names of the group's administrators and its 18 current members. Patterson told Toschi that she was "furious" about the group, particularly the involvement of two supervisors. Patterson reached out to Anderson on July 5, asking if Anderson was still part of the group, whether they had met with the CWA, and whether any other supervisors or coordinators were members. Anderson promptly responded with a detailed message about the activities of the group, including that employees were preparing a written response to Toschi's union email.

3. The Respondent announces the closure of the Dallas office, employees apply for remote positions, and Lukas is disciplined.

On June 30, President Toschi notified employees by email that they were required to attend a meeting "regarding the future of the Dallas facility," to be held at various times on July 7 and 8. Toschi's email did not say that the meetings were confidential. During the meetings, Toschi announced that the Respondent had decided to close its Dallas office, and she asked that employees keep the news to themselves until the Respondent could notify its stakeholders.

Lukas's meeting was scheduled for July 7, his day off, so he called into the meeting from home. Lukas's friend Michael Baker, a former employee of the Respondent, was with Lukas at the time of the call. Lukas put the call on speakerphone, so Baker heard Toschi's announcement. Shortly after the meeting, Baker sent a text to one of the Respondent's supervisors reacting to the meeting. That supervisor forwarded Baker's text to Patterson. At 3:48 p.m., Patterson informed Toschi that Baker and another individual knew about the meeting. At 4:09 p.m., Toschi sent an email marked "Company Confidential" to employees requesting that they "keep this information confidential within the company while we notify our affected clients and vendors." The next day, Toschi learned that it was Lukas who allowed Baker to listen to the call.

On July 11 at 5:17 a.m., employee supporters of the Union issued a lengthy response to Toschi's union email. The July 11 response was signed by ten employees, including Lukas. Twelve hours later, HR Representative Rochelle Johnson issued Lukas a written warning for an "egregious breach of duty of loyalty to your employer." The warning stated that Lukas "admittedly allowed former NCI employee Michael Baker to listen in on a company confidential telephone conference led by NCI's President and COO."[10] The Respondent contends that it wanted to prevent its vendors, clients, and landlord from learning of the closure prematurely. Toschi testified that some disclosures of the announcement, such as informing the Union, would not warrant discipline "[b]ecause there [would be] no consequence." The Respondent did not investigate whether Lukas or Baker revealed news of the closure to anyone.

The next day, manager Patterson sent an email to Toschi with the subject, "Background on those who signed union letter." The email included information on employees' union support, reaction to the closure announcement, and evaluative comments regarding individual signers' attitude, performance, and character. A few comments were positive.[11] Most comments, however, were negative.[12] Patterson wrote of Lukas as follows:

> Mike Lukas DOH 10.6.15, TX. IOA. Very slow trainee. Was very unhappy and vocal about being used on air before being promoted/paid more. Just passed his IOA tests and had promotion recommended on 7/10.

Following the closure announcement, the Respondent provided its Dallas employees with forms to use to apply to transfer to the Chantilly or Santa Clarita office or to become full-time remote employees. Although the Respondent did not spell out its retention criteria, the record establishes that it did not plan to reduce its captioner workforce. Most of the Dallas captioners, including Hall and Lukas, sought full-time remote positions, and Toschi testified that she sought to retain employees who could successfully handle full-time remote work and had the necessary equipment. After submitting her application for full-time remote work on July 12, Hall spoke with

[10] The Respondent also disciplined prounion employee Stacy Hawkins Gardner for attempting to record a portion of a closure-announcement meeting. However, Gardner attended one of the July 8 meetings, after Toschi warned employees to keep news of the closure confidential.

[11] One employee was described as "[d]edicated to NCI," and another was described as a "[v]ery helpful, generous, thoughtful coworker."

[12] Patterson referred to one employee as having "[s]howed poor judgment in the past regarding multiple issues" and as possessing a "[p]assive-aggressive personality"; another as "very gossipy and paranoid"; and a third as showing "no pride in his work except for what he enjoys" and having "an overly inflated ego."

Director of Steno Captioning Parker and was told that since she was already set up to work remotely, she should continue with her normal schedule.

4. The Respondent discharges Lukas and Hall and continues to monitor Spark for information about the organizing drive.

Before making her retention decisions, Toschi sought input from employees' immediate supervisors. Patterson, who oversees voice writers, wrote as follows regarding Lukas:

> Despite extended frustrations at the less-than-ideal situation in which he found himself for many months covering [IOA work] without officially being IOA, Mike persevered to achieve IOA status in early July. He works very early mornings (4 am EST and 3 am local) and works both Saturdays and Sundays.

Regarding Greenberg, Patterson wrote:

> Aaron has been a late bloomer as far as his testing and really struggled to finally reach IOA, which is why he is in the bottom quartile. He can make a lot of excuses as to why something is not going his way or why his quality isn't stronger, but when push came to shove, he passed his tests and evaluation period successfully. He works early mornings and weekends and has been covering his defaults for many months without having been promoted. He stuck it out despite extended frustrations and it would be a shame to lose someone who finally proved he was capable of rising to the challenge of the job.

On August 4, Toschi recommended that Hall and Lukas not be retained. She included the following comment about Lukas:

> Mike recently received HR disciplinary action. He has a history of poor attitude. He complained of being used for on-air work despite not having achieved IOA status. He finally achieved IOA status 11 months after his hire date, way outside of expected progression.[13] I would think this indicates [he] does not have the self-motivation or self-discipline required of a remote employee.

Toschi testified that she took her comments on Lukas's performance from Patterson's July 12 email providing background on employees who signed the response to Toschi's union email. In the August 4 document, Toschi recommended retaining Greenberg, who was hired at the same time as Lukas but took longer to pass the IOA exam, stating:

> Aaron is classified as 4th quartile because it took him a longer than desired time to work through his training. He has finally completed training and is a reliable employee.[14]

Toschi also included comments explaining that other fourth-quartile employees that she recommended retaining were "very new" or, in the case of one employee, ranked in the fourth quartile "because of her tenure."

On August 16, HR Representative Johnson sent the Respondent's managers an email with the subject, "Dallas decision process." Johnson informed management that the Respondent had completed its review of employee applications and had based its retention decisions on five factors: productivity, quality, reliability, disciplinary record, and seniority. The Respondent issued letters to Hall (August 19) and Lukas (August 23) rejecting their applications for full-time remote work because they "did not meet the minimum requirements." All other employees who applied for full-time remote work—27 in all—were approved.[15] This included Greenberg, who passed his final IOA exam after Lukas, and who had been on the verge of being discharged as recently as July 5. It also included employee Lupe Rojo, who had been removed from on-air work at the end of January because her work had fallen below required accuracy standards.

Meanwhile, throughout July and August, the Respondent, primarily through Toschi, continued to monitor employees' Spark conversations for references to the Union. Toschi enlisted the help of the Respondent's IT manager to run searches and prepare weekly summaries of his findings. The Respondent's CEO, Gene Chao, suggested search terms (such as CWA, union, and organize) to help Toschi search more effectively. Toschi finally stopped these searches "when it became increasingly clear to [her] that they were not nearing the stage of a [union] vote."

[13] Toschi's assertion was incorrect. Lukas passed his final IOA exam 8 months after his hire date and was promoted to IOA status the following month.

[14] Each department's employees are placed by their immediate supervisors into one of four quartiles based on several factors, including performance and flexibility in covering other employees' shifts. Generally, quartiles had been used in the past to evaluate employees' training needs. New employees, who had not yet mastered the skills and accuracy of more seasoned employees, were almost invariably ranked in the fourth quartile.

[15] A third employee, Tomy Duke, was also denied continued employment. Duke was not a captioner. He worked in the Broadcast department, one of the few departments that the Respondent sought to downsize. Like Lukas and Hall, Duke was ranked in the fourth quartile and had recent disciplines. Unlike Lukas and Hall, Duke sought a cross-country transfer to the Chantilly location. Toschi determined that Duke's services were not needed in Chantilly and that his transfer was not worth the expense.

DISCUSSION

For the reasons set forth below, we adopt the judge's finding that the Respondent engaged in unlawful surveillance of a private employee Facebook group, unlawfully disciplined Lukas, and unlawfully discharged Lukas and Hall because of their support for the organizing drive. We sever and remand allegations regarding the Respondent's maintenance of certain policies and its directive that employees not discuss the closure of the Dallas office. Finally, because the judge found that the Respondent unlawfully maintained an "Unacceptable Behavior" policy, and because Hall was disciplined pursuant to that alleged policy, we also sever and remand the allegation that her discipline was unlawful. As explained below, however, we will direct the judge to reconsider whether this policy actually exists.

1. Remand of work rule allegations

The complaint alleged, and the judge found, that the Respondent violated Section 8(a)(1) of the Act by maintaining its social media and unacceptable behavior policies and by directing employees to refrain from discussing the closure of the Dallas office. In finding these violations, the judge relied on the "reasonably construe" prong of *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). *Lutheran Heritage* was overruled in relevant part in *The Boeing Co.*, 365 NLRB No. 154 (2017). On October 2, 2018, the Board issued a Notice to Show Cause why the allegations regarding the social media and unacceptable behavior policies and the "do not discuss" directive should not be severed and remanded to the judge for further proceedings consistent with *Boeing.* No party responded to the Notice to Show Cause. We shall therefore remand the allegations regarding these policies and this directive to the administrative law judge to reopen the record, if necessary, and to prepare a supplemental decision setting forth credibility resolutions (if necessary), findings of fact, conclusions of law, and a recommend Order.

We observe that the only evidence that the Respondent maintains an Unacceptable Behavior policy is the written warning issued to Hall on June 15, which refers to Hall's "unacceptable behavior" but does not mention an Unacceptable Behavior policy. And in its exceptions, the Respondent contends that there is no evidence that this written warning was seen by any employee other than Hall. Accordingly, in preparing the supplemental decision, the judge is directed to address whether the reference to "unacceptable behavior" in the Respondent's June 15 written warning to Hall constitutes a work rule or simply an ad hoc directive. See, e.g., *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 4 fn. 8 (2019) (finding that an instruction that employees stop talking was an ad hoc statement and not the promulgation of a rule); *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 2 fn. 10 (2018) (finding that an instruction that a single employee stop heckling or insulting other employees was never repeated to another employee as a general requirement and thus was not the promulgation of a rule), enfd. mem. per curiam—Fed. Appx.—, 2019 WL 3229142 (D.C. Cir. July 12, 2019).[16]

2. The Respondent engaged in unlawful surveillance of the VW Bus Facebook group.

We find that the Respondent violated Section 8(a)(1) of the Act when it repeatedly solicited and received from employee Anderson reports about the membership of the VW Bus Facebook group and the messages posted on the group's Facebook page. It is well settled that an employer commits unlawful surveillance if it acts in a way that is out of the ordinary in order to observe union activity. See, e.g., *Sands Hotel & Casino*, 306 NLRB 172, 172 (1992), enfd. mem. sub nom. *S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993) (per curiam). Here, the Respondent encouraged an employee to report on a private, invitation-only Facebook group dedicated to discussions about unionizing the Respondent's employees. Although two prounion supervisors were members of the group, none of the Respondent's managers had access to its Facebook page. Once manager Patterson learned of it from Anderson, however, she encouraged Anderson to report on its content and membership. Patterson followed up on Anderson's initial reports with requests for additional information on the membership of the group and its activities. The Board has found such intentional monitoring of pro-union employees' Facebook postings to violate the Act. See *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1 fn. 4, 24–25 (2018).

We reject the Respondent's arguments that the Board cannot find surveillance here because the Respondent based no adverse employment action on the information it obtained and because employees were not aware of the surveillance. As to the former argument, out-of-the-ordinary surveillance of union activity is itself an unfair labor practice; an adverse employment action is not required to make out a violation of the Act. The latter argument is also unavailing because it is clear that at least one employee, Anderson, was aware that the Respondent was monitoring the Facebook group. See *Seton Co.*, 332 NLRB 979, 981 fn. 11 (2000) (knowledge of the respondent's filming by applicant who had been unlawful-

[16] In our analysis of the discipline and discharge allegations below, we do not rely on these remanded policies.

ly refused hire was sufficient to find unlawful surveillance even if employees were generally unaware of being filmed).[17] Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by its surveillance of the VW Bus Facebook group.[18]

3. The Respondent unlawfully disciplined Lukas.

We next consider whether the Respondent violated Section 8(a)(3) when it issued Lukas a written warning on July 11. The General Counsel contends that Lukas was disciplined because of his union activities, whereas the Respondent claims that it disciplined Lukas because he allowed a non-employee to listen in on a confidential company meeting. In evaluating allegations of unlawful discipline or discharge where motive is in dispute, the Board applies the standard set forth in *Wright Line*.[19] Under that standard, the General Counsel must first show that "union or other protected concerted activity was a substantial or motivating factor in the employer's decision to take adverse employment action against [one or more] employees." *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, slip op. at 3 (2019). To sustain this initial burden, the General Counsel must show "(1) union or protected concerted activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer." Id. Regarding the last of these elements, we reiterate that the evidence must be sufficient to establish that protected activity was a motivating factor in the adverse employment action at issue. As one court has succinctly stated, "an abstract dislike of unions is insufficient." *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015). If the General Counsel sustains his initial burden, the burden of proof shifts to the employer to show, if it can, that it would have taken the same adverse employment action even in the absence of the protected activity. *Wright Line*, 251 NLRB at 1089.

We find that the General Counsel has satisfied his initial burden. Lukas's engagement in protected activity and the Respondent's knowledge of that activity are not in dispute. The Respondent knew that Lukas was involved in the organizing drive since at least June 23, when employee Anderson gave manager Patterson the names of the members of the VW Bus Facebook group, including Lukas. Lukas's name also appeared in the July 11 response to President Toschi's June 28 union email, and Lukas used the CWA logo as his Spark icon.

Regarding the third element of the General Counsel's initial burden, we note the following. First, the Respondent's unlawful surveillance of the VW Bus Facebook group to keep tabs on the organizing drive supports a finding of antiunion animus.[20] Such animus is further evidenced by Patterson's comments about the employees who signed the July 11 response to Toschi's union email. Patterson criticized the attitude and performance of most of the signatory employees, including Lukas, in a manner that potentially paved the way for later retaliation.[21] Notably, in a different context, Patterson described Lukas's performance in positive terms ("Despite extended frustrations at the less-than-ideal situation in which he found

[17] *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224 (4th Cir. 2015), cited by the Respondent, does not warrant a different result. In that case, the court examined factors, including the employer's justification and the duration of the observation, in determining whether surveillance was unlawfully excessive. Id. at 236. Here, the Respondent has cited no business justification for monitoring the Facebook group, and the monitoring took place over the course of weeks.

Chairman Ring and Member Kaplan recognize that extant precedent makes it a violation of Sec. 8(a)(1) of the Act to engage in out-of-the-ordinary conduct in order to observe union activity, even if employees are unaware that they are being observed. See, e.g., *NLRB v. Grower-Shipper Vegetable Assn. of Central California*, 122 F.2d 368 (9th Cir. 1941) (seminal case regularly cited for proposition that surveillance may be unlawful regardless of whether it is known by employees). Because at least one employee was aware that the Respondent was engaged in surveillance of the VW Bus Facebook group, Chairman Ring and Member Kaplan need not and do not here pass on the soundness of that precedent. They note, however, the lack of meaningful analysis in that precedent regarding how an employer can "interfere[] with, restrain[], [or] coerce[] . . . employees in the exercise of the rights guaranteed by Section 7" by engaging in surveillance of which not a single employee is aware. Id. at 376. Chairman Ring and Member Kaplan would welcome the opportunity to revisit this precedent in a future appropriate proceeding.

[18] We find it unnecessary to decide whether the Respondent's searches of Spark for union-related discussions also constituted unlawful surveillance because this additional finding would not affect the remedy. We also find it unnecessary to rely on *Purple Communications*, 361 NLRB 1050 (2014), cited by the judge.

In agreement with the judge's decision, Member McFerran would find that the Respondent's targeted searches of Spark by multiple members of management to learn about the organizing drive also constituted unlawful surveillance, as did Nubbe's focused examination of Hall's Spark logs. As explained above, Toschi admitted that her examination of Spark logs was out of the ordinary but necessary to determine whether Hall was planning to quit and take one of the Respondent's clients with her. Despite finding no evidence of such plans, Toschi and Nubble (with the assistance of the Respondent's IT department), then engaged in regular searching and summarizing of Hall's Spark conversations, flagging Hall's conversation about connecting her personal laptop to the Respondent's server as a "violation of policy" that then appeared on Hall's written warning.

[19] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[20] See *Fairfax Hospital*, 310 NLRB 299, 301 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993) (per curiam), cert. denied 512 U.S. 1205 (1994). In addition, although we do not reach whether the Respondent's searches of Spark for mentions of the union organizing effort independently constituted coercive surveillance, we find that those searches further support a finding of antiunion animus.

[21] See *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, 365 NLRB No. 68, slip op. at 4 (2017) (finding animus from an employer's keeping a list of employees with negative code words used to indicate their union sympathies).

himself for many months covering [IOA work] without officially being IOA, Mike persevered to achieve IOA status in early July."), while painting a decidedly darker portrait when describing Lukas the prounion employee who signed the July 11 response ("Very slow trainee. Was very unhappy and vocal about being used on air before being promoted/paid more."). Finally, although the Respondent disciplined Lukas within 3 days of learning that he had permitted former employee Baker to listen in on a meeting during which the closure of the Dallas facility was announced, the discipline came just 12 hours after he was identified as a signatory on the response to Toschi's union email.

The timing of Lukas's discipline, standing alone, lends some support to a finding of animus.[22] Further support is found in evidence that the Respondent's stated reason for this discipline was pretextual. The warning stated that Lukas was being disciplined for an "egregious breach of duty of loyalty" because he allowed former employee Baker "to listen in on a company confidential telephone conference." The Respondent explains that it wanted to prevent its vendors, clients, and landlord from learning of the closure before the Respondent could inform them properly. Certainly, an employee's disclosure of confidential information could be grounds for discipline. Here, however, Lukas was disciplined for violating a confidentiality requirement that had not yet been imposed. The Respondent did not announce to employees in advance that the meeting was confidential. It was only after the meeting and after being notified that Baker had listened in that Toschi sent the Company Confidential email instructing employees to refrain from discussing the closure of the Dallas office.[23]

Moreover, the Respondent never investigated whether Lukas or Baker revealed the closure news to anyone else, let alone to the Respondent's landlord or any of its clients or vendors.[24] This is particularly troubling in light of Toschi's admission that some disclosures of that news, such as informing the Union, would not have warranted discipline "because there would be no consequence," together with the fact that Toschi did not explain what consequences resulted from Lukas's disclosure of the news to former employee Baker by allowing him to listen to the call.

For these reasons, we find that the Respondent has failed to sustain its *Wright Line* defense burden, and we conclude that the Respondent unlawfully disciplined Lukas because of his protected union activity in violation of Section 8(a)(3) and (1) of the Act.[25]

4. The Respondent unlawfully discharged Lukas.

We further find that the Respondent's discharge of Lukas was unlawful. Preliminarily, we agree with the judge that Lukas's discharge was unlawful because the Respondent relied on Lukas's unlawful discipline to justify his discharge.[26] However, even in the absence of the unlawful discipline, we would find that the Respondent violated Section 8(a)(3) by discharging Lukas.

For the reasons set forth above in connection with Lukas's discipline, we find that the General Counsel met his burden under *Wright Line* of establishing that union activity was a motivating factor in the Respondent's decision to discharge Lukas. The burden therefore shifted to the Respondent to show that it would have discharged Lukas even in the absence of his union activity. To sustain its burden, the Respondent contends that when it decided to close the Dallas office, it further decided that it would not retain Dallas employees who were in the fourth performance quartile and had been recently disciplined, and that Lukas met these two non-retention criteria. Lukas did indeed meet these criteria: he was in the fourth performance quartile, and he had been disciplined recently. However, for the following reasons, we find the evidence insufficient to support a finding that the Respondent in fact relied on those criteria in deciding whom to retain.

First, the Respondent had no plans to downsize its captioner workforce, and it articulated no retention criteria when it invited employees to apply to work remotely or transfer to another site. The decision to close the Dallas office was announced at meetings on July 7 and 8, and it was not until August 16 that retention criteria were stated. On that date, HR Representative Johnson informed management that HR had applied five criteria: productivity, quality, reliability, disciplinary record, and seniority. However, the Respondent now contends that it applied the different, two-criteria standard set forth above.[27]

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[22] See *Real Foods Co*., 350 NLRB 309, 312 (2007).

[23] The record contains no evidence that the Respondent had previously issued discipline based on a rule that it had created after the fact.

[24] See *Fairfax Hospital*, supra, 310 NLRB at 301 (finding that a failure to investigate an incident before discharging an employee is evidence of pretext.)

[25] We do not rely on the other factors listed by the judge in finding pretext.

[26] See *Southern Bakeries, LLC*, 366 NLRB No. 78, slip op. at 2 (2018) ("An employer's imposition of discipline violates Section 8(a)(3) and (1) if it relies on prior discipline that violates Section 8(a)(3) and (1), and the employer fails to show it would have issued the same discipline even without reliance on the prior unlawful discipline.").

[27] It is unclear what kind of discipline Toschi purported to consider in her retention decisions. When questioned at the hearing, Toschi could not answer whether discipline for minor infractions, such as tardiness, would be given the same weight as performance-related discipline. In addition, although Toschi testified that she considered

And it just so happens that this newly articulated two-criteria standard, which was *not* articulated at the time the retention decisions were made, was applied to deny retention only to Lukas and Hall.[28] These facts support a reasonable inference that the Respondent tailored its retention criteria after the fact, which is evidence of pretext. See *Desert Toyota*, 346 NLRB 118, 120 (2005), review denied mem. sub nom. *Machinists Local Lodge 845, AFL-CIO v. NLRB*, 265 Fed. Appx. 547 (9th Cir. 2008).

There is additional evidence that the Respondent did not in fact rely on this purported two-criteria standard when it decided not to retain Lukas. As described above, the record contains a copy of Toschi's August 4 email setting forth her retention recommendations. For each employee in the fourth quartile, she added a written comment "to explain my recommendation." To be consistent with the Respondent's claimed two-criteria standard (fourth quartile plus recent or active discipline), those comments should have been limited to whether the employee did or did not have a recent or active discipline. The comment for Lukas was not thus limited. In addition to stating that Lukas "recently received HR disciplinary action," Toschi noted that Lukas "has a history of poor attitude," that he "complained of being used for on-air work despite not having achieved IOA status," and that he achieved that status "way outside of expected progression. I would think this indicates [Lukas] does not have the self-motivation and self-discipline required of a remote employee." Thus, Toschi relied on more than quartile placement and recent discipline in recommending that Lukas not be retained. Significantly, Toschi testified that she took her August 4 comments regarding Lukas from Patterson's July 12 email—the email in which Patterson commented, mostly negatively, on the employees who signed the July 11 response to Toschi's union email. Toschi chose to rely on this description instead of the more positive assessment of Lukas's performance that Patterson provided during the same timeframe, in which she characterized Lukas as having "persevered to achieve IOA status" despite "the less-than-ideal situation in which he found himself for many months covering [IOA work] without officially being IOA." Moreover, Toschi's August 4 comments regarding Lukas are in stark contrast to her comments about employee Greenberg. Greenberg was on the verge of being discharged a month earlier because of his inability to pass the IOA exams, and he passed his final IOA exam *after* Lukas passed his. But whereas Lukas, in Toschi's telling, achieved IOA status "way outside of expected progression," Greenberg merely took "longer than desired . . . to work through his training." And whereas Toschi deemed Lukas's tardy achievement of IOA status to indicate that he "[did] not have the self-motivation and self-discipline required of a remote employee," she declared the even-more-tardy Greenberg "a reliable employee" and recommended approving him for a full-time remote position. This evidence is strongly indicative of pretext.

In sum, we find that the Respondent's stated reasons for discharging Lukas were pretextual—i.e., that it did not, in fact, rely on those stated reasons—and therefore the Respondent necessarily failed to establish that it would have discharged Lukas even in the absence of his union activity. See, e.g., *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("[I]f the evidence establishes that the reasons given for the [r]espondent's action are pretextual—that is, either false or not in fact relied upon—the [r]espondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."). We therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act in discharging Lukas.

5. Remand of allegation regarding Hall's discipline for further consideration.

The judge dismissed the allegation that the Respondent unlawfully disciplined Hall, finding that the Respondent would have disciplined Hall for disclosing a coworker's medical information even in the absence of her protected conduct. The Respondent listed several reasons for disciplining Hall, including three—accusing management of dishonesty and bad faith, complaining in an aggressive and hostile manner, and spreading inaccurate and personal information—that, taken together, the judge characterized as an "Unacceptable Behavior Policy" and found unlawful under *Lutheran Heritage Village*, supra. Because we now remand that policy to the judge for further consideration under *The Boeing Company*, supra, we also remand the allegation regarding Hall's discipline for further consideration. Clearly, the lawfulness of Hall's discipline is intertwined with the lawfulness of the "Un-

discipline within the previous six months, it is unclear when this six-month period began. For example, employee Lupe Rojo was issued a disciplinary memo on January 29 for falling below the Respondent's required accuracy rates, and she was taken off the air for retraining. January 29 was within six months of the July 7 and 8 announcement of the Dallas office closure and the subsequent invitation to apply for a transfer or to work remotely, and Rojo was in the fourth quartile. Nevertheless, the Respondent approved Rojo's application to work as a full-time remote employee.

[28] As mentioned above, a third employee, Duke, was also denied retention, but Duke worked in a department (Broadcast) that the Respondent wished to downsize, he sought a transfer to the Chantilly office, and his services were not needed in that office.

acceptable Behavior Policy," assuming such a policy exists. Accordingly, remand of both is appropriate.[29]

6. The Respondent unlawfully discharged Hall.

We adopt the judge's finding that the Respondent unlawfully discharged Hall because of her support for the union organizing drive. The Respondent was unquestionably aware of Hall's support for the organizing effort from reviewing her Spark logs. On Spark, Hall advocated for unionization and suggested that she was a driving force behind the effort, writing that "me and a voice writer and a scheduler began this. . . . [I] have been in constant contact with the nlrb." And, as explained above, the evidence supports a finding that the Respondent harbored animus towards its employees' union activities.

As with Lukas, the Respondent contends that it declined to retain Hall because she was in the fourth performance quartile and had been recently disciplined. This defense fails for some of the same reasons it fails with respect to Lukas's discharge. Thus, the two-criteria standard was announced after the fact; it conflicts with HR Representative Johnson's stated five-criteria standard (productivity, quality, reliability, disciplinary record, and seniority); and it conveniently targets only Hall and Lukas for non-retention among Dallas employees seeking a full-time position working remotely.

In addition, and as emphasized by the judge, applying the purported fourth-quartile-plus-discipline standard to disqualify Hall from continued full-time remote work conflicts with Toschi's stated goal of seeking to retain employees who could successfully work remotely. Hall, the third-most-senior employee at the Dallas office, had trained many of the steno captioners working in and out of that office. She was abundantly experienced with remote work, having worked remotely either full time or in a hybrid position (in the office one day a week) since 2009. Yet the Respondent discharged Hall while retaining employee Lupe Rojo for a remote-work position, even though, earlier that year, Rojo was removed from working on-air and retrained because her work had fallen below required accuracy standards. The Respondent also retained employee Greenberg, discussed above, who had never worked remotely and was on the verge of discharge a month earlier. Particularly in light of these comparators, the Respondent's explanation that Hall "did not meet the minimum requirements" for a remote position rings hollow considering Hall's considerable experience with exactly such work. We therefore conclude that the Respondent failed to show that it would have discharged Hall in the absence of her union activity, and we find that her discharge violated Section 8(a)(3) and (1) of the Act.

[29] As explained above, the judge is to determine on remand whether the Respondent did, in fact, maintain an Unacceptable Behavior Policy. If the judge finds that it did, and if he finds the policy unlawful under *The Boeing Company*, then the judge must further evaluate the lawfulness of Hall's discipline under the standard set forth in *Continental Group, Inc.*, 357 NLRB 409 (2011). Chairman Ring and Member Kaplan acknowledge that *Continental Group* is extant Board law, but they otherwise express no views regarding that decision.

Because we are remanding Hall's discipline for further consideration, we take the occasion to draw the judge's attention to two other issues relative to that discipline. First, although the judge found that Hall's union activity was a motivating factor in her discipline, he did not address the General Counsel's allegation that Hall also engaged in, and was disciplined for, protected concerted activity. Second, the judge found that the Respondent sustained its *Wright Line* defense burden as to Hall's discipline, but in so finding, he did not address whether the Respondent treated Hall disparately by disciplining her for disclosing a coworker's medical information, but not others who did likewise. We direct the judge to address these issues on remand.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activity by encouraging and receiving reports on the membership and activities of a pro-union private Facebook group.
3. The Respondent violated Section 8(a)(3) and (1) of the Act by disciplining and subsequently discharging employee Mike Lukas.
4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Janice Marie Hall.
5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

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

Having unlawfully discharged employees Mike Lukas and Janice Marie Hall, the Respondent must offer Lukas and Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Lukas and Hall whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers,*

Inc., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate Lukas and Hall for their search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate Lukas and Hall for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

We shall order the Respondent to remove from its files any reference to Lukas's unlawful discipline and to Lukas's and Hall's unlawful discharges, and to notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way. Finally, because the facility involved in this proceeding has closed, we will order the Respondent to mail the notice to all current and former employees who worked in or out of the former Dallas facility on the date of the Respondent's first unfair labor practice. See *Indian Hills Care Center*, 321 NLRB 144, 144 (1996) ("If the record indicates that the respondent's facility has closed, the Board routinely provides for mailing of the notice to employees."); *Wheelco Co.*, 260 NLRB 867, 868 fn. 7 (1982).[30]

ORDER

The National Labor Relations Board orders that the Respondent, National Captioning Institute, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in coercive surveillance of employee union activity by encouraging and receiving reports on union sympathizers' private Facebook group.

(b) Issuing written warnings, discharging, or otherwise discriminating against employees because of their support for or activities on behalf of the Union.

(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) Rescind the unlawful discipline issued to Mike Lukas.

(b) Within 14 days from the date of this Order, offer Mike Lukas and Janice Marie Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Mike Lukas and Janice Marie Hall whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d). Compensate Mike Lukas and Janice Marie Hall for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Mike Lukas and Janice Marie Hall and to the unlawful written warning issued to Lukas, and within 3 days thereafter, notify them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

(f) 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.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, a copy of the attached notice marked "Appendix" to all current and former employees who were employed by the Respondent at its former office in Dallas, Texas, on July 5, 2016, including those who worked remotely but were on the payroll of the Dallas office.[31] The notice shall also be distributed

[30] The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judg-

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.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

IT IS FURTHER ORDERED that the allegations that the Respondent violated Section 8(a)(1) of the Act by maintaining social media and unacceptable behavior policies and by directing employees to refrain from discussing the upcoming closure of its Dallas office without qualification as to the duration of that prohibition, and Section 8(a)(3) and (1) of the Act by disciplining employee Janice Marie Hall, are severed and remanded to Administrative Law Judge Robert A. Ringler for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall reopen the record (if necessary) and prepare a supplemental decision addressing the remanded allegations, setting forth credibility resolutions (if necessary), findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, 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 engage in surveillance of our employees' union activity by encouraging and receiving reports on union sympathizers' private Facebook group.

WE WILL NOT discipline, discharge, or otherwise discriminate against you for participating in activities on behalf of the National Association of Broadcast Employees & Technicians—Communications Workers of America, AFL–CIO.

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

WE WILL rescind the unlawful discipline issued to Mike Lukas.

WE WILL, within 14 days from the date of the Board's Order, offer Mike Lukas and Janice Marie Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mike Lukas and Janice Marie Hall whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mike Lukas and Janice Marie Hall for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for these employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Mike Lukas and Janice Marie Hall and the unlawful written warning issued to Lukas, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their discharges and discipline will not be used against them in any way.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL CAPTIONING INSTITUTE, INC.

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The Board's decision can be found at http://www.nlrb.gov/case/16-CA-182528 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.

Bryan Dooley, Esq., for the General Counsel.
Lynn Perry Parker, Esq. (LPP Law) and *Arthur T. Carter, Esq. (Littler Mendelson P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Fort Worth, Texas on May 8 and 9, 2017. The complaint alleged that the National Captioning Institute, Inc. (NCI or the Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act (the Act). On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' post-hearing briefs, I make the following[1]

FINDINGS OF FACT[2]

I. JURISDICTION

At all material times, NCI, a non-profit corporation, with offices in Dallas, Texas (the TX office), Santa Clarita, California (the CA office) and Chantilly, Virginia (the DC office), has provided closed-captioning, subtitling and other media services. Annually, it derives gross revenues in excess of $100,000, and purchases and receives at its offices goods valued in excess of $5,000 directly from out-of-state points. It, therefore, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act.

[1] NCI's unopposed *Motion to Correct Transcript Errors* is GRANTED and ADMITTED as R. Exh. 50. NCI was previously ORDERED to submit R. Exh. 50 to the court reporter for inclusion in the record.

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

NCI services national broadcasters, cable TV networks, corporations and universities. It is run by: Chairman and CEO Gene Chao; President and COO Jill Toschi; Vice President for Administration and HR Beth Nubbe; and Director Meredith Patterson. It employs about 200 employees in the following positions: steno captioners;[3] voice captioners;[4] engineers; and schedulers. Captioners often work remotely, once competency has been established.

In early–2016,[5] the National Association of Broadcast Employees & Technicians–Communications Workers of America, AFL–CIO (the Union) attempted to unionize NCI's TX and CA offices. COO Toschi learned about this drive in early May and promptly notified CEO Chao. (GC Exhs. 2–3). This case mainly involves NCI's reaction to the Union's organizing drive, which included its decision to fire 2 Union supporters, Janice Marie Hall and Mike Lukas.

B. NCI's Efforts to Monitor Employees' Union Activities

In May, Toschi began searching employees' chat logs on the Spark Messenger System (Spark) for Union discussions.[6] (GC Exhs. 4, 8, 10; Tr. 36). Chao also ran his own searches. (GC Exh. 7). On August 15, Chao asked Toschi to summarize her findings, which resulted in Hall being identified as a Union adherent. (GC Exh. 9). On June 23, Crystal Anderson, a non-supervisor, emailed Patterson and revealed that a coworker invited her to join the Union's Facebook page. (GC Exh. 11). She informed Patterson that: 18 employees, including Lukas, had already joined the Facebook page; and that a Union meeting was set for June 29. Patterson forwarded this email to Toschi. (Id.).

C. Toschi's Email to Management

On June 26, Toschi sent this email to NCI management about the Union:

> [E]mployees have been attempting to [unionize] ….
>
> There are a considerable number of employees … that have expressed interest …. [The] union … will be holding a meeting on June 29….
>
> [T]he threat is serious. NCI's position … is solidly against unionization. I will be sending a company-wide communication to this effect ….
>
> I want you to …. restrict your comments [to the following] …:
> NCI is against the union involvement

[3] They stenographically create closed-captioning for live broadcasting.

[4] They recite a broadcast into voice recognition software, which converts their oration into closed-captioning.

[5] All dates are hereinafter in 2016, unless otherwise stated.

[6] She said that she did not generally search employees' Spark logs before the Union campaign. (Tr. 72).

> Employees have the right to participate or not
> Employees who feel … coerced …. should let their manager know ….
> Unionization would increase costs … that could be better used on reinvestment in the company and its employees
> Unionization does not guarantee increased salaries but does guarantee that employees have to pay union dues ….

(GC Exh. 18).

D. Anti-Union Email to Employees

On June 28, Toschi sent this email to NCI's workforce:

> Our … path to success … is in jeopardy. There is an outside force trying to … restrict direct contact …, muddle communication, and demand … resources …. That force is the … CWA ….
>
> CWA is asking you to trust that if you pay mandatory dues, it will provide you better terms and conditions of employment …. [It] cannot make NCI agree to any term or condition of employment …. [and] can require you to go on strike….
>
> I believe that … CWA [is] unnecessary … [and] would be … detrimental ….

(GC Exh. 19).

E. Patterson's Interrogation[7]

On July 5, Patterson emailed Anderson and asked whether: she still had access to the Union's Facebook page; she knew anything about the upcoming meeting; and Brenna had posted anything. (GC Exh. 40). Anderson replied that Brenna was no longer posting.

F. Union's Reply to NCI's Anti-Union Email

On July 11, the Union's organizing committee, i.e., Lukas and 9 others, sent an email to NCI's workforce, which refuted Toschi's anti-Union points. (GC Exh. 23). On July 12, supervisor Patterson sent Toschi a mean-spirited synopsis of the Union's supporters, and made unsubstantiated accusations of: mental health issues; "overly inflated ego[s];" harboring "grudges;" "passive-aggressive personality" disorders; laziness; and "eerie quietness."[8] (Id.). She specifically derided Lukas as being "slow [and] …. unhappy." (Id.).

G. Decision to Close the TX Office and Announcement

In March, NCI began to weigh closing the TX office.[9] (R. Exh. 1). By June 30, a final closure decision was made. Toschi, thereafter, announced meetings on July 7 and 8 about "the future of the Dallas facility." (GC Exh. 20). Her announcement did not describe the upcoming meetings as being confidential, or hint at a forthcoming closure. (Id.).

On July 7, at various meetings, Toschi announced the TX office's impending closing. (R. Exh. 5). She asked employees to refrain from repeating her announcement, in order to give her the first chance to broach this topic with other stakeholders. (Id.). She did not, however, tell employees not to discuss the news internally, threaten connected discipline, or indicate how long her external discussion ban would be effective. (Tr. 70–71). Within hours of the meeting, she emailed employees, reannounced the closure, and asked them to "keep this information confidential … while we notify our affected clients and vendors." (Tr. 82; GC Exh. 25).

H. Transfer Options Provided to TX Office Employees

Following the closure announcement, NCI distributed packets to TX office workers, which summarized their transfer options, and enclosed employment applications. Their options included applying for remote (i.e., work-at-home) jobs, or transferring to the CA and DC offices. On August 16, HR Representative Rochelle Johnson emailed workers and stated:

> Each request was considered … on the basis of a number of factors …, including:
>
> Productivity[,] Quality [,]Reliability [,]Disciplinary record [and]Seniority
>
> Employees with a strong record … will likely have their first-choice request honored. Employees with a markedly weak record … may be denied their requests…. [M]ost employees have been granted their first-choice requests.

(GC Exh. 26).

I. Closure of the TX Office and Associated Discharges

The TX office closed on February 28, 2017. Out of the 33 affected workers, 2 transfers to the DC office were granted and 1 was denied, while 27 work-at-home requests were granted and 2 were denied (i.e., Hall and Lukas). (GC Exhs. 29–32).

J. Lukas' Employment History

On October 8, 2015, Lukas began his employment at the TX office as a voice writer trainee. He was promoted to an intermediate on-air (IOA) slot before his September 16 firing.

1. Union Activities

He participated in the Union's Facebook page and was listed as a supporter. His activity was reported to Toschi in June. (GC Exh. 11). He was also identified as an organizing committee member in the Union's July rebuttal email to Toschi. (GC Exhs. 19, 23, 24).

2. Written Warning about July 7 Incident

On July 7, Lukas and his family (i.e., wife and kids), and Michael Baker, a former NCI employee and friend, visited the Dallas Zoo. Following their outing, Baker returned to Lukas' home, where Lukas called into Toschi's closure announcement meeting, and placed the call on speakerphone, within Baker's

[7] This matter was not pled as a violation, although it likely was. See generally *Westwood Healthcare Center*, 330 NLRB 935 (2000).

[8] Toschi directed Patterson to prepare this report, on the basis of Chao's orders. (Tr. 86).

[9] The GC has not alleged that the TX closure decision was unlawful.

earshot. Lukas credibly testified that he did not think that permitting Baker to hear the call was of issue because he: did not reasonably suspect that it involved a closing; and rationally thought that it was non-sensitive.[10] Following the call, and unbeknownst to Lukas, Baker texted an NCI supervisor and raised his independent concerns about the closing. The supervisor told Patterson, who duly informed Toschi. (GC Exh. 21).

On July 11, Toschi issued Lukas a written warning for allowing Baker to overhear her closure announcement. The warning issued, without her first questioning Lukas about his actions or rationale, or any further investigation. The warning described his actions as an "egregious breach of [his] duty of loyalty," and threatened that similar misconduct would result in his firing. (GC Exh. 22). Toschi stated that she was appalled and "disgusted" by his actions.[11] (Tr. 79). She expressed concern that Baker could have prematurely shared the announcement with clients,[12] and said that she initially wanted to fire Lukas. She said that she was unaware that he was involved with the Union, before issuing his warning. (Tr. 369–70).[13]

3. Promotion

Following the closure announcement, Lukas was promoted to an IOA slot in July. (R. Exhs. 26–27). The promotion closely preceded his firing.

4. Termination

Following the closure meeting, Lukas applied for a remote position. On August 23, he was told that his "performance did not meet … minimum requirements" and he would be fired effective September 16. (GC Exh. 28). Toschi said that he was not retained because he was ranked in the 4th performance quartile,[14] and received a written warning within the last six months.[15] See (Tr. 90; R. Exh. 15). She defended that Tony Duke, another 4th quartile employee with pre-existing discipline, was also not retained.[16] (Tr. 405).

[10] Lukas' testimony on these points was credited. *First*, he was a straightforward witness, with a stellar demeanor. *Second*, his credibility was buttressed by NCI counsel's inexplicable failure to cross-examine him, and leave his testimony generally unrebutted. *Third*, his contention that he had no way of knowing that the meeting involved the closing was rational, given that NCI permitted him to call in remotely, kept the topic a secret and failed to otherwise advise him that the call was confidential.

[11] Her testimony on this point was incredible; it appeared to be a self-serving exaggeration about a minor issue.

[12] There is no evidence that Baker communicated the announcement to clients.

[13] Her testimony on this point was a misrepresentation, given that she was told by Patterson on June 23, i.e., about 2 weeks earlier, that Lukas was a member of the Union's Facebook page. See (GC Exh. 11).

[14] Quartile rankings are created annually for each employee by department directors. Patterson stated that all trainees start off in the 4th quartile because they are less efficient.

[15] NCI never eliminated his job and he was, thereafter, replaced with a new hire. (Tr. 324).

[16] This was something of a red herring, inasmuch as Duke sought a long distance transfer to the DC office, which likely involved added moving costs, as opposed to a work-at-home job as was the case with Lukas.

K. Hall's Employment History

In 2001, Hall began working for NCI in its DC office. She later transferred to the TX office in an in-house role. In 2009, she started working remotely out of her Dallas home. In June 2015, she moved from Dallas to San Antonio, and continued to work-at-home. She later returned to the TX office in a hybrid slot, where she mainly worked-at-home and worked in-house once per week. See also (R Exh. 45).

1. Union Activities

In April, Hall began encouraging coworkers to support the Union. She attended Union meetings, and averred that she was the sole captioner, who openly supported the Union. NCI became aware of these activities. On May 31, Toschi searched Spark and found a conversation between Hall and a coworker, where she rallied for unionization and called herself a "Union girl." (GC Exh. 6). On August 15, Chao identified Hall as a Union supporter. (GC Exh. 9). Toschi said that she knew about her actions. (Tr. 139).

2. Disciplinary History

a. Lateness and Missed Shifts Discipline

On February 18 and July 5, Hall was disciplined for missing her scheduled shifts. (GC Exh. 13; R. Exhs. 34, 37). The GC demonstrated that others missed their shifts, without disciplinary consequences. (GC Exhs. 46–47). Hall averred that her colleagues routinely arrived late, without discipline, and that NCI generally asked a coworker to stay longer for coverage.[17]

b. Professionalism Discipline

In March, Hall exchanged emails with Toschi, and complained that she had misled her about her leave accrual. (R. Exh. 11). In another email, Hall, who was seeking to bring a service dog to the office under the A.D.A., expressed frustration over NCI's delays. (GC Exh. 17; R. Exh. 35). Although she expressed irritation in both emails, she was not insubordinate. See also (R. Exh. 41). In June, one of her colleagues (the anonymous employee) complained to NCI that Hall had been sharing her private medical data.[18] (GC Exh. 16). On June 15, Hall received a written warning for unprofessional conduct on the basis of these incidents. (GC Exh. 12).

c. Re-Application and Termination

Following the closure announcement, Hall applied for a remote captioner position. On August 23, she was told that "did not meet the minimum requirements," and would be fired effective September 16. (GC Exh. 27). Toschi said that she rejected Hall because she was in the 4th performance quartile and received discipline in the last 6 months. See (R. Exh. 15). She

[17] This testimony has been credited. *First*, she was a credible witness, with a strong demeanor. *Second*, she openly admitting oversleeping (i.e., a detrimental fact), which aided her overall credibility. *Finally*, her testimony was consistent with NCI's documented failure to discipline others for similar transgressions. (GC Exhs. 46–47).

[18] Hall divulged medical information about the anonymous worker, while complaining about workplace coverage.

concluded that she could not work remotely, even though she had done so for many years.[19]

L. Challenged Personnel Policies

1. Social Media Policy

On April 11, Patterson issued this memorandum to the voice writing department:

> If you opt to post about your job on social media, it must be done responsibly … [Here are] … our guidelines ….
>
> **1. Do not post about NCI's software.** A lot of our software … was invented by NCI…. Don't post screenshots of our software … and do not refer to any of our software by name. Avoid anything other than vague descriptions ….
>
> **2. Do not identify clients by name ….** [D]on't post subjective commentary that could reflect poorly upon NCI's professionalism or reputation.
>
> **3. Refrain from commenting on the quality of other captioning.** ….
>
> **4. Don't use the NCI name on any posts that are Google-searchable.** Posts … are Googleable… It is fine to list your job title and employer name on your social media profiles.
>
> **5. You are NOT anonymous on the internet.** Online harassment … [that does not] reflect well upon NCI [is prohibited]….
>
> Please remember that these guidelines [will] … protect you from inadvertently crossing a line because doing so could have serious consequences ….

(GC Exh. 33).

2. Unacceptable Behavior policy

In a June 15 email, NCI issued Hall a written warning, which described its *Unacceptable Behavior* policy and the following associated prohibitions:

> (1) Accusing NCI management of dishonesty and acting in bad faith in both direct communications to NCI management and to others in the company.
> (2) Complaining in an aggressive and hostile manner to management and co-workers ….
> (3) Spreading … personal information about NCI employees…. [and]
> (4) [D]isparag[ing] and bully[ing] management ….

(GC Exh. 12).

[19] Toschi never explained this oddity, which deeply undercut her overall credibility.

III. ANALYSIS

A. 8(a)(1) Allegations

1. Social Media Policy[20]

NCI's *Social Media* Policy violated §8(a)(1). The Board has held that an employer violates the Act, when it maintains rules that reasonably tend to chill §7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board has held that a rule is unlawful, if it "explicitly restricts [§7] activities." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). However, if the rule does not explicitly restrict protected activities, it still violates the Act if, "(1) employees would reasonably construe the language to prohibit §7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of §7 rights." Id. at 647. The GC avers that the challenged rules would be reasonably construed by employees to bar §7 activity.

This policy is unlawful in several ways.[21] *First*, it restricts employees from generating social media posts that do not "reflect well upon NCI," or "could reflect poorly on NCI's professionalism or reputation." The Board has found analogous social media and blogging policies unlawful, given that employees would reasonably construe them to ban their §7 right to collectively criticize their employer or workplace.[22] *Second*, this policy improperly bans usage of NCI's name on any posts that are "Google-searchable," or "reference NCI, its operations, or its employees," which could reasonably be construed by employees to ban them from naming NCI in posts about their wages, hours or other terms and conditions of employment on any "Google-searchable" platform.[23] *Third*, it unlawfully bars employees, without qualification, from engaging in activities that NCI subjectively considers to be "online harassment," which could reasonably be construed by employees to bar online §7 activities such as solicitations to initially resistant coworkers to support the Union and lobbying of unsympathetic third parties to support a labor dispute[24] *Fourth*, its software posting ban leaves no exception for software postings that do

[20] This allegation is listed under complaint pars. 6 and 11.

[21] Although the GC contends that NCI's ban on commentary about competitors' captioning is unlawful, this contention is invalid. Banning employee commentary about competitors' captioning would not be reasonably construed by employees to prohibit their own legitimate §7 activities. This portion of the policy is, thus, valid.

[22] See, e.g., *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (statements that damage Costco); *Knauz BMW*, 358 NLRB 1754 (2012) ("disrespectful" conduct and "language which injures the image … of the Dealership."); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 fn. 4 (2015); *Direct TV U.S. Holdings*, 362 NLRB No. 48 (2015); *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 fns. 2, 3 (2015).

[23] See, e.g., *Costco*, supra; *Direct TV*, supra.

[24] Given that Board protects minor harassment, NCI's wholesale ban of all "online harassment" including protected minor harassment that is not misconduct is invalid. See *Pipe Realty Co.*, 313 NLRB 1289, 1290 (1994).

not reveal propriety matters, but, simultaneously touch upon collective concerns. Thus, for example, NCI's total software discussion ban would prohibit an employee's online posting about how difficult his job is due to the complexity of NCI's software, or prohibit a screen shot of wage data to be used for collective purposes. This ban, as a result, is overly broad and could reasonably be viewed by employees to restricting their §7 rights.[25]

2. Unacceptable Behavior Policy[26]

Multiple components of this policy, as described by Nubbe's June 15 email, are unlawful. *First*, this policy bars disrespectful workplace commentary, which could reasonably be construed by employees to ban statements of criticism of their employer.[27] *Second*, this policy, which bars "spreading … personal information" about one's coworkers could reasonably be construed by employees to ban sharing wage and other workplace data for collective purposes.[28]

3. Toschi's Directive to Not to Discuss the Closure[29]

Her July 7 directive to not report the closure was unlawful because she failed to indicate how long this ban would be effective. See also (GC Exh. 25). Given that the TX office's closing was a key workplace issue, her warning to not discuss it for an unlimited duration with outside entities effectively banned employees from consulting with news and media organizations, contacting the Union, raising the matter with government agencies, or posting concerns on social media. This ban, therefore, unlawfully chilled their §7 right to discuss this key workplace issue with 3rd parties. See *Lutheran Heritage*, supra.

4. Surveillance[30]

NCI has engaged in unlawful surveillance since May 9. Regarding electronic surveillance of email, chat logs and other electronic communications, the Board has held that:

> [Electronic] surveillance allegations [are addressed] by the same standards … [as] surveillance in the bricks-and-mortar world. Board law establishes that "those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary." An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists. Nor is an employer ordinarily prevented from notifying its employees, … that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system.

Purple Communications, 361 NLRB No. 126, slip op. at 15 (2014) (footnotes and citations omitted).

Toschi began searching Spark for Union references in May. She agreed that, before the Union campaign, she generally never searched Spark. Chao also began searching employees' communications, once learning about the Union campaign. These searches were "out of the ordinary," represented elevated "monitoring during an organizational campaign," focused on protected conduct and were, thus, unlawful surveillance. *Purple Communications*, supra.

B. 8(a)(3) Allegations[31]

1. Lukas

a. July 12 Written Warning

Lukas's written warning was unlawful. In assessing whether a personnel action violates §8(a)(3), the Board applies a mixed motive analysis. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the GC must first demonstrate, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. He satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If the GC meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it

[25] See, e.g., *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with other employees and with the union).

[26] This allegation is listed under complaint pars. 7 and 11.

[27] See, e.g., *Casino San Pablo*, 361 NLRB No. 148 (2014); *Knauz BMW*, supra.

[28] See, e.g., *Costco Wholesale Corp.*, supra.

[29] This allegation is listed under complaint pars. 8(a) and 11.

[30] The complaint was amended at the hearing to add an allegation that, since May 9, 2016, NCI has engaged in surveillance of employees' union activities. (Tr. 242–43).

[31] These allegations are listed under complaint pars. 9, 10 and 12.

would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

i. Prima Face Case

The GC satisfied his initial burden of showing that Lukas's protected conduct was a motivating factor in the adverse action. He engaged in extensive Union activity; specifically, he supported the Union, was a member of its Facebook page, and was listed on it email rebuttal to Toschi. Toschi was consistently made aware of these activities. See (GC Exhs. 11, 19, 23, 24). There is also abundant evidence of Union animus, which includes the several personnel policies found unlawful herein, unlawful surveillance and Patterson's openly hostile description of the employees who signed the Union's email. Lastly, the close timing between Lukas' Union activity and his written warning demonstrates animus. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

ii. NCI's Response

NCI averred that it would have taken the adverse action against Lukas absent his protected activity. It argued that he breached his duty of loyalty by permitting Baker to overhear Toschi's announcement, and that it would have disciplined anyone for this transgression.

iii. Analysis

NCI failed to demonstrate that it would have issued Lukas a written warning absent his Union activity. *First*, he did not knowingly breach a duty of loyalty. He was never given official notice that Toschi's unique meeting, which he casually called on his day off, was confidential. As a result, he cannot be fairly held accountable for a breach, when the duty was neither obvious nor communicated. *Second*, Toschi's overblown reaction to his relatively minor action rendered her stringent disciplinary measures suspect. Moreover, given that she repeatedly announced the TX office's closure to her staff, clients and others without any legitimate confidentiality safeguards, her exaggeration that she was disgusted by Lukas' leak seems overblown.[32] Her actions appear even more arbitrary, once one considers: that there was no evidence presented that NCI lost a client or was otherwise harmed; and that Lukas had a statutory right to discuss the closure with coworkers, the Union or other third parties, whose collective support he may have chosen to later enlist. *Third*, the legitimacy of his written warning is further undercut by the substantial level of Union animus present herein. *Fourth*, Toschi's claim that she would have issued him a warning absent his Union activities is further eviscerated by her overall lack of candor regarding his Union activities.[33] *Fifth*, NCI's inexplicable unwillingness to cross-examine Lukas following his very strong direct testimony deeply bolstered all aspects of his testimony. Simply put, the legal decision to leave wide patches of testimony on several key points virtually unchallenged amounted to a concession that he should be credited over Toschi on such points. *Sixth*, NCI's failure to conduct a comprehensive investigation of his actions, by minimally interviewing him about his rationale before meting out punishment delegitimizes its actions. Or put another way, an evenhanded employer, would have first completed a comprehensive investigation before issuing discipline. NCI's decision to shoot first and ask questions later rendered its actions suspect. *Finally*, the fact that NCI had the very obvious option of just counseling Lukas about this unique scenario without disciplining him, given it was likely aware of the effect that such discipline might have on his post-closure retention suggests invidious treatment. In sum, based upon the foregoing reasons, i.e., *many of which suffice in isolation*, NCI failed to show that it would have issued Lukas a written warning, absent his Union activity. His written warning was, therefore, unlawful.

b. September 16 Discharge

Lukas' connected termination was unlawful. As noted, the GC presented a prima facie case, which established Union activity, knowledge and animus. Although NCI contended that it would have terminated Lukas absent his Union activity because he had a combined 4th quartile performance ranking and recent discipline, this argument is unreasonable because his written warning was unlawful and must now be treated as a non-factor. Moreover, given that it is undisputed NCI retained all employees with 4th quartile rankings and no discipline (see also (GC Exhs. 29–32)), it follows that he would have been retained absent his unlawful warning. His termination, which solely flowed from his unlawful warning, was, thus, unlawful.[34]

2. Hall

a. June 15 Discipline

Hall's written warning was valid. As noted, her written warning stated, inter alia, that she, "violate[d] … standard[s] of professionalism … [by] spreading inaccurate and personal information about NCI employees." (GC Exh. 12).

i. Prima Face Case

The GC satisfied his initial burden that Hall's protected conduct was a motivating factor in the adverse action. She advocated for the Union and attended its meetings. NCI knew about these activities. There is also, as noted, abundant evidence of Union animus.[35]

[32] If Toschi genuinely wanted employees such as Lukas, who was off that day, to witness the meeting in a secured environment, she could have easily ordered them to attend in person or warned them to call in isolation. Her unwillingness to take these obvious steps undermines her contention that he knowingly breached a duty of loyalty.

[33] Her claim that she was unaware on July 11 (i.e. when his warning issued) that he was involved with the Union is "fake news," given that she was told by Patterson on June 23 that he was a member of the Union's Facebook page. (GC Exh. 11). Given her extensive surveillance, a claim that she failed to note his activities was implausible.

[34] This finding relies upon the same facts and analyses, which led to the finding that his warning was invalid.

[35] The timing between her Union activity and warning also adduces animus. See *La Gloria Oil & Gas Co.*, supra.

ii. NCI's Response and Analysis

NCI demonstrated, however, that it would have issued her a written warning, even absent her protected activity. It is undisputed that she spread detailed rumor, innuendo and information about a coworker's serious and private health condition on Spark. Given that NCI has an ongoing legal and moral obligation to protect the private health-related information of its employees, Hall's breach in this regard formed a fair and rational basis for her discipline. The anonymous employee, complained about her misconduct, which formed an independent basis for her discipline that was unconnected to her Union or other protected activities. The punishment of a written warning in this case seems to fit the crime, and NCI legitimately demonstrated that it would have issued a comparable punishment to a non-Union adherent.

b. September 16 Discharge

Hall's termination violated the Act. The GC, as noted, presented a prima facie case, which established Union activity, knowledge and animus. Although NCI averred that it legitimately refrained from offering Hall a position because she was in the 4th performance quartile and received a written warning in the last 6 months, this contention is unreasonable for several reasons. *First*, given that the stated goal of NCI's selection process was to fairly gauge who could effectively work remotely, it is irrational that it used its selection process to arbitrarily reject Hall, *who was already a proven and established remote worker*.[36] Simply put, NCI's claim that Hall, who had already been a remote worker for several years, "did not meet the minimum requirements," of a remote position is nonsensical. *Second*, it is equally inexplicable that NCI used its arbitrary process to retain employees, who had never worked remotely before, had less than a year of seniority and were in the 4th performance quartile (see, e.g., Victoria Verrando and Aaron Greenberg), over someone like Hall.[37] (GC Exhs. 29–32). *Third*, although NCI is contending that it applied a 2-part test to reject Hall (i.e., her performance ranking and disciplinary record), it initially communicated to employees that it would utilize a 5-part-test (i.e., productivity, quality, reliability, disciplinary record, and seniority). (GC Exh. 26). Its failure to satisfactorily explain why it used a 2-part test for Hall, when it first announced a 5-part test for everyone else, renders her handling suspect.[38] *Fourth*, NCI failed to explain what weight, if any, it gave to Hall's other very positive factors (i.e., her substantial seniority, and long-term record of reliability and experience in a remote job).[39] *Finally*, Toschi's claim that she fairly evaluated Hall, without any consideration of her Union activities, and blindly treated her the same way that she would have handled an employee without Union activity is unreliable.[40] On these bases, many of which independently suffice, NCI failed to show that it would have terminated Hall, absent her protected activity. Her firing was, thus, invalid.

CONCLUSIONS OF LAW

1. NCI is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. NCI violated §8(a)(1) by:

a. Maintaining a *Social Media* policy, which: prohibits employees from creating social media posts that "do…. not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that it considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

b. Maintaining an *Unacceptable Behavior* policy, which prohibits: disrespectful workplace commentary; and "spreading … personal information" about one's coworkers without citing an exception for wage and other personnel data.

c. Directing employees to not report the TX office's closure on July 7, 2016, without any qualification regarding duration.

d. Engaging in surveillance of employees' Union and other protected activities in emails, chat room logs and other electronic communications since May 9, 2016.

3. NCI violated §8(a)(3) by issuing Lukas a warning and later discharging him.

4. NCI violated §8(a)(3) by discharging Hall.

5. The unfair labor practices set forth above affect commerce within the meaning of §2(6) and (7) of the Act.

REMEDY

Having found that NCI committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

Regarding its unlawful personnel policies, it must rescind the overbroad Handbook rules, and furnish all current employees with inserts for their current Handbooks that (1) advise that

[36] If Toschi truly believed that she was unqualified for remote work, she would have previously discharged her, instead of contradictorily employing her remotely on a long-term basis.

[37] NCI conspicuously failed to explain these inconsistencies, which eviscerates its position on Hall.

[38] Although NCI avers that its 5-part retention test was a legitimate and fair review, this proposition is misleading and invalid. The issue is not whether NCI created a valid retention test (i.e., it admittedly did); the issue is that it ignored its own test, and applied it to Hall in a deeply discriminatory manner. The violation herein flows from this lapse, and not the test itself, which, if properly applied, would likely be acceptable.

[39] Hall was hired in 2001, and ranked 3rd in seniority amongst the TX office employees. (GC Exhs. 29–32). NCI failed to explain how, if at all, her seniority level was weighed. This failure was astonishing, given that NCI appears to have a high turnover (i.e., 16 of 21 employees in voice-writing and broadcasting were hired in 2014 or sooner). (Id.) Given this high turnover, her near-best, seniority rate should have weighed heavily in favor of her retention. The fact that it was ignored suggests invidious treatment.

[40] This claim is untrustworthy for many reasons. *First*, Toschi misrepresented her awareness of Lukas' Union activities, and then unlawfully disciplined him and fired him on this basis. *Second*, she came across as a highly practiced witness with a poor demeanor, who was more focused on adhering to her mental script than providing true testimony. *Third*, her claim of evenhandedness is undercut by the extensive record of Union animus found herein.

the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised Handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule. Given that its unlawful policies are maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities where the unlawful policy has been, or is, in effect. See *Longs Drug Stores California, Inc.,* 347 NLRB 500, 501 (2006); *Guardsmark LLC*, 344 NLRB 809, 812 (2005).

Regarding its unlawful disciplinary actions and firings, it is ordered to offer Lukas and Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It is further ordered to make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate them for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is also ordered to remove from its files any references to the unlawful warning and discharges, and within 3 days thereafter to notify them in writing that this has been done and that their discipline will not be used against them in any way. It shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[41]

ORDER

NCI, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a *Social Media* policy, which: prohibits employees from creating social media posts that "do…. not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that NCI subjectively considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

(b) Maintaining an *Unacceptable Behavior* policy, which bars: disrespectful workplace commentary; and "spreading … personal information" about one's coworkers, without citing an exception for wage and other personnel data.

(c) Directing employees to not report the TX office's closure, without any qualification regarding duration.

(d) Engaging in surveillance of employees' Union and other protected activities in their email messages, chat room logs and other electronic communications.

(e) Issuing written warnings, discharging, or otherwise discriminating against its employees on the basis of their union or other protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing its 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) Rescind or modify the language in the *Social Media* policy to the extent that it: prohibits employees from creating social media posts that "do…. not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that NCI subjectively considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

(b) Rescind or modify the language in the *Unacceptable Behavior* policy to the extent that it bars disrespectful workplace commentary and prohibits "spreading … personal information" about coworkers without citing an exception for wage and other workplace data.

(c) Furnish all current employees with inserts for the Employee Handbook that

1. Advise that the unlawful rule has been rescinded, or

2. Provide the language of lawful rule or publish and distribute a revised Employee Handbook that

i. Does not contain the unlawful rule, or
ii. Provides the language of lawful rule.

(d) Within 14 days from the date of this Order, offer Lukas and Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Hall and Lukas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(f) Compensate these employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and

[41] 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.

file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(g) Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges and Lukas' unlawful written warning, and within 3 days thereafter, notify them in writing that this has been done and that their discharges and discipline will not be used against them in any way.

(h) 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.

(i) Within 14 days after service by Region 16, post at its CA and DC offices copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director, 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 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, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since April 11, 2016.

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

Dated Washington, D.C. September 18, 2017

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 maintain a *Social Media* policy, which: prohibits employees from creating social media posts that "do…. not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that NCI subjectively considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

WE WILL NOT maintain an *Unacceptable Behavior* policy, which bars disrespectful workplace commentary and "spreading … personal information" about one's coworkers without citing an exception for wage and other workplace data.

WE WILL NOT tell you to not report the closure of your office, as we did in the case of the closure of the Texas office, without any qualification regarding the duration of our direction.

WE WILL NOT engage in surveillance of Union and other protected activities in your emails, chat room logs, the Spark system, or other electronic communications.

WE WILL NOT discharge, discipline or otherwise discriminate against you for participating in Union or any other protected concerted activities

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

WE WILL rescind or modify the language in our *Social Media* policy to the extent that it: prohibits employees from creating social media posts that "do…. not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that NCI subjectively considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

WE WILL rescind or modify the language in our *Unacceptable Behavior* policy to the extent that it bars disrespectful workplace commentary and "spreading … personal information" about one's coworkers without citing an exception for wage and other workplace data.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or

2. Provide the language of lawful provisions, or publish and

[42] 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."

distribute revised Employee Handbooks that:

a. Do not contain the unlawful provision, or
b. Provide the language of a lawful provision.

WE WILL within 14 days from the date of the Board's Order, offer Mike Lukas and Janice Marie Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lukas and Hall whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

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

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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-182528 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.