Alton H. Piester, LLC *and* Darrell Chapman. Case 11–CA–21531

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 24, 2007, Administrative Law Judge Keltner W. Locke issued the attached bench decision and certification.[1] The General Counsel filed exceptions and a supporting brief. The Respondent filed a response and a supporting brief.

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

The complaint alleged that the Respondent violated Section 8(a)(1) on January 13, 2007, by impliedly threatening its employees with discharge if they engaged in protected concerted activity and, on April 2, 2007, by impliedly threatening employee Darrell Chapman with discharge and by discharging him because he engaged in protected concerted activity. The judge dismissed the allegations, and the General Counsel has filed exceptions to all the dismissals. We find merit in the General Counsel's exceptions.

I. FACTS

The Respondent is a trucking company. On January 13, 2007,[3] the Respondent's owner, Alton Piester, announced a proposed change to its billing and bookkeeping practices regarding fuel surcharges ("the fuel surcharge change"). The change would decrease the drivers' net pay. Though many drivers protested, Piester told them that his mind was made up and that the change would proceed regardless of their objections. Piester told the objecting drivers that if they didn't like it, they could "clean out their truck and move to another job."

"Clean out your truck" has a special meaning for the Respondent and its drivers. A driver will typically leave personal items in a truck if he expects to use it again. Therefore, a supervisor's statement to a driver to "clean out your truck," conveys the message that the driver will no longer be operating that truck, i.e., that he is discharged.

After the January 13 meeting, and up to the time of Chapman's discharge, employees frequently complained among themselves about the fuel surcharge change. Employees also complained directly to Piester and the Respondent's secretaries,[4] although only Chapman continued to complain to the Respondent after January. On several occasions, however, owner-operator Adger McAlister informed Piester that the drivers continued to complain among themselves about the unfairness of the fuel surcharge change.[5]

On April 2, Chapman spoke with Derrick, the Respondent's secretary, who also had various accounting duties. Chapman repeated the complaint he (and others) had voiced about the fuel surcharge change, and asked that the surcharge change be reflected on his paycheck stub.[6] During this conversation, Chapman spoke loudly, then went into Piester's adjoining office to further discuss his concerns. Derrick followed Chapman into the office.

Chapman reiterated to Piester the same complaint and request he made to Derrick, at which point Derrick interjected that if Chapman was unhappy working there, he "should clean out" his truck. Chapman protested that Derrick did not have authority to discharge him. Chapman became louder, got up from his chair, and stepped toward Derrick.[7] Piester then told Derrick to clean out

[1] Appendix A, the judge's bench decision, originally issued on September 19, 2007.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3 (b) of the Act.

[3] All dates are in 2007 unless otherwise noted.

[4] Piester testified that he did not mind talking with the employees about the fuel surcharge change. In addition, both secretaries Renee Derrick and Sherry Marntin admitted that employees complained to them several times in the office about the fuel surcharge change.

[5] McAlister testified that he had talked five to six times with Piester about the fuel surcharge change from January 2007 until Piester discharged him in August 2007. When McAlister brought up the drivers' complaints, Piester would refuse to talk about the drivers with him. Piester admitted that McAlister had questioned him about the drivers' complaints and that Piester had refused to discuss the subject because he considered it none of McAlister's business (as McAlister was an owner-operator and not a driver employee). Thus, the record does not support the judge's finding that "over time, employee discontent with the new practice abated."

[6] There is no evidence that other employees asked to have the surcharge change noted on their paycheck stubs (although there is evidence that employees requested that the fuel surcharge information be included on their worksheets). Nonetheless, the testimony of Piester, Derrick, and Marntin shows that, on April 2, Chapman did more than ask about his paystub; he repeated shared employee complaints about the fuel surcharge change.

[7] Piester's office is small, with little room for moving around. When Chapman approached Derrick, he did not make any threatening gestures. Although the Respondent's secretary, Marntin, overheard the

his truck, which, as Piester acknowledged at the hearing, meant that Chapman was discharged.

Piester testified that Chapman's shouting on April 2 was the latest in a series of misconduct, and was the "last straw" in deciding to discharge him.[8] However, Piester did not mention any prior misconduct to Chapman, and the only reason listed for Chapman's discharge on the form filed with the South Carolina Employment Security Commission was "Disorderly Conduct in office, 4-02-7." On that form, Piester directly linked Chapman's April 2 conduct to the January 13 meeting by stating that "meet 1st part of Jan 07 that fuel surcharge would be taken out due to customer didn't want share."

II. ANALYSIS

A. Alleged January 13 Threat

The General Counsel argued that Peister's statement to the drivers at the January 13 meeting that if they did not like the surcharge change they could "clean out their trucks" constituted a veiled or implied threat of discharge in response to the employees' protected concerted activity. Although the judge agreed that the employees were engaged in protected concerted activity when protesting the surcharge change,[9] he found that not every reference to cleaning out a truck would automatically indicate the discharge of an employee.[10] Instead, the judge found that a typical driver would reasonably understand Piester's statement to mean, "if you don't like the new system you can leave."

The judge acknowledged that similar statements, i.e., "if you don't like the new system you can leave," have been found unlawful, citing *Jupiter Medical Center Pavilion*, 346 NLRB 650 (2006). In *Jupiter*, a supervisor told an employee, who had criticized management's treatment of employees in an employee meeting, held during a union organizing campaign, that, "[m]aybe this isn't the place for you . . . there are a lot of jobs out there."[11] The Board found that this statement violated Section 8(a)(1) because it implied that support for the union was incompatible with continued employment. The judge distinguished *Jupiter* on the basis that Piester's comment was not made in the context of a union campaign. Thus, the judge reasoned that the comment did not indicate that support for the union was incompatible with continued employment. The judge similarly found that Piester's comment was not made in the context of a meeting to discuss employees' protected activities. Therefore, the judge found that the statement could not reasonably be understood to imply that working for the Respondent was incompatible with engaging in protected concerted activity. Finally, considering the context in which Piester's statement was made, the judge found that the employees would reasonably understand it as the announcement of a fait accompli and not a threat. Noting that the employees had not selected a union, the judge found that the Respondent had no obligation to bargain before making any changes. Accordingly, the judge found that the Piester's announcement was not unlawful and recommended that the allegation be dismissed.

The General Counsel excepts, arguing that the judge inappropriately distinguished *Jupiter*, supra, as involving union activity rather than the protected concerted activity here. The General Counsel contends that what is critical is not the specific nature of the protected concerted activity, union or nonunion, but the similarity of the threats made. The General Counsel further argues that the uncontradicted record evidence shows that "clean out your truck" at this workplace means that an employee is discharged, demonstrating that Piester's statement meant that complaints about the fuel surcharge change were incompatible with continued employment. Finally, the General Counsel claims that the judge erred in finding Piester's statement to be no more than the announcement of a fait accompli.

We find merit to the General Counsel's exceptions and reverse the judge's dismissal of this allegation. First, as described above, substantial credited evidence, including by the Respondent's own witnesses, shows that the phrase "clean out your truck" equates to a discharge. Piester, Marntin, and Derrick all so testified. Therefore, when Piester responded to the employees' complaints about the fuel surcharge change by telling them that if they didn't like it, they could "clean out their truck and move to another job," he impliedly threatened to discharge them for their protected concerted activity of

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discussion from the adjoining office, there is no evidence that any unit employee witnessed or overheard the discussion.

[8] Piester cited an inappropriate sexual comment that Chapman allegedly made to Marntin; two incidents of insubordination by failing to deliver loads of sand in January and February 2007; and two accidents with company vehicles. However, no discipline resulted from any of these incidents. Piester testified that he was not even sure he had learned about the alleged inappropriate sexual comment until after he discharged Chapman. Piester further testified that he did not mention any of the other incidents to Chapman when he discharged him, and that the "big reason" for Chapman's discharge was his conduct on April 2.

[9] There are no exceptions to this finding.

[10] Although there was no testimony to this effect, the judge found that this phrase could more generally refer to the end of the driver's relationship with the vehicle whatever the reason, e.g., reassignment to another vehicle, discharge, or voluntary quit.

[11] Id. at 651.

voicing employment-related complaints. It is well settled that such threats violate Section 8(a)(1).[12]

Further, even if, as the judge found, "clean out your truck" meant "if you don't like the new system you can leave," Piester's statement was still unlawful. Thus, in *House Calls, Inc.,* 304 NLRB 311, 313 (1991), the Board found that the respondent engaged in unlawful coercion by telling employees protesting late paychecks that they could quit if they did not like it.[13]

The judge's distinction of *Jupiter*, supra, on the basis that it dealt with union activity rather than protected concerted activity is misguided.[14] The Act protects concerted activity for mutual aid or protection regardless of whether a union is involved.[15] Finally, the fact that the Respondent was not obligated to bargain with its unrepresented employees over the fuel surcharge change does not nullify the unlawful threat, i.e., render it the lawful announcement of a *fait accompli*. The violation flows from Piester's threat to discharge employees because they engaged in protected concerted activity, not the Respondent's failure to accede to employee protests against the fuel surcharge change.[16]

Based on the above, we reverse the judge and find that Piester's statement at the January 13 meeting constituted an implied threat of discharge in violation of Section 8(a)(1).[17]

B. Alleged April 2 Threat

The judge found that Derrick was acting as an agent of the Respondent when she told Chapman, on April 2, that "if you don't like it, maybe you should clean out your truck."[18] Nonetheless, the judge concluded that Derrick's statement was not a veiled or implied threat of discharge for the same reasons he offered when analyzing Piester's January 13 statement. The judge additionally found that Derrick's April 2 statement was not unlawful because Chapman was acting only for himself, in contrast to the concerted activity at the January 13 meeting. Therefore, the judge recommended dismissal of this 8(a)(1) allegation.

The General Counsel excepts, generally making the same arguments advanced in support of his exceptions to the dismissal of the allegations relating to Piester's January 13 threat. The General Counsel also asserts that the evidence establishes that Chapman's April 2 conduct related to ongoing protected concerted activity.

We find merit to the General Counsel's contentions. Like Piester's January 13 statement, Derrick's "if you don't like it maybe you should clean out your truck" statement constitutes an implied threat of discharge. Moreover, for the reasons set forth in our analysis of Chapman's discharge below, we find that the Derrick's statement was directed towards Chapman's protected concerted activity on April 2. Because Derrick's statement threatened adverse consequences for engaging in protected concerted activity, it violated Section 8(a)(1).[19]

C. April 2 Discharge of Chapman

The Respondent admittedly discharged Chapman on April 2, when Piester directed him to "clean out his truck." In finding that the discharge did not violate Section 8(a)(1), the judge, applying *Wright Line,*[20] first concluded that Chapman was raising a personal pay compu-

[12] See, e.g., *Datwyler Rubber & Plastics, Inc*., 350 NLRB 669, 669 fn. 2 (2007) (respondent unlawfully threatened an employee, who had engaged in the protected concerted activity of speaking on behalf of herself and fellow employees about their working conditions, by telling her that if she did not like the situation, she could go "flip burgers"); *The Korea News, Inc*., 297 NLRB 537, 540 (1990), enfd. 916 F.2d 708 (2nd Cir. 1990) (respondent made an unlawful implied threat of discharge by asking employees who had signed petition requesting improved working conditions why they did not quit if they had complaints).

[13] The Board found that the employees' protest amounted to protected concerted activity independently of the union activity also involved in that case. See also *Datwyler Rubber & Plastics, Inc*., supra; *The Korea News, Inc*., supra.

[14] Although Chairman Schaumber dissented in *Jupiter*, supra at 654–655, this case presents different facts. First, although the Respondent committed no other unfair labor practices at the January 13 meeting, Piester made the threat directly in response to the employees' concerted protest. Second, although the judge credited Piester's testimony that he did not mind talking with the employees about the fuel surcharge change, there was no credited testimony that the employees engaged Piester in such discussions for long after the January 13 meeting. Thus, this is not the type of "open and vigorous" workplace debate at issue in *Jupiter*. Instead, when Chapman brought up the subject again on April 2, Piester promptly discharged him. Finally, unlike in *Jupiter*, there is no evidence that the Respondent otherwise tolerated open and vigorous discussion of matters of mutual concern at the January 13 meeting.

[15] See, e.g., *Datwyler Rubber & Plastics, Inc*., supra; *House Calls, Inc.,* supra; *The Korea News, Inc*., supra.

[16] Cf. *Charleston Nursing Center*, 257 NLRB 554, 555 (1981); *Swearingen Aviation Corp.,* 227 NLRB 228, 236 (1976), enfd. in pertinent part, 568 F.2d 458 (5th Cir. 1978).

[17] Chairman Schaumber acknowledges that Piester's statement, as well as Derrick's April 2 statement, discussed below, constitute 8(a)(1) violations under extant Board law. He applies that law for institutional reasons.

[18] As noted above, Piester was present when Derrick told Chapman on April 2, that if he did not like the way his pay was calculated, he should clean out his truck. The judge found that Piester's silence amounted to acquiescence, and that Derrick's "clean your truck" statement could, therefore, be imputed to the Respondent. There are no exceptions to this finding.

[19] See *Stoody Co.*, 312 NLRB 1175, 1181 (1993) (supervisor unlawfully threatened employees when, after requesting their views on what was wrong with the plant, told them that if they were going to be "so nitpicking, maybe this wasn't the place" for them).

[20] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

tation issue on April 2, and was not eliciting the support of other employees. He found no evidence that other employees wanted or sought similar changes to their pay stubs. The judge, therefore, concluded that Chapman's April 2 conduct was not protected concerted activity.[21]

The judge further found that: Chapman had engaged in protected concerted activity at the January 13 meeting, that the Respondent knew of the activity, and that Chapman's discharge constituted an adverse employment action. However, he concluded that the General Counsel failed to show a link between the January 13 protected concerted activity and Chapman's discharge. Noting that 2 1/2 months had elapsed between the January meeting and Chapman's termination, the judge found the circumstances distinguishable from *Salisbury Hotel*, 283 NLRB 685, 687 (1987), on which the General Counsel relied. In *Salisbury*, the initial and allegedly continued protected concerted activity occurred within a month. The judge also found that, unlike the respondent in *Salisbury*, Piester did not bear animus toward the protected concerted activity.[22] The judge also credited Piester's testimony that Chapman's disruptive April 2 conduct was for him "the last straw." The judge concluded that although Chapman's earlier work problems may have been tolerated, Chapman's conduct on April 2, proved too much for the Respondent. Absent a link between the January 13 protected concerted activity and the Respondent's discharge of Chapman, the judge found that the General Counsel did not meet his *Wright Line* burden and recommended dismissal of the allegation.[23]

The General Counsel excepts, arguing that the judge improperly distinguished *Salisbury Hotel*. The General Counsel also asserts that the record contains substantial evidence that the employees continued to complain among themselves about the fuel surcharge change and that the Respondent knew of this continuing dissatisfaction through McAlister. The General Counsel asserts that the evidence establishes that Chapman's April 2 conduct was related to ongoing protected concerted activity and that the judge's decision should be reversed on that basis.

The General Counsel further contends that the judge improperly failed to give due weight to the shifting reasons the Respondent gave for discharging Chapman, beyond its original claim that Chapman engaged in disorderly conduct (as was stated on the South Carolina unemployment form). These shifting reasons include Chapman's two accidents, two incidents of insubordination, and an alleged inappropriate comment (as described in fn. 8 above). The General Counsel notes that the Respondent did not impose any discipline on Chapman for the earlier incidents.[24] Further, the General Counsel asserts that, at the hearing, Piester admitted he did not mention any of these incidents when he discharged Chapman, but instead focused on Chapman's April 2 conduct.

We find merit to the General Counsel's contentions. Unlike the judge, we conclude that Chapman's conduct on April 2, amounted to a continuation of the earlier concerted employee complaints about the adverse change to the fuel surcharge. We also find, and the Respondent does not seriously contest, that the April 2 incident was the primary basis for the discharge.[25] Consequently, we reverse the judge and find that Chapman's discharge violated the Act.

First, as the Respondent's own witnesses acknowledged, Chapman reiterated the shared employee complaint about the fuel surcharge change during his meetings with Derrick and Piester. According to Piester, when Chapman came into his office, he was talking about the fuel surcharge change. Similarly, Marntin (who overheard the discussion) testified that Chapman was "complaining about the fuel surcharge." Finally, Derrick testified that Chapman "was complaining about the fuel surcharge and wanted it showed (sic) on his check stub." As discussed above, the record evidence clearly establishes that the fuel surcharge issue was not unique to Chapman, but was instead concertedly voiced by employees on January 13, and thereafter. Moreover, Piester, via McAlister, knew that the issue remained a concern to the employees.[26] We therefore find that

[21] Nor did the judge find credible evidence that the Respondent believed that Chapman was speaking or attempting to speak for other employees on April 2.

[22] The judge credited Piester's testimony that he did not mind talking with Chapman about the pay issue.

[23] However, the judge also noted in his decision that the issue of whether Chapman was engaged in protected concerted activity on April 2, was "close and consequential." The judge found that if the Board determined that Chapman *was* engaged in protected concerted activity on April 2, Chapman's conduct on April 2, was not so egregious as to lose the Act's protection, and his discharge would violate Sec. 8(a)(1). No exceptions were made to this finding.

[24] Further, as noted above, Piester testified he was not certain that he learned before the discharge of the alleged inappropriate sexual comment made by Chapman.

[25] Nevertheless, the Respondent continues to argue that *Wright Line* is the proper framework for analyzing this issue. In order to respond to the Respondent's argument, we discuss *Wright Line* here. Had the Respondent not argued that it relied on events other than Chapman's April 2 conduct, however, we would have analyzed his discharge only under *Atlantic Steel*/*Felix Industries*, for the reason stated in footnote 30, below.

[26] Further, given the Respondent's unlawful threat that employees clean out their trucks if they did not like the fuel surcharge change Piester could not reasonably infer from the absence of subsequent employee complaints to him that the issue was no longer a matter of collective concern.

Chapman's repetition of the complaint about the fuel surcharge change on April 2 was a continuation of earlier protected concerted activity.

We recognize that Chapman made an individualized request for a notation on his pay stub. However, that request was made in the context of his underlying complaints about the fuel surcharge change. Further, other employees also had requested that the fuel surcharge information be included on their worksheets. The mere fact that those other employees had not additionally requested that the information be reflected on their pay stubs, does not exclude Chapman's request from the scope of protected concerted activity. See *JMC Transport,* 272 NLRB 545, 546 fn. 2 (1984), enfd. 776 F.2d 612 (6th Cir. 1985). In *JMC Transport*, the Board found that an employee's complaint about a payment discrepancy in his own paycheck was a continuation of employees' protected concerted activity in protesting, a month earlier, the company's change in the way employee wage payments were calculated. Here, too, Chapman's pay stub request was a continuation of the employees' earlier protected concerted activity in protesting the surcharge change.

The evidence also shows that the Respondent understood that the April 2 conduct was an extension of the earlier protected activity. First, Derrick's April 2 statement to Chapman, that if he was unhappy, he "should clean out" his truck, was an almost verbatim repetition of Piester's unlawful response to the employees' January 13 protected protest against the fuel surcharge change. In addition, in the space on the South Carolina Employment Security Commission form requesting the reason for termination, the Respondent wrote, "meet 1st part of Jan 07 that fuel surcharge would be taken out due to customer didn't want share. Disorderly conduct in office, 4-2-07." Thus, the Respondent itself linked Chapman's April 2 conduct to the January 13 meeting.[27] Accordingly, we find that Chapman's conduct on April 2 was, and was viewed to be, a continuation of earlier protected concerted activity.

Viewed applying a *Wright Line* analysis, the record further shows that the Respondent discharged Chapman for his protected concerted activity on April 2. To establish a violation under *Wright Line*, the General Counsel bears the initial burden of showing that protected concerted activity was a motivating or substantial factor in the adverse employment action. The elements commonly required to support such a showing are protected activity by the employee, employer knowledge of that activity, and animus on the part of the employer. The burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB No. 82, slip op. at 2–3 (2007).[28]

First, the General Counsel established both that the Respondent knew of Chapman's protected concerted activity (since Piester was present to observe it on April 2), and bore animus against it, as demonstrated by Piester's threat at the January 13 meeting, at which Chapman was present, and Derrick's subsequent April 2 threat to Chapman.

In addition, the Respondent has failed to show that it would have discharged Chapman absent his protected concerted activity. Though Respondent now contends that it discharged Chapman for reasons beyond his April 2 conduct (after initially asserting it was the April 2 conduct alone),[29] that assertion is undermined by the fact that the Respondent never disciplined Chapman for the other incidents, and never mentioned those incidents to Chapman or in its filing with the state unemployment commission. Moreover, the Respondent's own admissions demonstrate that Chapman's protected activity was a substantial and motivating factor for his discharge. Thus, Piester testified that Chapman's conduct on April 2, was the "big reason" for the discharge. Further, on the South Carolina unemployment form, Piester listed Chapman's conduct on April 2, as well as at the January 13 meeting at which employees (including Chapman) protested the fuel surcharge change, as the reasons for Chapman's discharge. Accordingly, we find that the Respondent failed to show that it would have discharged Chapman even in the absence of his protected activity.

Finally, we find that the same result obtains under an *Atlantic Steel/Felix Industries*[30] analysis (as the Respon-

[27] See, e.g., *Burle Industries*, 300 NLRB 498, 498 fn.1 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (in addition to evidence that employee engaged in protected concerted activity, respondent "clearly had the perception" that the employee engaged in protected concerted activity).

[28] Chairman Schaumber notes, as in *Consolidated Bus Transit, Inc*, supra at fn. 8, that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the animus and the adverse employment action. See, e.g., *American Gardens Mgmt. Co*., 338 NLRB 644, 645 (2002). Because *Wright Line* is a causation analysis, Chairman Schaumber agrees with this addition to the formulation. See, e.g., *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003). Chairman Schaumber believes that such a causal nexus has been shown here.

[29] Where, as here, an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive. See, e.g., *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 199 (1995); *Dumbauld Corp.*, 298 NLRB 842, 848 (1990).

[30] *Atlantic Steel Co*., 245 NLRB 814, 816–817 (1979); *Felix Industries*, 331 NLRB 144, 144–146 (2000), enf. denied on other grounds

dent effectively concedes)[31]. Pursuant to *Atlantic Steel*, an employer violates the Act by discharging an employee engaged in the protected concerted activity of voicing a complaint about his employment terms unless, in the course of that protest, the employee engages in opprobrious conduct, costing him the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Here, as we have found, Chapman was engaged in protected concerted activity on April 2, when he protested the surcharge change and requested that the monetary impact of the change be reflected on his paycheck stub. The Respondent claims that Chapman lost the protection of the Act on April 2, by speaking loudly to Derrick, and standing up and taking a step in her direction. We disagree. Applying the *Atlantic Steel* factors, we find that Chapman's conduct did not cost him the protection of the Act

First, the incident took place in Piester's office, and there is no evidence that any unit employee witnessed the incident or overheard the remarks. Thus, the first factor weighs in favor of protection. [32]

Similarly, the second factor weighs in favor of protection because the subject matter of the discussion, and Chapman's comments, related to protected concerted activity.

Regarding the third factor, the nature of the outburst, Chapman's conduct consisted of speaking loudly and stepping toward Derrick. However, merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection.[33] Nor was Chapman's moving toward Derrick sufficiently egregious. Given the small size of Piester's office, it would have been difficult for Chapman to move without approaching Derrick. Moreover, he stopped his approach almost immediately, and made no threatening gestures towards Derrick. Hence, this factor favors finding Chapman's conduct protected.

Finally, as to whether Chapman's outburst was provoked by the Respondent's unlawful conduct, the record reflects that Chapman stood up and approached Derrick promptly on the heels of her unlawful threat of discharge.[34] Thus, each of the *Atlantic Steel* factors weighs in favor of finding that Chapman's conduct did not cost him the protection of the Act.

Therefore, whether we apply a *Wright Line* or *Atlantic Steel/Felix Industries* analysis, the result is the same. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by discharging Chapman on April 2, 2007 because of his protected concerted activity.

AMENDED CONCLUSIONS OF LAW

1. The Respondent Alton H. Piester, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) by impliedly threatening its employees with discharge for engaging in protected concerted activity.
3. The Respondent violated Section 8(a)(1) by discharging Darrell Chapman for engaging in protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Darrell Chapman because he engaged in protected concerted activity, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W.*

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and remanded 251 F.3d 1051 (D.C. Cir. 2001). See, e.g., *Consumers Power Co.,* 282 NLRB 130, 132 (1986) (when "employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." (footnote omitted)).

[31] There are no exceptions to the judge's finding that Chapman's conduct on April 2, was not so egregious as to lose the Act's protection.

[32] See *The Tampa Tribune*, 351 NLRB No. 96, slip op. at 3 (2007) (where employee's profane and derogatory remark about a manager occurred in an office, away from other rank-and-file employees, this factor weighs in favor of protection); *Firch Baking Co*., 232 NLRB 772 (1977) (where employee's comments occurred in a private office meeting, and not on the plant floor where they could have negatively affected supervisors' status with other employees, employee did not forfeit the Act's protection).

[33] See *United States Postal Service*, 251 NLRB 252 (1980), enfd. 652 F.2d 409, (5th Cir. 1981) (two employees did not forfeit protection of the Act by loud language, including use of one profane word by one of them); *Firch Baking Co*., supra (employee did not forfeit protection of the Act by his loud and excited comments).

[34] See *Datwyler Rubber and Plastics, Inc*., supra, 350 NLRB 669, 670 (2007) (where an employee's outburst was an immediate response to a manager's unlawful threat of discharge, this factor weighs in favor of protection); *Felix Industries*, supra, 331 NLRB at 145 (where an employee's outburst was triggered by a supervisor's implicit threat of discharge, although not alleged as unlawful, this factor weighs in favor of protection).

Woolworth Co., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Chapman, and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

ORDER

The Respondent, Alton H. Piester, LLC, Newberry, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening its employees with discharge for engaging in protected concerted activity.

(b) Discharging its employees for engaging in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to 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 Darrell Chapman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Darrell Chapman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in Newberry, South Carolina, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 11, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Newberry facility at any time since January 13, 2007.

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

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, 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 impliedly threaten you with discharge for engaging in protected concerted activity.

WE WILL NOT discharge you for engaging in protected concerted activity.

[35] 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."

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

WE WILL, within 14 days from the date of the Board's Order, offer Darrell Chapman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Darrell Chapman whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

ALTON H. PIESTER, LLC

Jasper C. Brown Jr., Esq., for the General Counsel.
Charles Thompson, Esq. (Malone, Thompson, Summers & Ott), of Columbia, South Carolina, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on September 17 and 18, 2007, in Newberry, South Carolina. After the parties rested, I heard oral argument, and on September 19, 2007, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision. The Conclusions of Law and Order appear below.

Additional Discussion

Credibility of Charging Party Chapman

The bench decision explained why I credited the testimony of certain witnesses, but did not discuss my conclusion that Charging Party Chapman's testimony should not be credited. For the following reasons, I do not consider it reliable.

During cross-examination, Chapman initially testified that he had only one speeding ticket on his driving record. When asked if he had three speeding tickets, Chapman answered, "Not of my knowledge." However, when confronted with documentary evidence, he admitted he had three speeding tickets. It seems unlikely that Chapman, a commercial truckdriver, would lack knowledge of his own driving record.

Additionally, Chapman's interest in the outcome of this proceeding—he stood to regain his job with backpay—may have affected his recollection. For example, Chapman described a conversation he had with another driver on April 2, 2007, just after Respondent's owner, Alton Piester, discharged him. Chapman testified that he told this driver that Piester fired him "because I was talking about our money." However, according to the other driver, James Seibert Jr., Chapman said he had been fired because "he got loud in the office." Witnesses Marntin, Derrick and Piester uniformly testified that Chapman had, in fact, become loud before Piester discharged him. Crediting Seibert's testimony, I find that when Chapman spoke with Seibert on April 2, 2007, Chapman did attribute his discharge to getting loud in the office rather than, as Chapman testified at the hearing, that he was "talking about our money."

This difference, between how Chapman testified at the hearing and what he told Seibert on the day of his discharge, suggests an inclination to embellish his testimony in a way favorable to his case. This tendency may explain some rather improbable words which Chapman attributed to Renee Derrick.

Complaint paragraph 6 alleges that Renee Derrick, a secretary, was Respondent's agent. Complaint paragraph 7 alleges that Respondent, through Derrick, made an unlawful implied threat of discharge. The General Counsel thus had the burden of proving both Derrick's status as Respondent's agent and that she made the alleged threat.

Chapman quoted Derrick as saying, right before the alleged threat, "I can speak for me and Hollywood." ("Hollywood" referred to Owner Piester.) Obviously, if Derrick had said those words, it would support the General Counsel's claim that Derrick possessed apparent authority to act as the owner's agent. However, I do not credit Chapman's testimony.

For the reasons discussed in the bench decision, I have concluded that Derrick was a very reliable witness and credit all of her testimony concerning her interaction with Chapman on April 2, 2007. That testimony does not suggest that she said "I can speak for me and Hollywood."

Moreover, she would have no reason to make such a statement. Although it is possible to imagine circumstances in which Derrick might have a reason to say that she could speak for the owner, such circumstances were not present here. For example, if she had been trying to prevent Chapman from talking to Piester, she might have said that she had authority to speak for Piester. However, she was not trying to shield Piester from Chapman. To the contrary, Derrick credibly testified that she told Chapman that he "needed to go talk to Alton" and Chapman did.

Additionally, when Derrick told Chapman that if he didn't like the way things were done, "then maybe he should clean his truck out," Piester was present. It would seem odd for Derrick to say "I can speak for me and Hollywood" when "Hollywood" was right there.

Indeed, Chapman's testimony that Derrick referred to Piester as "Hollywood," and did so in Piester's presence, strains credulity. More than once in her testimony, Derrick referred to Owner Piester by his first name, Alton, but she never called him "Hollywood." Neither did the other secretary, Sherry Marntin. Rather, "Hollywood" appears to have been the irreverent nickname which some of the drivers applied to Piester, perhaps a bit pejoratively. Although it would not have been out of character for Chapman himself or some other driver to have used this epithet, it is difficult to believe that Piester's secretary would do so even if Piester were not there to hear it.

In sum, Chapman's testimony does not ring true and I do not credit it.

Derrick's Status as Respondent's Agent

As noted above, the complaint alleged that Derrick was Respondent's agent. Citing *Dentech Corp*., 294 NLRB 924 (1989), the General Counsel argues that Derrick possessed the apparent authority to act for Respondent.

The Dentech Corp. decision notes that, "The Board has held that apparent authority may be inferred when an employee acts with the cooperation of or in the presence of supervisors." Id. at 926, citing *Advanced Mining Group*, 260 NLRB 486, 503–504 (1982), *Wm. Chalson & Co*., 252 NLRB 25 (1980), and *Hit 'N Run Food Stores*, 231 NLRB 660, 668–669 (1977). Additionally, as the Board observed in Dentech Corp., an employer's failure to disavow an employee's conduct may warrant an inference that the employee possessed apparent authority. *Haynes Industries*, 232 NLRB 1092, 1099, 1100 (1977).

In the present case, Owner Piester was present when Derrick told Chapman that if he did not like the way his pay was calculated, he should clean out his truck. Piester did not contradict this comment or otherwise indicate that he disagreed with it. Piester's silence amounted to acquiescence. See *Dentech Corp*., 294 NLRB at 927. Accordingly, I agree with the General Counsel that Derrick's "clean your truck" remark may be imputed to Respondent.

However, for reasons discussed in the bench decision, I have concluded that the remarks about Chapman cleaning out his truck did not, considered in context, communicate an implied threat or otherwise interfere with, restrain or coerce employees in the exercise of Section 7 rights. Accordingly, even if Derrick's "clean your truck" comment is imputed to Respondent, it does not constitute a violation of the Act.

The Protected Activity Issue

In substantial part, this case turns on whether Chapman was engaged in protected activity at the time of his discharge. This issue appears to be a close one and it has significant ramifications.

If I erred in concluding that Chapman's activity on April 2, 2007, was not protected, then it also was inappropriate to analyze the facts under the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Rather, when an employer discharges an employee for protected activity, the appropriate inquiry focuses on whether the employee had committed any misconduct sufficient to remove him from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006). Because the issue concerning Chapman's protected activity is both close and consequential, the additional discussion below may assist the Board in reviewing the correctness of my conclusion that the cases cited by the General Counsel can be, and should be, distinguished.

The General Counsel has cited several cases to support the its argument that on April 2, 2007, Chapman was continuing the protected concerted activity of January 13, 2007, when the drivers complained about Respondent's new method of computing their earnings. For example, in *Salisbury Hotel*, 283 NLRB 685 (1987), the Board found that the alleged discriminatee, Resnick, had engaged in protected, concerted activity when she complained to management about the respondent's new lunch hour policy. Even though the record did not establish that the "employees explicitly agreed to act together" to change the policy, most of them complained to management. Accordingly, the Board concluded, "the employees were engaged in a concerted effort to convince the Respondent to change its lunch hour policy. Resnick's complaints to other employees, as well as her individual complaint to the Respondent, were part of the concerted effort." *Salisbury Hotel*, 283 NLRB at 687.

In *Salisbury Hotel*, the record did not establish that employees authorized Resnick to speak on their behalf or even knew in advance that she was going to complain to management. Nonetheless, the Board found that her protest fell within the definition of concerted activity set forth in *Meyers Industries I*, 268 NLRB 493 (1984), and *Meyers Industries II*, 281 NLRB 882 (1986).

The present facts are similar in several ways. When Respondent announced the new pay computation, a great many employees objected. They continued to talk about it among themselves, and, individually, complained to management. Chapman, like Resnick in Salisbury Hotel, was among the most vocal. Were these the only facts, I would conclude that *Salisbury Hotel* is apposite here.

However, in *Salisbury Hotel*, the respondent announced the lunch hour policy in December, and management decided to discharge Resnick in December, not long after she complained. (The respondent waited to effectuate the discharge decision until after the Christmas holidays because it expected difficulty in finding a replacement.)

In the present case, Respondent announced the pay computation change on January 13, 2007, but did not decide to discharge Chapman until April 2, 2007. In the meantime, employee objections to the new pay computation method had faded. The General Counsel did present evidence that the change remained a subject of discussion among employees even at the time of Chapman's discharge in April, but the evidence suggests that, at the time of his discharge, Chapman was the only driver who still was voicing objections.

Chapman's protest, of course, would still be protected even if he were the lone holdout trying to rally other employees to support this cause. Indeed, an individual employee's complaints aimed at instigating group action is quintessential concerted activity.

However, the credible evidence does not establish that Chapman was trying to enlist the support of other employees or that, on April 2, 2007, he intended to speak for anyone but himself. On that date, Chapman sought, in effect, that Respondent treat the reduction in pay as a deduction from pay and list it on the paycheck stub. The record does not establish that any other employees wanted, or had asked for, such a change. Therefore, I conclude that Chapman was acting by himself, and not continuing the employees' January 13, 2007 concerted activity.

Credible evidence does not establish that, on April 2, 2007, Respondent regarded Chapman as speaking or attempting to speak for anyone other than himself. Accordingly, it is difficult to find a nexus between Chapman's discharge on that date and his protected activity several months earlier.

Based on this absence of a link between the protected activity and the adverse employment action, I concluded that the

General Counsel had failed to prove the fourth Wright Line requirement. However, should the Board conclude that Chapman was, in fact, engaged in protected activity when Respondent discharged him on April 2, 2007, use of the Wright Line framework is not appropriate. As noted above, the proper inquiry in such circumstances would be whether Chapman had engaged in any misconduct sufficient to deprive him of the protection of the Act.

Were I to reach this issue, I would conclude that Chapman did not engage in such egregious misconduct and, accordingly, that he did not lose the Act's protection. Therefore, had I concluded that Chapman had been engaged in protected activity at the time of his discharge, I would have concluded further that the discharge was unlawful. However, in view of my conclusion that Chapman was not engaged in protected activity, I recommend that the Board dismiss the Complaint.

CONCLUSIONS OF LAW

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

2. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

ORDER

The complaint is dismissed.

Dated Washington, D.C., October 24, 2007.

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Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Based on the credited evidence, I conclude that Respondent did not violate the Act, and recommend that the Complaint be dismissed.

Procedural History

This case began on April 23, 2007, when the Charging Party, Darrell Chapman, filed and served on Respondent the initial unfair labor practice charge in this proceeding. Chapman amended the charge on June 27, 2007.

After investigation, the Regional Director for Region 11 of the National Labor Relations Board issued a Complaint and Notice of Hearing on June 27, 2007. In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

A hearing opened before me on September 17, 2007 in Newberry, South Carolina. On that day and the next, the parties presented evidence. Also on September 18, 2007, counsel presented oral argument. Today, September 19, 2007, I am issuing this bench decision.

Admitted Allegations

In its Answer to the Complaint, Respondent admitted a number of allegations. Based upon those admissions, I find that at all material times Respondent has been a South Carolina corporation with a facility located in Newberry, South Carolina, where it is engaged in the interstate and intrastate transportation of goods and materials.

Additionally, I find that Respondent satisfies both the statutory and discretionary standards for the Board to exercise jurisdiction. Further, I conclude that Respondent is an employer within the meaning of Section 2(6) and (7) of the Act and that its owner, Alton Piester, is its supervisor and agent within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Respondent admits that on April 2, 2007, it discharged its employee Darrell Chapman, and thereafter has failed and refused to rehire him. I so find. Respondent denies that it took this action for unlawful reasons or violated the Act.

Background

Respondent performs trucking in several southeastern states. Although it contracts with some owner–operators, most of its drivers are employees. The record does not indicate that any labor organization represents these drivers and it does not appear that any union was trying to organize Respondent's employees. The government does not allege that Respondent discriminated against any employee because of union activities or to discourage membership in a

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labor organization. Indeed, the Complaint does not allege a violation of Section 8(a)(3) of the Act, which makes unlawful employment discrimination to encourage or discourage membership in any labor organization.

Rather, the Complaint alleges that Respondent discharged employee Chapman because he "engaged in concerted activities with other employees for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection." For clarity, it may be noted that no evidence suggests that any employee or group of employees had requested that Respondent engage in collective bargaining and the General Counsel has not argued that any employees had formed any committee or organization to negotiate with their employer. Thus, notwithstanding the allegation that Chapman had "engaged in concerted activities. . .for the purpose of collective bargaining," the record does not support such a finding.

Instead, the General Counsel argues that Chapman engaged in concerted activities with other employees for their "mutual aid or protection." More specifically, the government asserts that a number of employees, including Chapman, protested a change Respondent made in the procedure for calculating their compensation, resulting in less pay. The employees began voicing these protests when Respondent's owner announced the change during a January 13, 2007 meeting. The employees' objections at the meeting constituted protected, concerted activity and, the government argues, Chapman was continuing that protected activity about two–and–a–half months later, on April 2, 2007, when, acting alone, Chapman complained about the change to one of Respondent's office workers and to Respondent's president.

The General Counsel contends that Respondent discharged Chapman in retaliation for protesting, in concert with other employees, the changed method for calculating compensation. Although such an alleged retaliatory discharge for protected activity resembles a discharge motivated by antiunion animus, the absence of a labor organization takes it outside the ambit of Section 8(a)(3) of the Act, which prohibits an employer from encouraging or discouraging union membership by engaging in employment discrimination.

Instead, the Complaint alleges that Chapman's discharge violated Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). Section 7 of the Act grants employees the "right to self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also "the right to refrain from any or all of such activities. . ." 29 U.S.C. § 157.

The Complaint also alleges that Respondent made two threats which violated Section 8(a)(1) of the Act. Specifically, Complaint paragraph 7 alleges that on January 13, 2007, Respondent, by Owner Piester, impliedly threatened employees with discharge if they engaged in protected concerted activity. The same paragraph further alleges that on April 2, 2007,

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Respondent, by Renee Derrick, impliedly threatened employees with discharge if they engaged in protected activity.

Derrick works in Respondent's office. The Complaint alleges, and Respondent denies, that Derrick is Respondent's agent

The January 13, 2007 Meeting

Respondent has not contested that its truck drivers (apart from the few owner–operators not relevant here), are "employees," and therefore within the protection of the Act. Although their legal "employee" status isn't disputed, it may be noted that the drivers receive compensation under a system different from that common in other industries. The productivity of the truck in generating revenue determines the compensation of its driver. However, as already noted, in January 2007, Respondent announced a change in billing and bookkeeping practices which negatively affected the amount of compensation a driver would receive. The change, which concerned the handling of fuel surcharges, made each truck appear to be less profitable than previously, and that, in turn, decreased the driver's paycheck.

When Owner Piester described the change at a January 13, 2007 meeting with the drivers, many protested vigorously. Piester told them, in effect, that he had made up his mind and that the change would take place notwithstanding their objections. During his testimony, Piester admitted he told the drivers that if they didn't like it or it didn't work for them, they could "clean out their truck and move to another job."

The record establishes that the phrase "clean out your truck" carries a special meaning for truck drivers, or at least for Respondent's drivers. Typically, a driver assigned to a truck will leave some personal possessions in it because he expects to be returning to operate it again. Should a supervisor tell a driver to "clean out your truck," it would convey that the driver no longer would be operating that vehicle, or, in other words, that he was fired.

Accordingly, the General Counsel argues that Piester's remark to the drivers that if they didn't like the change they could "clean out their trucks," constitutes a veiled or implied threat of discharge. The record, however, does not persuade me that every reference to cleaning out a truck relates to the discharge of an employee. Rather, cleaning the personal possessions out of a truck reasonably would appear simply to signify that the driver's previous relationship with that vehicle has ended, for whatever reason. The driver might have been reassigned to another vehicle, or he might have been discharged, or he might have quit voluntarily.

Therefore, I do not understand Piester's comment, that the drivers could clean out their trucks, to imply that they could be discharged for not liking the new system. Rather, I conclude that a typical driver reasonably would understand Piester's words to mean, "if you don't like the new system you can leave." Stated another way, Piester's words would be equivalent to saying, "If you don't like the new system, you can pack your bags."

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Would such a statement to employees upset about a change in working conditions – that if they didn't like it they could pack their bags and leave – constitute an implied threat? In Jupiter Medical Center Pavilion, 346 NLRB No. 61 (March 13, 2006), the respondent conducted a number of employee meetings in response to a union organizing campaign. At one such meeting, an employee criticized the way management treated its workers. A supervisor replied "Maybe this isn't the place for you . . . there are a lot of jobs out there."

Reversing the administrative law judge, the Board held that the statement, suggesting that the employee seek work elsewhere, violated Section 8(a)(1) of the Act:

The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with continued employment. Rolligon Corp., 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

However, a significant fact distinguishes the present case from Jupiter Medical Center. Employees were not discussing unionization during the January 13, 2007 meeting at which Piester made the "clean out your truck" comment. Piester did not schedule the meeting in response to a union organizing campaign. Indeed, nothing in the record suggests the existence of such a campaign.

In the absence of any evidence establishing even that the word "union" came up during the January 13, 2007 meeting, employees would have no reason to believe that Piester was

saying that support for a union was incompatible with continued employment. Certainly, Piester's "clean out your truck" comment communicated that employees dissatisfied with working conditions or at least this particular working condition should leave. But that suggestion isn't the same as the veiled message which the Board found to be unlawful in Jupiter Medical Center. In that case, the suggestion was unlawful not because it merely communicated that an unhappy employee should leave but rather because the remark suggested the unhappy employee should leave "rather than engage in union activity in the hope of rectifying matters. . ."

In Jupiter Medical Center the context of the remark a meeting called in response to a union organizing drive provided the unspoken words which made the remark violative. When an employer's management calls a meeting to discuss a union campaign, employees attending the meeting quite reasonably would try to relate the remark to the overall purpose of the meeting. Respondent's January 13, 2007 meeting did not take place in the context of such a union organizing campaign.

Even if Piester's "clean out your truck" remark did not convey to employees that working for Respondent was incompatible with union activity, could it communicate that working for Respondent was incompatible with engaging in other concerted activities for the employees'

mutual aid and protection? It seems unlikely. Respondent did not call the January 13, 2007 meeting to discuss employees' protected activities.

Taking into account the total context, I conclude that employees attending the January 13, 2007 meeting reasonably would understand Piester's words not as the statement of a threat but as the announcement of a fait accompli. The words signified that Piester had made up his mind and the new plan would be going into effect despite their protests.

In this instance, announcing a fait accompli was not unlawful. Respondent's employees had not selected a union to represent them and Respondent had no obligation to bargain before making changes. Because I conclude that Piester's comment, in context, did not constitute an implied threat, I recommend that the Board dismiss this allegation.

Events of April 2, 2007

The record suggests that over time, employee discontent with the new practice abated. Chapman, however, continued to complain about the change. On April 2, 2007, he spoke with Renee Derrick, a secretary whose responsibilities include various accounting functions.

Witnesses differ somewhat concerning the details, so I must determine which gave the most reliable testimony. Based on my observations of the witnesses, I conclude that Derrick's testimony merits the greatest confidence. In addition to Derrick's demeanor, I also note that her answers were responsive to the questions and well organized. Additionally, based upon my observations of the witnesses, I credit the testimony of Sherry Marntin, who also works in Respondent's office.

Alton Piester appeared to have greater difficulty providing responsive answers. Although I believe him to be a sincere witness, his testimony sometimes seemed confusing and sometimes conclusory. In general, however, I credit his testimony.

The credited testimony establishes that when Chapman spoke with Derrick on April 2, he was concerned that the fuel surcharge amount did not appear on his pay stub. Derrick offered an explanation. Chapman remained unsatisfied and ultimately spoke with Piester. During the discussion, Chapman began to raise his voice.

Piester asked Derrick to come into his office. During his testimony, Piester explained that he summoned Derrick because he believed it would be good for someone to witness his conversation with Chapman.

At some point during the conversation, when Chapman still appeared to be unsatisfied, Derrick commented to him that if he was unhappy working there, he should clean his truck. Chapman protested that Derrick did not have authority to tell him to clean his truck, that is, she did not have authority to discharge him.

Derrick stressed during her testimony, which I credit, that she did not instruct Chapman to "clean his truck," which would be tantamount to discharging him, and noted that she did not have that authority. Rather, she told Chapman that if he were unhappy working there, he should clean his truck. That is, he should find work elsewhere.

The Complaint alleges that Derrick's statement to Chapman about cleaning his truck constituted a veiled threat which violated Section 8(a)(1) of the Act. That issue will be discussed later in this decision.

Chapman became louder and got up out of his chair. Based on Derrick's credited testimony, I find that he took a step towards Derrick. Piester told Derrick to clean out his truck, that he was fired.

My finding that Chapman spoke in a loud voice is based on the credited testimony of Derrick and Piester. However, I also note that on the witness stand, Chapman spoke in a noticeably louder voice than other witnesses.

In this instance, Chapman was concerned that information about the fuel surcharge did not appear on his paycheck stub. Derrick offered an explanation which did not satisfy Chapman. Derrick then referred Chapman to Piester.

Based on the credited testimony, most notably that of Marntin and Derrick, I find that Chapman spoke only about his own pay and pay documents and not those of any other employee. Additionally, the record fails to establish that Chapman indicated in any way that he intended to speak on behalf of any other employees or that any other employees had asked him to act on their behalf.

Discussion

For the reasons discussed with respect to Piester's "clean your truck" comment at the January 13, 2007 meeting, I conclude that Derrick's remark did not constitute a veiled or implied threat. That is particularly true because employees were engaged in concerted activity on January 13 when they protested the change in pay computation, but Chapman was acting by himself on April 2, 2007.

The General Counsel argues that Chapman's April 2 conduct was a continuation of the employee protests at the January 13 meeting, and therefore protected. The credited evidence does not establish that Chapman said anything which would lead Piester to conclude that he was continuing the earlier protest. Considering the amount of time which had elapsed, it would not be self–evident that Chapman's complaints, focused solely on his own pay and his own pay documentation, actually constituted activity on behalf of other employees. I conclude that Respondent had no reasonable basis to believe that Chapman was acting on behalf of anyone but himself.

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Concluding that Chapman's conduct was unprotected, Derrick's remark in response to that conduct does not constitute an implied threat of discharge or other retaliation for engaging in protected activity. Therefore, I recommend that the Board dismiss this 8(a)(1) allegation.

In determining whether Piester's discharge of Chapman violated the Act, I will follow the framework which the Board set forth in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under Wright Line, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc,* 346 NLRB No. 96 [1099] (April 28, 2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc*., 321 NLRB 278, 280 at fn. 12 (1996).

It is true that the Board adopted the *Wright Line* framework to evaluate Section 8(a)(3) allegations, and that in certain Section 8(a)(1) discharge cases, following the *Wright Line* mode is not appropriate. However, the present discharge issue clearly turns on motive, and the Board has held that *Wright Line* provides an appropriate framework for analysis "in cases that turn on the employer's motive." *Phoenix Transit System*, 337 NLRB 510 (2002). Therefore, I will apply it here.

At the first step, I must determine whether Chapman engaged in protected concerted activity. Along with other employees, Chapman protested the change in pay computation at the January 13, 2007 meeting. Although I do not conclude that his actions on April 2, 2007 were protected, Chapman did engage in protected activity on January 13. Therefore, I conclude that the General Counsel has established the first Wright Line element.

The record certainly establishes that Respondent knew about Chapman's protests on January 13. Respondent's owner was present at the meeting. The General Counsel has proven both the second Wright Line element and the third. A discharge certainly is an adverse employment action.

However, I conclude that the government has not carried the burden of showing a link between the protected activity and the adverse employment action. Considering that two and

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one–half months had elapsed, and considering also the absence of evidence showing that the Respondent was hostile to the employees' protests, I do not find that such hostility existed. Indeed, I credit Piester's testimony that he did not mind talking with Chapman about the pay issue.

The credited evidence clearly establishes that Piester became upset when Chapman not only spoke loudly at Derrick but also stood up and took a step in her direction. The General Counsel elicited testimony that Chapman did not make any threat, in words or gestures. However, yelling at another employee, or even speaking loudly to an employee in an upset tone of voice, can impart discomfort as well.

Respondent pointed to Chapman's driving problems and driving record. I do not view this effort as an indication of a shifting defense. When Piester testified that Chapman's shouting was "the last straw," he seemed very sincere. Crediting that testimony, I conclude that Chapman's work problems had been a source of frustration to Piester which Piester might have tolerated longer. However, when Chapman started shouting at Piester's secretary, that was too much.

In sum, the credited evidence does not establish that Respondent discharged Chapman because of any protected, concerted activities. Accordingly, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the proceeding, counsel displayed consistently high standards of professionalism and civility, which I truly appreciate. The hearing is closed.