NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC, a single employer *and* Teamsters Local 456, International Brotherhood of Teamsters. Case 02–CA–220395

March 3, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 15, 2019, Administrative Law Judge Benjamin W. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed reply briefs.

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC, a single employer, Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within a reasonable time, reopen and restore the business operation of RAV Truck and Trailer Repairs as it existed on May 14, 2018."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 3, 2020

[1] 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.

On August 26, 2019, the Respondent filed a "Motion to Reopen the Record and Remand Matter To ALJ Benjamin Green." The motion requested that the Board reopen the record to accept into evidence a document purporting to be a signed 2017 tax return for RAV Truck and Trailer Repairs, Inc., to remand the case to Judge Green for consideration of this evidence, and to suspend the briefing schedule until the Board ruled on this motion. The General Counsel and Charging Party filed oppositions, and the Respondent filed a reply. On August 29, 2019, the Executive Secretary denied the Respondent's motion to the extent that it sought to stay the briefing schedule.

We deny the Respondent's "Motion to Reopen the Record and Remand Matter to ALJ Benjamin Green." In doing so, we find that the document presented in the Respondent's August 26, 2019 motion is not, in fact, the "actual signed tax return" requested by Judge Green at the hearing, but is instead a document signed by the Respondent's owner on January 14, 2019, and created by a different paid tax preparer than the document advanced at the hearing. For these reasons, we find that the judge did not err in declining to consider the document as evidence in his decision.

[2] We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by engaging in an unlawful partial closure of its business under *Textile Workers v. Darlington*, 380 U.S. 263 (1965). In addition to the evidence relied upon by the judge we also rely upon the unfair labor practices found in *Concrete Express of NY, LLC*, Case Nos. 02–CA–220381 et al. (Feb. 28, 2020) (unpublished auto-adopt), as evidence that the Respondent's closure of RAV Truck and Trailer Repairs, Inc. was motivated by a purpose of chilling the protected union activity of its remaining employees at Concrete Express of NY, LLC, and that the Respondent would reasonably have foreseen that this closure would have a chilling effect.

[3] With respect to the Respondent's exceptions to the judge's issuance of a reinstatement and backpay remedy, we note that evidence of a discriminatee's immigration status may properly be considered at the compliance stage of the proceedings. See *Tuv Taam Corp.*, 340 NLRB 756, 760–761 (2003).

We agree with the judge that a broad cease-and-desist order is warranted here, but the judge omitted the necessary justification of that remedy from his decision. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (stating that "each case will be analyzed to determine the nature and extent of the violations committed by a respondent so that the Board may tailor an appropriate order"). Because RAV Truck and Trailer Repairs, Inc. and Concrete Express of NY, LLC constitute a single employer, it is appropriate, in assessing the nature and extent of the violations committed, to consider both this case and *Concrete Express of NY, LLC*, 02–CA–220381 et al., supra. In this case, we have concluded that RAV and Concrete Express, a single employer, violated Sec. 8(a)(3) of the Act by discharging one employee and laying off a second for their union activities, and later closing RAV with the purpose and foreseeable effect of chilling union activity among the employees of Concrete Express. In 02–CA–220381 et al., we have adopted Judge Green's findings and conclusions that Concrete Express violated Sec. 8(a)(1) by threatening employees with discharge if they did not vote against the Union, threatening to close Concrete Express if employees elected the Union, interrogating employees regarding their union activities, and soliciting employee grievances and impliedly promising to remedy them, and Sec. 8(a)(3) by changing employees' parking privileges because employees engaged in union activities. We find that these violations warrant a broad order under either prong of the *Hickmott* standard. See *Hickmott Foods*, supra (holding that a broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"). We do, however, modify the judge's recommended Order in one respect. The judge included language that would require the Respondent to reopen and restore its truck and trailer repair operation within 14 days from the date the Order issues. We believe a 14-day time limit to reopen and restore a business is unrealistic. We will omit that time limit and instead require the Respondent to reopen and restore the business within a reasonable time. We shall substitute a new notice that reflects this change and to conform to the violations found and to the Board's standard remedial language.

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against you for supporting Teamsters Local 456, International Brotherhood of Teamsters (the Union) or any other labor organization.

WE WILL NOT partially close our business operation because employees sought to be represented by the Union or any other labor organization for purposes of collective bargaining, and do so with the intent and foreseeable effect of chilling the union activity of remaining employees.

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

WE WILL, within a reasonable time, reopen and restore the business operation of RAV Truck & Trailer Repairs, Inc. as it existed on May 14, 2018.

WE WILL, within 14 days from the date of the Board's Order, offer Jorge Alberto Valencia Medina and Victor Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jorge Alberto Valencia Medina and Victor Gonzalez whole for any loss of earnings and other benefits resulting from their discharges and/or layoffs, 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 Jorge Alberto Valencia Medina and Victor Gonzalez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

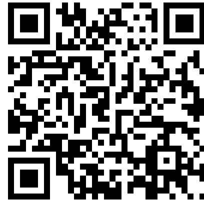
WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or layoffs of Jorge Alberto Valencia Medina and Victor Gonzalez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and/or layoffs will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics employed by the Respondent at its facility at 3773 Merritt Avenue, Bronx, NY, excluding all other employees, including clerical employees, guards, managers, professional employees, and supervisors as defined by the Act.

RAV TRUCK & TRAILER REPAIRS, INC. AND CONCRETE EXPRESS OF NY, LLC, A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/02-CA-220395 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.



Jamie Rucker, Esq. and *Rachel F. Feinberg, Esq.,* for the General Counsel.
Aaron T. Tulencik, Esq. (Mason Law Fir Co., L.P.A.), for the Respondent.
Bryan T. Arnault, Esq. (Blitman & King, LLP), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in New York, New York, on October 15, November 27 and 28, 2018.[1] The General Counsel alleges that the Respondent, RAV Truck & Trailer Repairs, Inc. (RAV) and Concrete Express of NY, LLC (Concrete Express), as a single employer, violated Section 8(a)(3) and (1) of the Act by discharging Jorge Alberto Valencia Medina,[2] laying off Victor Gonzalez, and closing RAV's business operation because employees engaged in union activity. The General Counsel also alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with arrest/deportation and business closure because they supported the Union, Teamsters Local 456, International Brotherhood Teamsters. The General Counsel seeks a bargaining order as part of the remedy of these alleged violations.

For reasons discussed below, I find that the Respondent unlawfully discharging Jorge, laid off Gonzalez, and closed RAV. I also find that a bargaining order is appropriate. I do not find and will dismiss allegations that the Respondent committed independent violations of Section 8(a)(1).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the General Counsel and the Respondent, I make these

FINDINGS OF FACT[3]

JURISDICTION

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

ALLEGED UNFAIR LABOR PRACTICES

Background

Trentini is the sole owner and officer of Concrete Express and RAV. He has owned a number of other companies since he went into business for himself in 1984. Before 1984, Trentini and Rafael Valencia, uncle of discriminatee Jorge, worked for the same company. Rafael has been employed by Trentini owned companies since 1984. Trentini estimated that he has hired about 50 employees over the course of his career as a small business owner.

Trentini testified that he understood I-9 forms to be forms that are used by employers to establish whether an applicant for employment is authorized to work in the United States.[4] The Immigration Reform and Control Act of 1986 (IRCA) requires employers to verify the identity and employment eligibility status of any person hired by having that employee complete an I-9 form and present certain documents (described in the I-9 form) that can verify his/her legal status to work in the country. An employer can be assessed civil and criminal penalties for knowingly employing undocumented workers. 8 U.S.C. 1324a.

Trentini testified that RAV asked newly hired employees for their social security numbers and driver's licenses, if they had one. During his time as a business owner, Trentini has not required applicants to submit documents establishing identify and employment authorization as set forth in I-9 forms. As indicated in the I-9 form, a driver's license can establish identity, but does not establish employment authorization (which requires additional documentation, such as a social security card).

Concrete Express

Since opening in 2006, Concrete Express has been engaged

---

[1] All dates refer to 2018 unless indicated otherwise.

[2] Herein, I refer to Jorge Alberto Valencia Medina and his uncle, Rafael Valencia, by their first names in order to avoid confusion between them.

[3] My factual findings are based in part on credibility determinations and, in this decision, I have credited some but not all of the testimony of certain witnesses. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 10 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

[4] A copy of the I-9 form can be accessed online at https://www.uscis.gov/i-9.

in the manufacture, wholesale, and retail sale of concrete from its principal place of business at 2279 Hollers Avenue, Bronx, New York (Hollers Avenue). Concrete Express also has access to 2277 Hollers Avenue and some adjacent public property it rents from the City of New York. Trentini estimated that the entire property Concrete Express has access to is 85 by 100 feet.

Concrete Express uses square mobile mixer cement trucks to deliver and mix concrete at remote customer locations. Trucks are loaded with the component materials (sand, gravel, water) and use an auger to mix the concrete. The trucks leave to the delivery site from Hollers Avenue, but are parked overnight at 3771 Merritt Avenue, Bronx, New York (3771 Merritt Avenue).[5] About 15 cement trucks are housed at 3771 Merritt Avenue. Trentini testified that he purchased six new trucks for Concrete Express in 2016 and began operating those trucks on a staggered basis as they were received and registered. Of the new trucks, the first was registered on October 4, 2016 and last two were registered on September 6, 2017. Concrete Express only operates the new trucks. The old trucks are no longer registered.

Concrete Express has employed a variable number of drivers at different times. In April, Concrete Express employed seven drivers. As of the hearing, Concrete Express employed four drivers and was operating five of the new trucks on a regular basis with Trentini sometimes driving the fifth truck himself. The sixth truck is used as a spare.

Rafael testified that he is employed by Concrete Express as a mechanic and yardman at Hollers Avenue. Trentini also performs mechanical repair work on Concrete Express trucks. Rafael testified that he spends 25 hours working as a mechanic and 20 hours working as a yardman. Rafael described his yardman work as using a machine to load trucks (loaders) with materials such as sand and gravel, and doing whatever else needs to be done in the yard. Rafael performs repairs on the loaders and the forklift.

Jorge testified that he was hired by Concrete Express in 2015 and worked as a mechanic at Hollers Avenue performing such tasks as changing hoses, changing lights, and changing auger blades on the cement trucks. Further, when Rafael was not at work, Jorge repaired the loaders, helped load materials on the trucks, leveled sand on the top of the trucks with a shovel, and sprayed down the yard with water. Jorge received his assignments from Rafael and Trentini. According to Trentini, Jorge was hired to assist Rafael.

Trentini's sister-in-law, Diane Denti, is employed by Concrete Express and works in the office at Hollers Avenue. Trentini testified that Denti maintains the personnel files and is responsible for personnel decisions, such as hiring and firing. Trentini initially denied he was involved in the recent discharge of two drivers (one for theft of concrete and one for failing a drug test). However, upon cross-examination, Trentini reluctantly disclosed that he investigated the theft of concrete and advised the drug testing company that Concrete Express was opting to discharge the driver who failed the drug test.

I take administrative notice of certain facts associated with the representation case, *Concrete Express of NY, LLC*, 02–RC–218783. The Union filed the petition in that case on April 19 and an election was conducted on May 10 among Concrete Express employees in the following unit:

> All full-time and regular part-time drivers and mechanics employed by the Employer at 2279 Hollers Avenue, Bronx, New York, but excluding all clerical employees, guards, managers, professional employees and supervisors as defined by the Section 2(11) of the Act.

The tally of ballots shows that four employees voted in favor of representation and three employees opposed representation with one determinative challenged ballot. The sole challenge was to the ballot of Rafael, which was challenged by the Union on the ground that he is not a mechanic and, therefore, not a bargaining unit employee.

RAV

Trentini opened RAV, a truck repair business, in 2015. Trentini did all the hiring, firing, and disciplining of RAV employees. Trentini also assigned work to mechanics. Trentini testified that, in 2017, he hired an individual named Rudy (last name unknown) to perform certain administrative work. RAV hired Gonzalez as a mechanic in August 2016.

RAV's operation was originally located at 38 Edison Avenue, Mount Vernon, New York (Edison Avenue), which it rented from a nearby company called Petrillo. Edison Avenue is a 4,000 square foot four-bay garage with an 8,000 square foot fenced-in area outside. According to Trentini, the outdoor area was large enough to store about 15 trucks. RAV was certified by the New York State Department of Motor Vehicles as a registered repair shop and Edison Avenue was listed as RAV's address on the "official business certificate." RAV's last lease at Edison Avenue was scheduled to end on December 31, but the lease included an early termination provision upon 30 days written notice by either party.

At trial, RAV produced an undated and unsigned 2017 federal tax return which lists the company's taxable income as a loss of $274,370.[6] The tax return includes Form 1125-A for "Cost of Goods Sold." These costs do not include any expense for the cost of labor, but do include an itemized cost for "subcontractors" of $215,807. Trentini testified that RAV did not use subcontractors. Trentini generally denied knowing anything about RAV's financial accounting and how his account-

[5] I take administrative notice that Hollers Avenue and 3771 Merritt Avenue are less than 0.5 miles apart based upon directions obtained from Google Maps. See *Bud Antle, Inc.*, 359 NLRB 1257, 1258 fn. 3 (2013), reaffd. 361 NLRB 873 (2014).

[6] I conditionally admitted RAV's 2017 tax return as a business record over the General Counsel's objection, with the qualification that the return be replaced with one that was signed and dated. See *Armstrong v. Curves International, Inc.*, 2017 WL 5256997, at *4 (W.D. Tex. Nov. 2, 2017) (tax returns, signed by the taxpayer under penalty of perjury, and filed with the taxing authority under risk of criminal charges if fraudulent, have an inherent indicia of reliability and trustworthiness, and qualify as business records under FRE 803(6)). However, the Respondent did not replace the unsigned tax return with a signed tax return.

ant arrived at the figures in the tax return. And although Trentini claimed, "I know my numbers," he subsequently admitted he was not particularly familiar with RAV's costs because, in his words, "I'm not in there." (Tr. 214.) Thus, Trentini was not familiar with the monthly payroll or the costs of goods. Trentini testified, "I don't follow numbers. . . . I'm lackadaisical when it comes to stuff like that; I got too many things on my mind." (Tr. 214.)

RAV performed repairs on trucks owned by various companies, including Concrete Express and Petrillo. Trentini admitted that, during the winter months, RAV reserved one of the four bays in the garage for cleaning Concrete Express trucks. RAV invoices for the repair of Concrete Express trucks were entered into evidence. Those invoices were stamped, "paid."

Trentini testified that his brother-in-law, George Denti, was employed by RAV for about 4 or 5 months when the company initially opened and that George[7] prepared some invoices. Then, after Rudy was hired in 2017, he prepared invoices. Trentini testified that Rudy decided whether to prepare invoices for work on Concrete Express trucks. Trentini also admitted he did not know what repairs Rudy recorded for invoices to Concrete Express since he (Trentini) did not spend much time at Merritt Avenue.

The record contains 14 RAV invoices to Concrete Express during the period May 16, 2016, to November 28, 2016 (perhaps the invoices prepared by George). There is a gap in the invoices from November 2016 to June 2017. The record contains another 19 RAV invoices to Concrete Express during the period June 26, 2017, to November 20, 2017 (perhaps the invoices prepared by Rudy). When asked about the absence of RAV invoices to Concrete Express after November 20, 2017, Trentini testified, "It's a shop that handles it. I'm not in the shop all the time. I'm not always told what's done all the time." (Tr. 257.) Trentini admitted that RAV repaired Concrete Express trucks from November 2017 to May.

Trentini initially testified, quite decisively and in detail, that Concrete Express paid the invoices from RAV by check. Trentini was subsequently questioned regarding the Respondent's failure to produce such checks in response to the Union's subpoena duces tecum.[8] Extensive discussion among counsel ensued as to whether I should draw an adverse inference that the invoices were not paid because the checks were not produced. Although Trentini was identified as the Respondent's custodian of records, he denied knowledge of the documents the Respondent produced and did not produce in response to the subpoenas. Respondent's counsel represented that he did not consider that the checks might be documents responsive to the subpoenas and assumed responsibility for the oversite. Toward the end of the Respondent's case, I offered Respondent's counsel an opportunity to testify and provide an explanation on the record for the failure to produce the missing checks. Respondent's counsel asked for and was granted 5 minutes off the record to speak with Trentini.

After the break, Trentini was called back to the stand and asked how Concrete Express paid for RAV services. Trentini testified that Concrete Express paid RAV for services rendered by reducing funds owed on a loan Concrete Express extended to RAV when it opened in 2015. According to Trentini, these transactions would have been recorded by Concrete Express's accountant. Trentini testified that there was no written agreement between the two companies reflecting the terms of the loan and he did not know the amount of the initial loan. Trentini estimated that RAV still owed Concrete Express $12,000 to $15,000. However, under Schedule L for "other Current Liabilities" of RAV's 2017 unsigned tax return, an amount of $20,000 is listed as "due to Concrete Express." This tax return also reflects that $20,000 was due to Concrete Express at the start of the 2017 tax year and remained $20,000 at the end of the tax year. Meanwhile, RAV invoices reflect that significant work was performed by RAV on Concrete Express trucks in 2017. Further, the Respondent was unable to produce any documents showing an actual accounting write down of the loans in response to Union subpoenas which requested such information. Ultimately, Trentini's testimony deteriorated and became extremely confused on the subject. At one point, Trentini testified, "there's checks that are for loans and there's checks that are for repairs. So, I don't know how the accountant arrived at the numbers. I gave them a check for repairs, I also gave him checks for loans."[9] (Tr. 310.)

Gonzalez performed mechanical repairs on trucks owned by Concrete Express and other companies. Gonzalez received his assignments from Trentini and Rudy. The tasks that Gonzalez performed included changing oil and changing the auger blades for mixing concrete. According to Gonzalez, Trentini told him RAV was repairing new Concrete Trucks even though they were under warranty because the dealership took too long to repair them.

In addition to working at Edison Avenue, if Concrete Express had a problem starting a truck, Gonzalez went to Hollers Avenue to start it. Gonzalez testified that this happened two to four times per week. Trentini testified that Rudy probably did

[7] George Denti is referred to by his first name to avoid confusion with his wife, Diane Denti.

[8] The Union entered into evidence subpoenas duces tecum it served on RAV and Concrete Express. Request number 26 of each subpoena sought, "True copies of any documents or communications reflecting the transfer of funds between Concrete Express and RAV, including but not limited to the amount(s) involved, reason(s) for, and date(s) of transfer of funds." (CP Exh. 1-2.)

[9] Trentini's testimony on this subject was not credible. As noted above, RAV's 2017 tax return contradicts his claim that RAV paid Concrete Express by reducing the amount owned on a loan. Although, as discussed below, the unsigned tax return is not reliable as a business record to be used by the Respondent to establish losses, it is useful as the nonhearsay admission of an opposing party. FRE 801(d)(2). Aside from the tax return, if RAV's accountant had reduced the loan from Concrete Express by amounts reflecting the cost of RAV repair work, there would be accounting records which should have been produced in response to the Union's subpoenas. I grant the General Counsel's request for an adverse inference and find that Concrete Express did not pay the RAV invoices. See *Essex Valley Visiting Nurses Assn.*, 356 NLRB 146 (2010), three-member panel affg, 352 NLRB 427, 442 (2008) (judge refused to credit employer's witness that rent was paid and, instead, inferred it was not paid where the employer failed to produce substantiating subpoenaed documents). I not only discredit Trentini on this point, but find his overall credibility diminished by a willingness to reverse his testimony as the defense required.

not prepare invoices for this type of work because it only took about 15 minutes to jump start a vehicle. According to Trentini, an invoice would not be prepared unless a vehicle was taken to RAV's repair shop. However, as discussed above, Trentini did not evince a firm understanding or knowledge of when and how RAV's Concrete Express invoices were prepared. When asked what other services RAV provided to Concrete Express free of charge, Trentini answered, "I don't know. It's just whatever Rudy made up an invoice or he didn't. And I don't know. I'm not—I don't spend all my time in the shop so they—whatever they did, they did." (Tr. 261.)

Jorge testified that he was permanently transferred from Concrete Express at Hollers Avenue to RAV at Edison Avenue in late 2017. According to Jorge, he worked at Edison Avenue as a mechanic performing work on Concrete Express trucks and trucks owned by other companies, including Petrillo. Jorge estimated that, at Edison Avenue, he worked on Concrete Express trucks about 2 hours a day and other trucks the rest of the time. Jorge also testified that he would sometimes go to Hollers Avenue to "review and check out" the Concrete Express trucks. (Tr. 115.)

Trentini denied that Jorge was permanently transferred to RAV at Edison Avenue in 2017. Rather, according to Trentini, Jorge was temporarily assigned to Edison Avenue to work on Concrete Express trucks during the winter months of 2017. Trentini claimed that Concrete Express trucks, which were new, did not require much repair work and RAV mechanics did not work on such trucks unless they had nothing else to do. However, Trentini admitted he was not familiar with all of RAV's work because, in his words, "I don't spend too much time there. I, you know, I just go there. Everything okay, and I leave. I don't spend too much time there. . . . It ran itself." (Tr. 181)

In February, Petrillo terminated RAV's lease at Edison Avenue. At the time, according to Trentini, RAV had outstanding work on only two Petrillo trucks—a road sweeper and a tractor dump trailer. Trentini claims he decided to go out of business after RAV completed its work on these two vehicles. According to Trentini, he notified his customers that RAV was going out of business and laid Rudy off.[10] Trentini further testified that he gave Gonzalez a list of prospective employers and advised him, "we were losing the lease, that we have to move to another location, just to finish the work and then, you know, start looking for work."[11] (Tr. 170.) Gonzalez denies Trentini told him RAV was losing its lease or closing. Rather, Gonzalez testified that Trentini told him RAV was moving to a larger space.

RAV entered into a new lease, dated March 23, for 600 square feet of garage space and one garage door at 3773 Merritt Avenue, Bronx, New York (3773 Merritt Avenue). Although the new space has a different postal address than 3771 Merritt Avenue (used by Concrete Express to house trucks), 3771 Merritt Avenue and 3773 Merritt Avenue are one building with a single open internal space. Trentini estimated that the entire building is 7500 or 8000 square feet. The property has no area for outdoor parking. Trentini appeared to testify that RAV used the entire space at Merritt Avenue (3771 and 3773) for repairs of the Petrillo trailer, but his testimony was unclear on the subject. The lease for 3773 Merritt Avenue states that it is a "[w]arehouse space for the repair of commercial vehicles to finish remaining repairs from previous location. No repairs to be done prior to April 1, 2018 due to the interior sewer lines being broken." (R. Exh. 6.) The lease was month to month with a minimum rent for the term of March 1 to May 31.

Gonzalez testified that he was transferred by RAV from Edison Avenue to Merritt Avenue in early 2018. According to Gonzalez, at Merritt Avenue, he continued working on various trucks, including trucks owned by Concrete Express, Petrillo, RCA, Greenpatch and others. Following his transfer, Gonzalez did not notice any change in the type or amount of work he previously performed at Edison Avenue. Among his duties, Gonzalez continued to go to Hollers Avenue to start trucks two to four times per week.

Jorge testified that he was transferred by RAV from Edison Avenue to Merritt Avenue in about January or February but was unsure of the date and admitted it could have been as late as April. Jorge also testified that his workload reduced a bit when he moved to Merritt Avenue. According to Jorge, at Merritt Avenue, he worked on Concrete Express trucks, a sweeper, and a truck. The sweeper needed a new engine and the truck needed new electrical cables. Jorge testified that he also swept and cleaned the space at Merritt Avenue. Jorge estimated that, the week before he was terminated, he spent about 30 minutes sweeping per day.

Trentini denied that Jorge was permanently transferred to RAV at Merritt Avenue until May, about a week and a half before he (Jorge) was discharged. However, Trentini also testified that Jorge worked on third-party Petrillo and RCA trucks before he was transferred (work performed by RAV, not Concrete Express). Trentini generally denied that RAV, at Merritt Avenue, worked on trucks other than the two Petrillo vehicles which still had repairs to complete from Edison Avenue. Trentini did admit that, at Merritt Avenue, RAV mechanics repaired Concrete Express trucks. Particularly, according to Trentini, Gonzalez and Jorge repaired the old trucks to get them ready for sale. Trentini has sold two of the old trucks.

Jorge was paid by Concrete Express through the first week of May. Jorge's last paystub from Concrete Express reflects that it covered the payroll period April 30 to May 6. While Jorge was paid by Concrete Express, he routinely worked overtime in excess of 40 hours per week. Jorge was first paid by RAV for the payroll period May 7–13. That week, Jorge worked an equivalent amount of overtime (8 hours) as he had in prior payroll periods with Concrete Express. As discussed below, Jorge was discharged on May 14 (the first day of the next payroll period).

Gonzalez was always paid by RAV and, like Jorge, regularly accumulated overtime in excess of 40 hours per week. During

[10] Although Trentini claims that Rudy was laid off in about February, it is noteworthy that RAV issued no invoices (prepared by Rudy) to Concrete Express after November 20, 2017. Trentini testified that RAV continued performing work on Concrete Express trucks through May.

[11] Gonzalez testified that Trentini gave him a list of prospective employers on the date he was laid off, May 21, and not before. I credit Gonzalez in this regard.

his last two full weeks of work, Gonzalez accrued 9.5 hours of overtime (May 7-13) and 3.75 hours of overtime (May 14–20).

Union Activity

In about February or March, Gonzalez spoke to Concrete Express drivers, who pick up their trucks at 3771 Merritt Avenue, about the Union. The drivers told Gonzalez he would receive better benefits with the Union. Around the same time, Gonzalez spoke to Union representatives Tony and Dominick. Tony and Dominick told Gonzalez they could get him good benefits if he joined the Union and he should keep in touch with the Concrete Express drivers.

On May 14, at about 12 or 12:30 p.m., Tony called Gonzalez at work and asked him to come outside. Gonzalez was on his break and came outside to meet with the Union representatives and an interpreter. They told Gonzalez he needed to sign an authorization card to obtain union membership. The union representatives then gave Gonzalez two cards. Gonzalez went back inside and gave Jorge one of the authorization cards. Gonzalez and Jorge filled out, signed, and dated their respective cards. Gonzalez then went back outside and gave the two cards to Tony.

Later that day, the Union filed with the Board and emailed Trentini a petition to represent the mechanics of RAV Trucking Corporation (RAV Trucking). RAV Trucking is not Respondent RAV, but a different company owned by Trentini. Although this petition named RAV Trucking as the employer, the address of the employer was listed as 3771 Merritt Avenue and the unit was described as "All full-time and regular part mechanics employed by the Employer." (GC Exh. 7) RAV Trucking does not employ mechanics or operate at Merritt Avenue.

On May 21, the Union filed a new petition for the same mechanics unit, but correctly named RAV as the employer. The Union emailed the petition to the Respondent at 4:57 p.m.

On May 22, the Union filed a third petition for the same mechanics unit but named RAV and RAV Trucking as a single or joint employer. The Union emailed the petition to the Respondent at 2:22 p.m.

Discharge of RAV Mechanics and RAV Closure

Trentini testified that, on some date prior to May 15, the owner of a nearby Metro Tire Shop, Frankie, told him, "there were rumor[s] that ICE was in the area checking businesses." Trentini added, "they've been in the area before, they just happened to be around at that time, too." (Tr. 294.)

Jorge testified that he had arguments with Rafael because Rafael threatened to call ICE (presumably, to have Jorge deported). The record does not clearly indicate when these arguments occurred. Trentini testified that Jorge and Rafael were having arguments prior to Jorge being moved to RAV on a full-time basis in advance of Jorge's anticipated separation. Trentini explained that he did not want "Jorge in retaliation that he may go after his uncle for the firing. So we moved him over to . . . [RAV] to separate the two, and then kind of lay him off later on." (Tr. 253–254.)

Trentini testified that he suspected Jorge did not have documentation authorizing him to work in the United States. According to Trentini, "There might have been a suspicion, but we didn't bother it. I mean . . . he's working, let him work. We never got any kickbacks from the IRS about social security number of anything like that. Usually, if there's a discrepancy they would let you know when you did the payrolls and stuff, and we didn't have that." (Tr. 296.) When asked what his suspicion was based on, Trentini testified, "Rafael saying that -- they had been into an argument about it if he went back to Mexico or the ICE is going to send him back to Mexico, he doesn't have a visa here." (Tr. 296.) It is not clear when Trentini developed a suspicion that Jorge was unauthorized to work in the United States. According to Trentini, "it's been heard. It's been around."[12] (Tr. 247.)

On May 15, Trentini, with his daughter Alexis Trentini and an interpreter, spoke to Gonzalez and Jorge. The interpreter was someone from a nearby tire repair shop (not Frankie). Gonzalez testified that Trentini said, "ICE agents . . . were going to find the different business to see who had documentation." (Tr. 78–79.) Trentini asked Gonzalez and Jorge whether they had documentation authorizing them to work in the United States. Gonzalez said he did and Jorge said he did not. According to Jorge, Trentini said "he couldn't give me more work because Immigration was checking immigration documentations." (Tr. 104.)

After Gonzalez provided his initial testimony about this conversation, he was asked by the General Counsel, "did Mr. Trentini say anything about what would happen if ICE showed up and somebody didn't have the correct papers?" Gonzalez answered, "That he was going to close down the shop, the business." (Tr. 78–79.) However, Jorge did not corroborate Gonzalez in this regard when the General Counsel specifically asked whether "Trentini or the interpreter said anything about what would happen if immigration authorities came?" Jorge responded, "No. They only told me that he didn't want any problems." [Tr. 104–105.] Trentini's description of this exchange, as follows, was similar to Jorge's (Tr. 246):

> I heard from his uncle that his papers were not legal. I heard that from Victor, his papers were not legal. So rather than get everybody in trouble, I approached him, I said, listen, you got, you know, your papers up to date and stuff? And he says no. I said, I can't have you here anymore, because ICE is in the area checking businesses. And we don't want a problem, and he doesn't want a problem. He doesn't want to get deported.

Alexis gave Jorge a letter to sign which stated that he was resigning. Trentini described this document as a "termination letter." Jorge refused to sign the letter. When asked whether the letter was prepared in advance, Trentini testified, "We heard about it before, but we had made up the letter and just to go there and see if they had their papers. If they didn't, they would have to that afternoon with the letter. . . . Because we knew they're in the area, so let's have something prepared in

[12] Trentini initially testified that he developed this suspicion in March. However, during his testimony, he repeatedly confused March and May. In an event, Trentini did not testify clearly as to the timing and it was my impression that he did not recall exactly when he began suspecting Jorge was undocumented.

case there's an issue." (Tr. 296.)

On May 21, at about 2:30 or 3 p.m., Trentini called Gonzalez and said, "he was going to close down the business because there was no work for [him]." (Tr. 79.) Gonzalez went to speak to Trentini in person about 10 minutes later and Trentini confirmed that Gonzalez was being laid off because there was no more work. Gonzalez testified that Trentini told him he should look for a new job and gave him the names of five prospective employers. Trentini testified that Gonzalez was discharged because RAV "was no longer in business. No more work to be done." (Tr. 58.)

As noted above, on May 21, the Union filed the second of three petitions which corrected the name of the employer. The Union emailed the petition to Trentini on May 21, at 4:57 p.m.

On May 31, RAV filed a statement of position in case 02–RC–220701, which stated, in part, as follows (GC Exh. 3):

> Further, the Union is seeking only to represent Mechanics. The Mechanic job classification is only in RAV Truck & Trailer Repairs Inc. There is only one person employed in the bargaining unit of Mechanic. Before this petition was filed, there was another Mechanic who was employed but he was terminated/quit because he was an illegal alien and the Company, upon discovery of this fact was by law required to terminate him. He is not eligible to vote and he cannot sign a card and he cannot be counted as an employee.

. . .

Further, as noted above, there is only one mechanic on the payroll and the NLRB does not certify a bargaining unit of one.

> . . .
> Finally, the final issue is the remaining Mechanic who is working for RAV Truck and Trailer Repair. He advised the Company he is legal and has his papers. However, he was laid off from work and has never presented the papers showing he can lawfully work in the United States. Therefore, the Company only has his verbal representation that he is lawful and may not be.

By email the same day, May 31, at 1:43 p.m., Respondent's counsel stated as follows with regard to the closing of RAV (GC Exh. 6):

> RAV Truck and Trailer will be shutting its doors. We will not go to the hearing tomorrow. It is now officially out of business.
>
> There are no longer any Mechanical positions available for RAV Truck and Trailer, and since the former two and now one employee were the only people working there, there are no longer any employees at RAV Truck and Trailer as of today. They are permanently laid off.
> We will notify the one Mechanic on layoff that we have closed RAV Truck and Trailer.

ANALYSIS

Single Employer

The General Counsel contends that RAV and Concrete Express constitute a single employer. I agree.

In determining whether two nominally separate entities are so integrated as to constitute a single employer, "the Board looks to four factors—common ownership, common management, interrelation of operations, and common control of labor relations. No single factor is controlling, and not all need to be present. Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Dow Chemical Co.*, 326 NLRB 288 (1998). Although no single criterion is controlling, the first factor (common ownership) is generally considered the least important and the fourth factor (common control of labor relations) is considered the most important. *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001); *Canned Foods, Inc.*, 332 NLRB 1449 (2000).

Here, regarding the first factor, Trentini owned RAV and Concrete Express.

Although Trentini attempted to down play his involvement in decisions at Concrete Express, the evidence indicates he was more involved than he sought to admit. Trentini admittedly hired Rafael. Trentini also conducted the investigation of an employee who was ultimately discharged for theft of concrete and made the decision to discharge an employee who failed a drug test. In addition to personnel decisions, Trentini testified that he bought and sold trucks on behalf of Concrete Express. Further, the person who, according to Trentini, makes personnel decisions at Concrete Express is his sister-in-law, Denti. The management of the two operations by family members suggests a close coordination among the two entities. *Brisitzky*, 323 NLRB 524, 525 (1997); *Imco/International Measurement & Control Co., Inc.*, 304 NLRB 738, 739 (1991). Thus, the record demonstrates common management and common control of labor relations between RAV and Concrete Express.

The evidence revealed additional integration of the two operations. RAV mechanics repaired Concrete Express trucks and occasionally came to Hollers Avenue to do so. Trentini also admits that Jorge was transferred to RAV on, at least, a temporary basis to work on Concrete Express trucks during the winter months. Further, Trentini admitted that Jorge was, ultimately, transferred to RAV and put on RAV's payroll when it was convenient for Concrete Express to do so.

The most definitive evidence of an integrated relationship between RAV and Concrete Express is the absence of an arms-length business relationship between them. Rudy and George prepared invoices and stamped them paid. However, the Respondent failed to produce subpoenaed records to establish that Concrete Express actually paid RAV for services rendered. Trentini's initially testimony that the invoices were paid by check turned on a dime once it was determined that the Respondent's failure to produce such subpoenaed checks could be problematic for the defense. Trentini subsequently testified, in a manner which was not credible, that the invoices were actually paid by write-downs of a loan instead of by check. Trentini did not explain why he suddenly changed his testimony. Fur-

ther, the Respondent did not produce subpoenaed accounting records of the alleged reductions in the amount of the loan. The only document produced by the Respondent was an unsigned tax return which indicates that money extended by Concrete Express to RAV remained the same throughout 2017 even though RAV, pursuant to its own invoices, did significant work on Concrete Express trucks that year.[13] Accordingly, I infer that Concrete Express did not pay RAV for work performed, and find that that the two companies failed to maintain an arms-length business relationship. See *Essex Valley Visiting Nurses Assn.*, 356 NLRB 146 (2010), three-member panel affg. 352 NLRB 427 (2008).

Based upon the foregoing, I find that all four factors of the single-employer analysis favor a finding that RAV and Concrete Express have been, at all relevant times, a single integrated enterprise.

Section 8(a)(1)

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by, on May 15, threatening employees with arrest/deportation and closure because of their union activity. I do not agree and will dismiss these allegations.

The General Counsel cites, among other cases, *North Hills Office Services,* 346 NLRB 1099, 1102 (2006), for the proposition that "threats involving immigration or deportation can be particularly coercive" because they place "in jeopardy not only the employees' jobs and working conditions, but also their ability to remain in their homes in the United States." However, the Board in *North Hills* found that the alleged threat did not constitute a violation, and explained its finding as follows:

> Here, the Respondent did not make a threat. It represented to employees its view of what the Union had done and what the Union allegedly planned on doing. The newsletter did not say that the Respondent had taken or would take any action regarding employees' immigration status. Because employees would reasonably understand that the newsletter did not refer to any action within the control of the Respondent, we find that it was not an unlawful threat. See *Smithfield Packing*, supra; *Pacific Grain Products*, 309 NLRB 690, 691 (1992) (rejecting contention that union official's statement was threat because union official did not have the ability to carry out the alleged threat). Consequently, we find that the newsletter referring to the Union's conduct did not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *Smithfield Packing*, supra (dismissing allegation that employer threatened employees by saying that if employees voted the union in, the union would "turn Immigration on the Latinos" because statement did not involve any action within the control of employer). Accordingly, we shall dismiss this allegation.

Id. at 1102.

Likewise, Trentini did not say he had taken or would take any action regarding employees' immigration status when he spoke to Jorge and Gonzalez on May 15. Trentini did not threaten to have employees deported because they engaged in union activity and a reasonable employee would not interpret Tarentine's comments as such even though they occurred the day after Jorge and Gonzalez signed authorization cards. Rather, Trentini was citing a potential threat to the business (i.e., ICE learning that RAV was employing undocumented employees) as a reason for discharging Jorge and possibly closing. While I do find, as discussed below, that Trentini's explanation for the discharge of Jorge was pretextual and, as such, evidence of a discriminatory motive, I do not find that it constitutes an independent violation of Section 8(a)(1) of the Act.

The General Counsel's reliance on *Tito Contractors, Inc.*, 366 NLRB No. 47 (2019), and *Sure-Tan, Inc.*, 234 NLRB 1187 (1978), in support of the argument that the context (particularly, here, the timing) warrants the finding of a violation also appears misplaced. In *Tito Contractors*, the Board found that the employer threatened "employees with immigration related consequences and discharges for engaging in union activities" by telling them, "in case the Union will win, ICE will come into the company and they will get us arrested." 366 NLRB No. 47 slip op. at 2. Unlike Trentini's remarks, this was a direct threat that the election of a union would cause employees to be arrested because of their immigration status and far more coercive.

In *Sure-Tan*, 234 NLRB 1187, 1190 (1978), the employer made the following unlawful comments:

> [A]n hour or two after the election in which the Union was selected, John Surak approached him and employees Ruiz and Primitivo and said, "no friends, no amigos," said "sons of a bitches" and used the word "immigration." Surak then stated "Union, why?" and then said "Mexican son of a bitch." Surak then asked Robles if he had immigration papers and [employee] Robles answered no. Then Surak asked if the others had papers and Robles responded he did not know. Primitivo then told Robles to tell Surak that nobody had papers there and Robles conveyed that information to John Surak.

Thereafter, the employer constructively discharged five employees (including Robles) and caused them to be deported by requesting that immigration authorities investigate their legal status. Thus, the employer's comments combined overt hostility toward employees' union activity (immediately after the election) and questions regarding employees' immigration status. The employer's comments were also followed by its unlawful action in making good on an implied threat to contact immigration because employees elected a union. Thus, the statements and circumstances in *Sure-Tan* were far more coercive as an implied threat of deportation in retaliation for employees' union activities than, as here, Trentini's attempt to explain an adverse employment action.

[13] See fns. 9 and 18, herein, regarding the admissibility and use of RAV's 2017 tax return. Further, I do not rely on the representation of Respondent's counsel regarding his failure to produce checks as an oversight. First, the representation does not constitute record evidence. After Trentini failed to demonstrate any knowledge or understanding of the production of subpoenaed records, Respondent's counsel was offered and declined an opportunity to testify and explain why certain documents were not produced. Second, Trentini subsequently disavowed his testimony that Concrete Express actually paid RAV by check. Third, given that the Respondent introduced the invoices into evidence, it cannot successfully claim that the failure to produce subpoenaed documents reflecting the payment of those invoices was a valid oversight.

Likewise, I do not find that the Respondent unlawfully threatened employees with plant closure on May 15. According to Gonzalez, Trentini did not indicate that RAV would be closed because of past or future union activity among his employees, but instead raised the prospect of closure if ICE appeared and employees did not have papers. Further, with regard to this isolated testimony, I do not credit Gonzalez. I generally found Gonzalez to be a credible witness and I do not believe his testimony was intentionally false. However, I question the accuracy of his recollection that Trentini said he would close the business if ICE arrived. Gonzalez had to be led to this answer after providing his initial account of the May 15 conversation, and he was not corroborated by Jorge. The General Counsel specifically asked Jorge whether "Trentini or the interpreter said anything about what would happen if immigration authorities came?" and he answered, "No. They only told me that he didn't want any problems." Meanwhile, Trentini's testimony was consistent with Jorge's testimony. Accordingly, I do not find that the Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure because of their union activity.

Section 8(a)(3) and (1)

The General Counsel contends that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging Jorge, laying off Gonzalez, and closing RAV. I agree.

Discharge of Jorge Valencia

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptistas Bakery, Inc.*, 352 NLRB 547, 549 fn. 6 (2008). The elements of the General Counsel's initial burden "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014). Circumstantial evidence may be used by the General Counsel to meet its burden of showing employer knowledge and animus. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253–1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Such circumstantial evidence may include the timing of alleged discriminatory action, general knowledge of and animus toward employees' union activities, failure to follow past practice, disparate treatment of discriminatees, shifting or irrational explanations for the treatment of discriminatees, and other contemporaneous unfair labor practices. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (2018); *Novato Healthcare Center*, 365 NLRB No. 137 (2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

While the second step of a *Wright Line* analysis is necessary in "mixed-motive" cases where some valid rational contributed to the alleged unlawful action, such an analysis is not necessary if the respondent's stated reason for discharging the discriminatee has been rejected as entirely pretextual. *Parkview Lounge, LLC*, 366 NLRB No. 71 (2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

The evidence indicates that both RAV mechanics signed Union authorization cards on May 14. That same day, the Union filed a representation petition and emailed a copy to the Respondent. Although this petition incorrectly named RAV Trucking as the employer, it listed 3771 Merritt Avenue as the address and described a unit of mechanics. RAV Trucking does not employ mechanics and is not located at Merritt Avenue. Accordingly, the Respondent would reasonably believe that the Union was seeking to represent the two mechanics employed by RAV at Merritt Avenue.[14] Further, the Respondent would reasonably believe that at least one of those mechanics signed an authorization card as a showing of interest in support of the petition. Thus, the employees engaged in union activity which culminated in the filing of a representation petition, while the Respondent was aware of that petition and had reason to suspect the employees of signing cards.

The evidence also established that the union activity of employees was a significant motivating factor in Jorge's discharge. The timing, in particular, was suspicious. Trentini has not maintained a practice of verifying the work authorization of employees with the I-9 form and supporting documentation.[15] The Union emailed Trentini the first petition on the afternoon of May 14 and, the next day, Trentini and Alexis asked the two RAV mechanics whether they had documentation authorizing them to work in the United States. It is particularly telling of the Respondent's unlawful motive that Trentini took no previous action against Jorge even though he (Trentini) had already been advised that Jorge was undocumented. Rather, Trentini testified that Jorge was "working, let him work." The Respondent's discriminatory intent may also be gleaned from the fact that Jorge's termination letter was prepared before he was actually questioned about and admitted his immigration status. This is powerful evidence that the Respondent sought to seize upon information it already knew as a pretext for discharging Jorge because Trentini received a representation petition the previous day.

Trentini was not credible or convincing in his attempt to explain the timing of his May 15 conversation with the RAV mechanics by testifying that the owner of a nearby tire repair business (Frankie) said there were rumors that ICE was in the area checking businesses for undocumented workers. Trentini failed to indicate when this conversation with Frankie took place and, without testifying that the conversation took place close in time

[14] I do not find it significant that the petition listed the address as 3771 Merritt Avenue instead of 3773 Merritt Avenue. Merritt Avenue (3771 and 3773) is a single garage and the Respondent would have known that RAV was the only company that employed mechanics in that building.

[15] RAV had a practice of requesting a copy of employee driver's licenses, if they had one, and a social security number. However, as reflected on the I-9 form, neither a social security number (without a social security card) nor a driver's license will establish employment authorization. Trentini also admitted that he did not require employment applicants to submit documents substantiating work authorization as set forth in the I-9 form.

to May 15, the explanation is not exculpatory. Further, this was not the first time Trentini heard about a possible visit from ICE. Trentini admitted that ICE had "been in the area before." It is also undisputed that Rafael threatened to call ICE to have Jorge deported. Trentini testified, "Rafael . . . had been into an argument about it if [Jorge] went back to Mexico or the ICE is going to send him back to Mexico, he doesn't have a visa here." Nevertheless, Trentini waited until he received the Union's representation petition to take issue with Jorge's status upon the pretextual explanation of some vague rumor on an undisclosed date that ICE was in the area. I find the evidence of timing and pretext sufficient to establish a prima facie case under *Wright Line*. See *Concrete Form Walls, Inc.*, 346 NLRB 831, 835 (2006) (employer "was content to violate the IRCA and employ workers whom its owner believed were illegal aliens until those workers decided to vote in a Board-conducted election").

I further find that the Respondent has not established a *Wright Line* defense. The Respondent took the position that Jorge was discharged on May 15 because he admitted he did not possess documents permitting him to work in the United States. If this had not occurred, Jorge would have continued working for RAV until, at least, such time as RAV went out of business (discussed separately below). As discussed above, I have found that RAV manufactured its new concern about Jorge's legal status in order to justify his termination in response to the receipt of a representation petition. Since the Respondent's actions were pretextual, it cannot establish a mixed-motive defense. *Parkview Lounge, LLC*, 366 NLRB No. 71 (2018); *K-Air Corp.*, 360 NLRB 143, 144 (2014).

RAV Closure and Discharge of Victor Gonzalez

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Gonzalez and closing RAV. The General Counsel analyzed the former as a *Wright Line* discharge and the latter as a partial closure under *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 270 (1965). This makes some sense as RAV laid off Gonzalez on May 21 and took the position in a statement to the Board, on May 31, that it was still in business. Thus, it can be argued that the layoff and closure should be address separately with the layoff being analyzed under *Wright Line*. On the other hand, Trentini laid off Gonzalez upon the stated reason that he was closing the business because there was no more work for him. Thus, it could be argued that the layoff and closure should be dealt with together under *Darlington*. Accordingly, I address both allegations (layoff and closure) under *Darlington* and, in the alternative, the layoff separately under *Wright Line.* As discussed below, in doing so, I find that the Respondent unlawfully closed RAV under *Darlington* and, therefore, its representation, even if true, that Gonzalez was laid off as a result of the closure, renders the layoff unlawful as well. However, alternatively, I find that the Respondent's explanation for laying off Gonzalez was actually a discriminatory pretext under *Wright Line* that preceded the decision to close.

RAV Closure

An employer may cease doing business entirely, even if the decision to do so is based on antiunion considerations. *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 270 (1965). Further, according to the Supreme Court in *Darlington*, the partial closure of a business only violates Section 8(a)(3) and (1) under the following circumstances:

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Id. at 275–276.

Therefore, the Supreme Court laid out four factors of an unlawful partial closing with the first factor being the closure of a plant for antiunion reasons.[16] As interpreted by the Board, "*Darlington* requires only a finding of foreseeability of the chilling effect rather than evidence of its actual occurrence." *George Lithograph Co.*, 204 NLRB 431, 431 (1973). However, evidence of "chill" must still "support two findings. First, the closing must be motivated, at least in part by a purpose to chill unionism in any of the remaining facilities of the single employer. Second, it must be found that the employer could reasonably have foreseen such an effect." *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977).

As in *Darlington*, my finding that RAV and Concrete Express are single employers necessarily "satisfy[ies] the elements of 'interest' and 'relationship'. . . ." Id. at 276.

The General Counsel also established that RAV was closed for antiunion reasons. Just a week after Trentini received the first petition and the same day he received the second petition, he told Gonzalez that RAV was going out of business because

[16] As the General Counsel observed, it is not entirely clear from the case law whether a *Wright Line* mixed-motive analysis must be applied to this preliminary factor under *Darlington*. That is, if the closure was based on both union and nonunion considerations, can the Respondent establish a defense by proving that the plant would have closed for legitimate reasons in the absence of antiunion animus? I do not believe so. In a discharge case, an employee does not suffer any adverse consequence of a partial discriminatory motive if he/she would have been terminated anyway for a legitimate reason in the absence of antiunion animus. However, this logic does not follow in a partial closing analysis under *Darlington*. Although employees who are laid off as a result of a mixed-motive partial closing are no worse off if the plant would have closed anyway for legitimate reasons, we are largely concerned with the coercive effect on remaining employees. The employees at other plants do not have a hearing record they can scour to determine whether the closure would have occurred regardless of a partial discriminatory intent. Accordingly, the nondiscriminatory motive behind a partial closing would not necessarily negate, as it would in a *Wright Line* situation, the harm of a plant closing as it pertains to the remaining employees.

there was no more work for him.[17] The timing of Trentini's statement of intent to shutter the business, close in time to the Union's filing of representation petitions, suggests a discriminatory intent.

A closer look at the circumstances further suggest that the Respondent's explanation for the closure was pretextual. Gonzalez and Jorge credibly testified that there was still work to be performed when they were separated. Although Jorge testified that his work slowed a bit toward the end of his employment, both mechanics worked overtime in excess of 40 hours in their final week. Further, on May 31, Respondent's counsel submitted a position statement to Region 2 in case 02–RC–220701 which characterized RAV as a going concern and Gonzalez's layoff as temporary. Meanwhile, Trentini did not clearly testify that RAV had finished the work on the two Petrillo trucks that were left over from Edison Avenue. Based upon demeanor and the totality of the evidence, I find that the mechanics were credible in their testimony that they still had significant mechanical work to do at the time of their respective separations.

The Respondent claims that RAV closed because (1) it lost its lease at Edison Avenue, (2) Merritt Avenue was not a registered repair shop and, otherwise, not suitable to house a repair operation, (3) the lease for 3773 Merritt Avenue had an ending date of May 31, and (4) RAV was losing money. In my opinion, these arguments are not compelling. RAV rented 3773 Merritt Avenue for the admitted purpose of performing truck repairs and did, in fact, perform such work at that location even though it was not a registered repair shop (and, perhaps, had other short comings for such a purpose). The credible evidence does not establish that RAV finished the work on the two outstanding Petrillo trucks, much less the other work which Gonzalez credibly testified he was doing at the time of his layoff. The lease for 3773 Merritt Avenue required a minimum rent for the period March 1 to May 31, but was month-to-month. Trentini did not testify that RAV could not continue to rent 3773 Merritt Avenue on a month-to-month basis and I do not read the lease as requiring RAV to vacate the space on May 31. Likewise, Trentini did not testify that he was unwilling or unable to rent an alternative location. In fact, at least initially on May 31, Respondent's counsel was still describing RAV's operation as a going concern. As for RAV's financial condition, Trentini did not evince a firm understanding of RAV's finances, costs, or losses, and the unsigned 2017 tax return is unreliable hearsay.[18] Rather, evidence of Trentini's sudden decision to close RAV, which was not winding down, in the context of recently filed representation cases, strongly suggests, and I find, that the decision was made because he received representation petitions.

The far more difficult issues are whether the Respondent closed RAV for the purpose of chilling the union activity of employees still employed by Concrete Express and whether such a chilling effect was realistically foreseeable under the circumstances. The Board has stated "that in determining whether a purpose to 'chill' existed we would rely on the 'fair inferences arising from the totality of the evidence considered in the light of then-existing circumstances.'" *George Lithograph Co.*, 204 NLRB at 431 quoting decision on remand in *Darlington*, 165 NLRB 1074, 1083 (1967). The chilling effect on remaining employees can be proved by circumstantial evidence as direct evidence of the same is rarely available. *Darlington*, 165 NLRB at 1083.

In *George Lithograph*, the Board "concluded that on the facts of *Darlington*, wherein it had been found that the plant was closed because of opposition to the union, the incidence of one such directly causative antiunion motive strengthened the probability of a second antiunion purpose-i.e., the 'chilling' of remaining employees in the exercise of their Section 7 rights." 204 NLRB 431. While recognizing that proof of the former antiunion motive does not "*ipso facto* establish the other, depending on all the facts and circumstances, it would indicate a disposition toward the other and be sufficient to support a logical inference." Id.

Additionally, "the Board in determining whether or not the proscribed 'chilling' motivation and its reasonably foreseeable effect can be inferred considers the presence or absence of several factors including, inter alia, contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees." *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977).

The Board's decisions in partial closing cases under *Darlington* are instructive. In *Fredman's Calcasieu Locks Shipyard, Inc.*, 206 NLRB 399 (1973), the Board adopted a judge's finding that night-shift employees were unlawfully laid off for antiunion reasons and, according to the judge, "the Employer must have foreseen that the layoff of the night shift employees shortly after they had signed union cards without any explanation to the day shift employees, and after employees had been told there would be layoffs, would be interpreted by the day-shift employees as a reprisal against the night shift employees for

[17] The evidence indicates that the Respondent laid off Gonzalez and made these comments at about 2:30 or 3 p.m., but did not receive an email from the Union attaching the second petition until 4:57 p.m. Nevertheless, I find it relevant and more than mere coincidence, when considered within the totality of the circumstances, that the Respondent took action on the same day the Union filed the corrected petition.

[18] I do not rely on RAV's 2017 tax return for the purpose of determining whether the company was operating at a loss. As discussed above, I admitted the document into evidence over the General Counsel's objection upon the qualification that the unsigned copy which was marked at trial be replaced by a duly executed tax return. However, the Respondent did not produce a signed or dated tax return. It was already lenient to allow Trentini to authenticate RAV's tax return as a business record given his admitted lack of knowledge of the financial operation and accounting process, but the utility of the document is fatally undermined where the Respondent could not produce a signed copy. It raises questions as to how, when, and why the unsigned documented was created. Under these circumstances, the tax return does not possess the indicia of trustworthiness that warrant an exception to the hearsay rule under FRE 803(6) or 807. Indeed, it could be argued that the Respondent's inability to produce a signed tax return actually works to contradict, rather than support, any finding that RAV was operating at a loss. FRE 803(7).

signing union cards."[19] 206 NLRB at 409. The judge quoted *[A.H. Bull Steamship Co.]* v. N.L.R.B., 347 U.S. 17, 45 (1954), for the proposition that ". . . a man is held to intend the foreseeable consequences of his conduct. . . . Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence." Id. Thus, in *Fredman's*, the Board effectively determined that the foreseeable chill that the discriminatory elimination of one shift would have on another shift at the same facility proved the employer's motive to accomplish the same.

In other partial closure cases, evidence that chill was intended and foreseeable has included the suspicious timing of a closing designed to maximize the impact on remaining employees (e.g., shortly before an election at another plant), comments made by employer representatives to employees at another plant regarding the closure, and/or coercive statements in violation of Section 8(a)(1) which, if made to or otherwise learned about by employees at another plant, suggest antiunion animus and would tend to enhance the chilling effect the closure could be expected to have on remaining employees. See *San Luis Trucking, Inc.*, 356 NLRB 168 (2010), three-member panel affg 352 NLRB 211 (2008); *Chariot Marine Fabricators & Indus. Corp.*, 335 NLRB 339 (2001); *Purolator Armored, Inc.*, 268 NLRB 1268 (1984); *Midland-Ross Corp.*, 239 NLRB 323 (1978); *Darlington Manufacturing Co.*, 165 NLRB 1074 (1967).[20]

Here, the record lacks certain evidence that is characteristic of other cases in which the Board found violations. The Respondent received the representation petition for a unit of Concrete Express employees on April 19 and did not seek to chill those employees by closing RAV prior to the election at Concrete Express on May 10. The General Counsel also presented no evidence that Concrete Express employees learned of the circumstances surrounding the closure of RAV. Likewise, the record contains no evidence that the Respondent discussed RAV's closure with Concrete Express employees or engaged in other unlawful conduct which might have established a coercive context at Concrete Express more conducive to an inference of chilling intent and foreseeability.

Nevertheless, I have found that the Respondent closed RAV because of the mechanics' union activity, which "would indicate a disposition toward" and support a "logical inference" that the Respondent intended to and could reasonable foresee the chill of Section 7 activity among Concrete Express employees. *George Lithograph Co.*, 204 NLRB 431, 431 (1973). RAV mechanics were working in the Merritt Avenue garage where Concrete Express drivers picked up and dropped off their trucks, and those drivers would certainly have noticed that the RAV mechanics were separated in the context of an organizing campaign. At the time of RAV's closing, Concrete Express was still contesting in postelection proceedings the Union's 4-3 election victory and had not conceded to union representation of the unit. The Union's organizing activity at RAV and Concrete Express, two facilities in close proximity to each other, suggests that the Concrete Express employees would likely learn of additional circumstances of RAV's discriminatory closure through the Union. Although I perceive this case as falling among the more minimal showings of chill within the evidentiary range of Board findings of unlawful partial closures, the Board's decisions in *Fredman's Calcasieu Locks Shipyard, Inc.*, 206 NLRB 399 (1973), and *George Lithograph., Co.*, 204 NLRB 431 (1973), are generally supportive of a violation. In light of this case law and the totality of the circumstances, it is reasonable to infer that the Respondent intended and could reasonably foresee that closing RAV would intimidate Concrete Express employees and sour them on a representation process which was still contested and in doubt after the election.

Accordingly, based upon the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by closing RAV because of employees' union activity and because, in doing so, the Respondent intended and could reasonably foresee that Concrete Express employees would be chilled in their Section 7 activity.

Gonzalez Discharge—Wright Line Analysis

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by closing RAV, and since the Respondent attributes its lay off of Gonzalez to that closure, the Respondent's layoff of RAV violates Section 8(a)(3) and (1) of the Act as well. However, the layoff of Gonzalez can also be viewed independently from the closure, as the General Counsel has done in its brief, and analyzed under *Wright Line*. Since the partial closing is a difficult allegation and subject to exceptions, I also analyze Gonzalez' layoff below under *Wright Line* and find a violation (even if the closing of RAV were ultimately found to be lawful).

On May 31, through counsel in a position to the Board, the Respondent indicated that Gonzalez was temporarily laid off (presumably, on May 21) because he never presented papers showing he could lawfully work in the United States. This position is entirely at odds with the Respondent's assertion that Gonzalez was laid off because the business was closing for lack of work. Rather, it suggests that, despite what Trentini told Gonzalez, the Respondent laid off Gonzalez on May 21 for reasons having nothing to do with a decision to permanently

[19] In *Fredman's*, a union was conducting an organizing drive of both the day and night-shift employees.

[20] In at least one case, *Spring City Knitting Co.*, 285 NLRB 426 (1987), distinguishing *Midland-Ross Corp.*, supra, the Board found no violation where the closure of one plant was not accelerated in order "to have the maximum impact on the employees at the plant being organized to influence their vote in the upcoming election" and "there were no unlawful notices posted at the nonunionized facility referring to the closing of the unionized facility." The Board dismissed the partial closing allegation in *Spring City Knitting* even though the employer in that case committed a number of unfair labor practices contemporaneously with the closing, including a statement to employees in one plant that the other plant was closed because those employees voted for a union. Id. at 440. I do not consider *Spring City Knitting* dispositive of my ultimate finding as it appears to be an outlier in that the Board has more often found violations upon far less evidence that chill was intended and foreseeable. It has been more common for the Board to dismiss partial closing cases where the record contains no evidence that remaining employees were engaged in Section 7 activity. See, e.g., *Bruce Duncan Co.*, 233 NLRB 1243 (1977); *Motor Repair, Inc.*, 168 NLRB 1082 (1968), *A.C. Rochat Co*., 1263 NLRB 421 (1967).

close (which had not yet been made).

The Respondent's position with regard to the separation of Gonzalez, as described above, is even more dubious than the position it took with regard to Jorge (who admitted he was undocumented). Trentini admits he did not obtain documents from employees under the I-9 process to confirm their authorization to work in the United States. However, once the representation petitions were filed, RAV explained the temporary layoff of Gonzalez by stating that it "only has his verbal representation that he is lawful and may not be." Gonzalez' layoff was, also, even farther removed than Jorge's discharge from the vague and dateless warning Trentini allegedly received from Frankie regarding the presence of ICE in the neighborhood.

Meanwhile, Trentini's explanation to Gonzalez on May 21 that he was being laid off because of a lack of work is belied by Gonzalez's credible testimony that there was work available and payroll records showing that Gonzalez was still accumulating overtime immediately before his layoff. It is also telling that Trentini did not specifically testify that outstanding work on the two Petrillo vehicles was complete. Further, Trentini admitted that RAV mechanics were still performing work on Concrete Express trucks through mid-May. Thus, the evidence does not substantiate Trentini's claim, on May 21, that Gonzalez was laid off for lack of work.

Ultimately, the totality of the circumstances suggest that the Respondent laid off Gonzalez upon the pretextual explanation that RAV was closing for a lack of work, but did not initially tell the Board the same thing (in connection with the representation cases) because RAV was not actually planning to close. Rather, the Respondent described RAV as a going concern and attributed Gonzalez's temporary layoff to a concern regarding his immigration status. However, this explanation was even less convincing than the first and it was quickly abandoned. It was only at this point that the Respondent decided and represented to the Board that it was closing RAV effective May 31.

The Respondent's failure to articulate a clear and consistent explanation of Gonzalez' layoff is not particularly surprising since it appears to have been a rushed reaction to the representation petitions. The Respondent laid off Gonzalez little more than a week after it received the first representation petition and the same day the Union filed a corrected petition naming RAV (instead of RAV Trucking) as the employer. Further, I do not credit Trentini's testimony that he had been making arrangements to close RAV since February.[21] That he may not have intended to continue the business indefinitely at Merritt Avenue does not mean he planned to close in May or that he ruled out the possibility of relocating to a different facility. As indicated above, the evidence does not indicate that RAV was winding down its operation or was planning to close when Trentini abruptly separated his two mechanics. Accordingly, I find that RAV made the decision to lay off Gonzalez on May 21 independent of its subsequent decision to close, and that the General Counsel has established a prima facie case that the layoff was discriminatory.

The Respondent has no *Wright Line* mixed-motive defense in this case. As discussed above, I have found that the Respondent's stated reason for laying off Gonzalez (i.e., RAV's closing due to a lack of work) was pretextual. Further, even if it were true, I have found that the closure itself was unlawful. Therefore, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off Gonzalez.

Gissel Bargaining Order

The General Counsel has requested a *Gissel* bargaining order and I will grant it. In *NLRB v. Gissel Packing Co.*, the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order, recently described by the Board in *Bristol Industrial Corp.,* 366 NLRB No. 101 (2018), as follows:

> Category I cases are "exceptional" and "marked by 'outrageous' and 'pervasive' unfair labor practices." Id. at 613. Category II cases are "less extraordinary" and "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614. In category II cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order[.]" Id. at 614-615. Accord *California Gas Transport, Inc.*, 347 NLRB 1314, 1323 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

The General Counsel seeks a category II bargaining order upon a demonstration of majority support (i.e., authorization cards it collected from both mechanics) in an appropriate unit and the Respondent's severe unfair labor practices. More specifically, the General Counsel argues that the unfair labor practices would tend to impede the election process to such an extent that the best remedy is a bargaining order based on the cards as opposed to an election.

In determining whether to issue a bargaining order, the Board examines "the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations." *Bristol Industrial Corp.*, 366 NLRB No. 101 (2018). Certain "hallmark violations" have been identified as those that more strongly support the issuance of a *Gissel* bargaining order because they are highly coercive of employees' section 7 rights and can be expected to have a lasting inhibitive effect on a substantial percentage of the workforce. *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011). Hallmark violations include the discharge of employees on the basis of union support or activity. See *Milum Textile Services, Co.*, 357 NLRB at 2055 citing *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996), and *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980). The Board has repeatedly held that, even among hallmark violations, the discharge of an employee because of union activity "is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the

[21] In making this finding, I credit Gonzalez' testimony that Trentini did not tell him RAV was closing until May and, previously, merely told him (Gonzalez) that they were moving to a larger space.

exercise of Section 7 rights than the loss of work." *Dayton Auto Electric, Inc.*, 278 NLRB 551, 558–559 (1986) citing *Apple Tree Chevrolet*, 237 NLRB 867 (1978). The "test for making a determination as to whether a bargaining order is warranted is an objective test." *Broadmoor Lumber Co.*, 227 NLRB 1123, 1138 (1977).

Unit and Majority Support

The Board will only order an employer to bargain with a union as the bargaining representative of an appropriate unit. A single facility unit is presumptively appropriate and can only be rebutted upon a showing that the facility has been so effectively merged into a more comprehensive unit by bargaining history, or is so integrated with another as to negate its identity. *Dixie Belle Mills, Inc.*, 139 NLRB 629 (1962). The party contesting a single-facility unit bears a "heavy burden of overcoming the presumption." *Sutter West Bay Hospitals*, 357 NLRB 197 (2011).

Here, the Respondent has not contested the appropriateness of the unit as a defense to the imposition of a bargaining order. Indeed, the Respondent did not seek to include the two RAV mechanics in the unit of mechanics and drivers at Concrete Express for purposes of the election in case 02–RC–218783. In any event, there is "no history of collective bargaining on a broader basis, and no larger grouping of employees is sought . . . . *Pantex Towing Corp.*, 258 NLRB 837, 846 (1981). The record does contain evidence that RAV mechanics performed certain work at the Concrete Express facility and interacted with Concrete Express drivers who housed their trucks at Merritt Avenue. The facilities of RAV and Concrete Express were also in close proximity to each other. However, RAV operated with a degree of autonomy and separate supervision. In fact, Trentini testified that RAV "ran itself." Accordingly, I find that the single facility unit of mechanics is appropriate. Further, the General Counsel entered into evidence the union authorization cards of both mechanics who make up the two-person unit. Therefore, the record demonstrates that the Union had majority support in an appropriate unit.[22]

ULPs and Appropriateness of a Bargaining Order

The General Counsel relies largely on *Bristol Industrial Corp.*, 366 NLRB No. 101 (2018) for its position that a bargaining order should issue. I agree that *Bristol Industrial* is on point and controlling.

Here, as in *Bristol Industrial*, the Respondent committed hallmark violations by unlawfully separating both employees in a small two-person unit. The two RAV mechanics were notified of their respective separations by the sole owner and officer of the company. Thus, the employees cannot hope to receive more favorable treatment going forward from a higher and more sympathetic authority within the company. Also, as in *Bristol Industrial*, the traditional remedy of reinstatement is less likely to "dispel the coercive atmosphere" where "the [employer is] willing to manufacture a pretextual reason to subsequently discharge them in retaliation for the protected activity." Id. slip op. at 3.

It is noteworthy that in *Bristol Industrial*, the Board stated that the termination of the entire unit would be grounds alone for issuing a bargaining order "even without considering the other violations found." 366 NLRB No. 101, slip op. at 2. Nevertheless, unlike in *Bristol Industrial*, the Respondent here took the extraordinary step of unlawfully closing RAV altogether. Under these circumstances, both eligible voters can be expected to be powerfully impressed and coerced by the dramatic steps the Respondent was willing to take in order to avoid union representation of its employees. Accordingly, as in *Bristol Industrial*, I find that a bargaining order is a better remedy than an election and will order the same.

CONCLUSIONS OF LAW

1. The Respondent, RAV Truck & Trailer Repairs, Inc. and Concrete express of NY, LLC, as a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local 456, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct, the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) On May 15, the Respondent discharged Jorge Alberto Valencia Medina because employees sought representation by the Union for purposes of collective bargaining.

(b) On May 21, the Respondent laid off Victor Gonzalez because employees sought representation by the Union for purposes of collective bargaining.

(c) On May 31, the Respondent closed RAV because RAV employees sought to be represented by the Union for purposes of collective bargaining, and the Respondent did so with the intent and foreseeable effect of chilling the Section 7 activity of remaining employees.

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

5. Other than the allegations listed above, the unfair labor practices alleged in the complaint are dismissed.

THE REMEDY

Having found that the Respondent, RAV Truck & Trailer Repairs, Inc. and Concrete express of NY, LLC, as a single employer, has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent has objected to the traditional restoration remedy for a partial closing violation upon the grounds that it would suffer substantial economic hardship and be unduly burdened if ordered to restore RAV's truck repair operations as it

[22] The Respondent did not contend in its brief that Jorge should be denied reinstatement because of his immigration status or that a single person unit consisting solely of Gonzalez would be inappropriate. The issue of Jorge's reinstatement can be addressed in compliance, if necessary. See *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112 fn. 11 (2016). However, since I am ordering the Respondent to restore RAV's operation as it existed on May 14, this would, presumably, require the hiring of two mechanics (even if one is not Jorge). Thus, the unit would remain appropriate.

existed in May. See *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). In support of this position, the Respondent asserts that it would either have to secure a new location that was already a state registered motor vehicle repair shop or retrofit the Merritt Avenue garage, if the owner of the building is agreeable, to become a registered repair shop. It seems opportunistic and inequitable for the Respondent to have admittedly operated an unregistered repair shop in violation of New York law and subsequently claim it cannot restore the operation because it would violate New York law to do so. However, even if this were a legally viable defense, it has not been established on the facts of this case.

Initially, as discussed in the body of this decision, I reject the Respondent's assertion that RAV was losing money. Trentini evinced no significant knowledge of RAV's finances and the unsigned 2017 tax return is unreliable hearsay.

In addition, the Respondent failed to establish that restoration would involve an undue economic burden. The Respondent attached to its posthearing brief certain documents regarding the requirements and process for registering a repair shop under New York Motor Vehicle Repair Shop Regulations. However, the Respondent cited no specific provision within those materials to substantiate the claim that the Merritt Avenue garage would require significant renovation and I cannot independently discern this to be the case. The record also contains no evidence, and Respondent has offered no estimate, of the cost or availability of securing a new location. Accordingly, I reject the Respondent's position that it cannot restore RAV's operation without suffering undue economic hardship, and will order restoration.[23]

The Respondent, having unlawfully discharged Jorge and laid off Gonzalez, must offer them reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall make Jorge and Gonzalez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Jorge and Gonzalez for search-for-work and interim employment expenses regardless of whether those expenses exceed their 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. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate Jorge and Gonzalez for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

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

ORDER

The Respondent, RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC, of Bronx, New York, as a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against employees for supporting the Teamsters Local 456, International Brotherhood of Teamsters (Union) or any other union.

(b) Partially closing its business operation because certain employees sought to be represented by the Union for purposes of collective bargaining and doing so with the intent and foreseeable effect of chilling the Section 7 activity of remaining employees.

(c) In any other manner interfering, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Jorge Alberto Valencia Medina and Victor Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jorge Alberto Valencia Medina and Victor Gonzalez 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 this decision.

(c) Compensate Jorge Alberto Valencia Medina and Victor Gonzalez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and/or layoff of Jorge Alberto Valencia Medina and Victor Gonzalez, and within 3 days thereafter, notify the employees in writing that this

[23] Nevertheless, "at the compliance stage of the proceedings, the Respondent may introduce evidence that was not available prior to the unfair labor practice hearing, if any, to demonstrate the reopening" RAV would be unduly burdensome. *San Luis Trucking, Inc.*, 356 NLRB 168 (2010), three-member panel affg. 352 NLRB 211, fn. 5 (2008).

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

has been done and that the discharges and/or layoffs will not be used against them in any way.

(e) Within 14 days from the date of this Order, reopen and restore the business operation of RAV as it existed on May 14, 2018.

(f) request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics employed by the Respondent at its facility at 3773 Merritt Avenue, Bronx, NY, excluding all other employees, including clerical employees, guards, managers, professional employees, and supervisors as defined by the Act.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel 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.

(h) Within 14 days after service by the Region, post at its facilities located at 2279 Hollers Avenue, 3771 Merritt Avenue, and 3773 Merritt Avenue, Bronx New York, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2018.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 15, 2019

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against you for supporting the Teamsters Local 456, International Brotherhood of Teamsters (Union) or any other union.

WE WILL NOT partially close our business operation because employees sought to be represented by the Union or any other union for purposes of collective bargaining and do so with the intent and foreseeable effect of chilling the union activity of remaining employees.

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

WE WILL, within 14 days from the date of this Order, reopen and restore the business operation of RAV Truck & Trailer Repairs, Inc. as it existed on May 14, 2018.

WE WILL, within 14 days from the date of this Order, offer Jorge Alberto Valencia Medina and Victor Gonzalez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jorge Alberto Valencia Medina and Victor Gonzalez whole for any loss of earnings and other benefits resulting from their discharges and/or layoffs, less any net interim earnings, plus interest.

WE WILL compensate Jorge Alberto Valencia Medina and Victor Gonzalez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges and/or layoffs of Jorge Alberto Valencia Medina and Victor Gonzalez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and/or layoffs will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of

employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics employed by the Respondent at its facility at 3773 Merritt Avenue, Bronx, NY, excluding all other employees, including clerical employees, guards, managers, professional employees, and supervisors as defined by the Act.

RAV TRUCK & TRAILER REPAIRS, INC. AND CONCRETE EXPRESS OF NY, LLC, A SINGLE EMPLOYER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-220395 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.