UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNIVERSAL DYNAMICS, INC.	Cases 5–CA–33275
	5–CA–33386
and	5–CA–33463

ASSOCIATION OF UNADYN FIELD
SUPPORT TECHNICIANS

LOREN RISTOLA, An Individual

Vonda Marshall-Harris, Esq., for the General Counsel.
James V. Meath and King F. Tower, Esqs,
(Williams Mullen, Richmond, Virginia),
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C., on March 19–22, 2007. The charges giving rise to these cases were filed on October 6, 2006, December 16, 2006 and February 16, 2007 and the initial complaint was issued December 29, 2006. An order consolidating cases and a consolidated complaint was issued February 28, 2007.

The General Counsel alleges that Respondent, Universal Dynamics, Inc. (Unadyn) violated Sections 8(a)(4) and/or 8(a)(3) and/or 8(a)(1) of the Act by not giving employee Darrin Mantle[1] a performance bonus in May 2006 for work performed in 2005 and discharging Mantle in September 2006. He also alleges that Respondent violated Sections 8(a)(3) and 8(a)(5) and (1) of the by requiring employees Loren Ristola and Quentin Parlett to report daily to its facility in Woodbridge, Virginia, rather than working from their homes in Luray, Virginia, and Section 8(a)(1) by interrogating and coercing Ristola about his February 8, 2007 leave request. Finally, the General Counsel alleges that Respondent UnaDyn violated Section 8(a)(5) in not fully complying with an information request submitted by the Union, the Association of Unadyn Field Support Technicians.[2]

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[1] The alleged discriminatee's given name is Charles Darrin Mantle.

[2] Respondent contends at page 2, n.1 of its brief that the reassignment issue, the bonus issue and the termination issue are not before me because they are not mentioned in the General Counsel's February 28, 2007 "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing." These allegations are contained in the original Complaint issued on December 29, 2006. Although the better practice would have been for the General Counsel to have repeated the original allegations in the February 28, 2007 document, it is clear that this Consolidated Complaint was incorporating the initial Complaint by reference. Moreover, from the way in which this case was litigated and briefed, it is clear that Respondent understood that these allegations were at issue. Finally, assuming that the February 2007 Consolidated

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On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Universal Dynamics, Inc. (Unadyn), a corporation, manufactures drying and similar machinery for the plastics industry in Woodbridge, Virginia. It is a subsidiary of Mann-Hummel, a German company. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the Association of Unadyn Field Support Technicians, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Unadyn has approximately 150 employees, approximately half of which are engaged in the manufacture of machinery for the plastics industry. It also employs 4–6 field support technicians, whose job is to start up newly installed machinery for Unadyn customers, repair Respondent's machinery at its customers' facilities and offer repair and maintenance advice over the telephone. In the course of their duties, field support technicians normally work at least 50 percent of the time traveling to customers' facilities to perform repair and maintenance work on site.

At times relevant this case, Respondent's field service technicians included Darrin Mantle, who was hired in 1999 and lives in Stover, Missouri; Quentin Parlett, who was hired in March 1989 and lives in Luray, Virginia; Loren Ristola, who was hired in 2000 and also lives in Luray; John Bruner who began working for Respondent in March 2006 and lives in Laper, Michigan; and Thomas Ferguson, who lives near Respondent's Woodbridge, Virginia facility. Of these five only Ferguson worked regularly at Woodbridge; the others, at least since 2002, generally worked out of their homes when not traveling to customers' sites.

Ristola and Parlett commuted 90 miles one-way to Woodbridge from Luray until 2002. At that time as part of an agreement to keep Ristola from leaving Respondent for another company, Respondent agreed to allow Ristola and Parlett to work from their homes when not on the road. As will be described later in more detail, there were occasions after 2002 on which Ristola and Parlett were required to commute to Woodbridge.

Sometime after Respondent hired Ristola in 2000, the field support technicians began working considerable overtime. In August 2004, Respondent informed the field support technicians that they were entitled to overtime pay prospectively. At the same time, it discontinued a bonus that it had been paying these employees.

Mantle, Ristola and Parlett discussed among themselves whether they were entitled to retroactive overtime payments and consulted an attorney. On January 21, 2005, Mantle

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Complaint may not be read as incorporating the allegations of the December 2006 Complaint, I deem these issues to have been tried by the consent of the parties. I therefore consider all issues raised in the December 2006 and February 2007 Complaints to be before me pursuant to Rule 15(b) of the Federal Rules of Civil Procedure.

[3] Tr. 544, line 1: "here" should be "her."

telephoned Donald Rainville, Respondent's President. Mantle informed Rainville that he and other field service technicians had discussed whether they were entitled to back overtime pay, determined that were so entitled and had consulted an attorney.

Up until this point, there is no suggestion in this record that Respondent was dissatisfied with Darrin Mantle as an employee in any respect. In fact, Respondent had awarded Mantle a bonus every year from 1999 or 2000 through 2004.

On February 18, 2005, Darrin Mantle and Loren Ristola filed a lawsuit in a United States District Court against Respondent and Donald Rainville under the Fair Labor Standards Act (FLSA) seeking to be compensated for overtime pay retroactively. In September 2005, the parties settled the lawsuit and Respondent paid Mantle, Ristola and their attorneys six-figure sums pursuant to that settlement.

Although Quentin Parlett did not join in the suit with Mantle and Ristola, Respondent's President Donald Rainville called Parlett in 2005 to assure him that he would receive any benefit that Mantle and Ristola received as a result of the lawsuit. After the settlement of the lawsuit, Respondent also paid Parlett a substantial sum of money.

On the same day[4] that Mantle and Ristola filed their lawsuit, Unadyn President Rainville conducted a meeting. Ristola and Parlett attended in person; Mantle participated by telephone. At this meeting Rainville announced the implementation of a new system whereby a computer program, called @Road, would be installed in each technician's cell phone that would allow Respondent to track their location. The technicians were also required to log in and log out on the @Road system. However, this system was to be used for the purpose of billing customers, not for paying the technicians. The technicians were paid according to time sheets that they submitted.

Rainville also discussed reinstating a bonus to replace the bonus that the company had ceased paying in August 2004. There is considerable dispute as to what Rainville said about the bonus. According to Ristola, Parlett and Mantle, Rainville told them that they would receive a 10 percent bonus if they were available for travel 80 percent of the time. They testified that Rainville told them that the only difference between the new bonus and the one that was discontinued in August 2004, was that this bonus would be paid annually, instead of quarterly.

Rainville, on the other hand, and Jan Harcharek, Respondent's human resources director, testified that Rainville told the technicians that the bonus would be up to 10 percent of their current salary but totally discretionary. Rainville also talked about the "duck rule'"[5] regarding bonuses to indicate that bonuses would be paid to those who made a good faith effort to comply with Respondent's rules and would not be withheld for minor deficiencies in compliance. Based on Harcharek's testimony and her notes, which she testified was prepared immediately following the meeting (R. Exh. 18), I credit the testimony of Rainville and Harcharek

[4] The fact that this meeting occurred on the same day that the lawsuit was filed appears to be coincidental.

[5] The duck rule is something like this: if it walks like a duck and talks like a duck, there is a good chance it's a duck.

that Rainville told the technicians that the bonus was discretionary and depended upon substantial compliance with Respondent's rules.[6]

Three months after Mantle and Ristola filed their FLSA lawsuit, a mediation conference was held on June 20, 2005. The same month, prior to the mediation, while on a smoking break, William Collis, the field support technicians' supervisor, told Cynthia Monroe, then a supervisor in Unadyn's parts department, that Respondent was trying to get rid of Darrin Mantle because he was causing too much trouble.[7]

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[6] Harcharek's notes, on their face, appear to be what they purport to be, a contemporaneous account of the February 18 meeting. I therefore credit her testimony in this regard and her recollection of the meeting which comports with her notes. Additionally, Quentin Parlett's testimony at Tr. 273 and 324 supports Respondent's contention that Rainville told the technicians on February 8, 2005 that the 10% bonus would be "discretionary."

Regardless of whether or not the bonus was discretionary, it would violate Section 8(a)(3) and/or (1) to either withhold the bonus or reduce it in order to interfere with, restrain or coerce an employee in the exercise of his or her Section 7 rights, or to retaliate against employees for exercising those rights.

[7] I fully credit the testimony of Cynthia Monroe, a seemingly disinterested witness called by the General Counsel. Monroe worked for Unadyn from 1987 to October 2005. There is no evidence in the record as to why she left Respondent's employment. Monroe testified that she had become friendly with Darrin Mantle by virtue of telephone conversations when Mantle would call the Woodbridge facility for parts and by talking to him during smoking breaks whenever he visited Woodbridge.

On cross examination, Respondent's counsel asked Monroe if she and Supervisor Collis were friends. She replied, "I would like to think we were." Counsel then asked why Monroe didn't respond to Collis when he told her that Respondent was trying to get rid of Darrin Mantle. I immediately cut him off and told counsel that the reason Monroe didn't respond to Collis was irrelevant. He replied that he was testing Monroe's credibility on whether this conversation ever happened, Tr. 533.

Later the same day Collis testified as follows:

> Q. And in or about July of 2005, did you say to her [Cynthia Monroe] any words to the effect that we are going to get rid of Darrin Mantle, he's causing too much trouble?
> R. I did not say those words specifically. I do recall telling her that I thought he was going to crash and burn.
> Q. Okay, Did you ever express anything concerning the company's intent about involuntarily discharging Mr. Mantle.
> R. I did not mention that to her, nor did I have knowledge that there was something going on.
> Q. What did you mean by your comment, it appears as if Mr. Mantle is going to crash and burn?
> R. He's creating—well, he was creating a lot of problems for the company, being defiant.

Tr. 589.

Collis went on to discuss the tension between Respondent and Mantle over his manner of using or not using its cellphone system. Thus, it is clear that Collis told Monroe that Mantle was in trouble with management. To the extent their testimony conflicts, I credit Monroe.

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In July 2005, Monroe was walking through Respondent's sales department when she overheard Rainville talking to Respondent's Quality Control Manager Annette Kinney. Monroe overheard Rainville ask, "where those boys were?" in a very angry tone. When Kinney said she did not know, Rainville directed her to track their whereabouts. Kinney replied that the directive "sounded like it was personal," because Rainville was always asking where they [obviously referring to several of the field support technicians] are. Rainville replied, "it's more than personal now."

In March 2006, Quentin Parlett attended a training session at Respondent's Woodbridge facility. He had lunch with Respondent's President Donald Rainville and Vice-President John Fleischer. During their luncheon conversation, the subject of the cellphones carried by the field support technicians came up. The computer program in the cellphones, which allowed Respondent to track the location of the technicians, was a source of acrimony between the technicians and management. Rainville told Parlett that if "one person" would leave the company, the phones would "go away." Parlett reasonably assumed that Rainville was referring to Darrin Mantle. At about this time, Respondent replaced the @Road computer program in the technicians' cellphones with a different program named Aligro.

February 2006: Respondent gives a bonus to Ristola and Parlett but not to Mantle.

The "crash and burn" reference can only mean that Mantle was on a course for involuntarily termination. Indeed, given the paucity of evidence of misconduct by Mantle prior to this conversation, it is evident that, by June 2005, Respondent was determined to terminate him in retaliation for filing the FLSA lawsuit. This is explained further in my discussion of the bonus issue.

Monroe's testimony was obviously truthful. She testified that Collis indicated to her that Respondent was likely to terminate Mantle and she did not testify as to any reason offered by Collis, or offer an opinion as the reasons. Monroe did not have any motive to embellish what Collis had said to her. Collis, on the other hand, who is still one of Respondent's supervisors, had an incentive to paraphrase what he said to Monroe.

Respondent's counsel also attempted to interrogate Monroe as to why she did not tell anyone other than the NLRB agent about overhearing Rainville's remarks to Annette Kinney. I also curtailed this inquiry, Tr. 535. Counsel responded:

> But my argument to you why you should be interested in why is because I'm going to argue to you that the fact that she didn't tell anybody is because the conversation didn't happen…

Tr. 536.

I also cut counsel off when he attempted to question Monroe about an incident in 2001 or 2002 in which she called the police from Rainville's office to complain about some unidentified person harassing her by calling her on her cellphone. Monroe apparently went to Rainville at a later time and recanted or withdrew the complaint, Tr. 539-545.

Later the same day, Rainville testified that on two or three occasions in 2005, he was angry and yelled to Annette Kinney to find out where the field technicians were, Tr. 666. Although, he testified that these events occurred between August and October 2005; Rainville essentially corroborated Cynthia Monroe's testimony.

On February 16, 2006, John Fleischer, Respondent's Vice President of Sales and Marketing notified Ristola and Parlett that they were being awarded a 5 percent bonus for 2005. Fleischer, who is the supervisor of the technicians' direct supervisor Bill Collis, stated in his emails to Ristola and Parlett that, "to be eligible for a bonus you must comply with the company work rules and policies. Although you have not been 100% compliant, you appear to have made a good faith effort…"

On March 2, 2006, Fleischer sent Mantle the following email:

> Darrin, in order to evaluate your eligibility for a bonus we need a response to apparent material deficiencies compared to your peers in the following areas:
>
> 1. Scheduling flight times contrary to instructions and SOPs
> 2. Not following instructions when filling out the time sheets-even in instances where the circumstance is defined by example
> 3. Not following instructions with regard to @Road. Example, Not logging off when arriving at the airport prior to 8:30 a.m. and very poor compliance as documented by @Road during the first six months of implementation.
>
> We recognize that occasionally mistakes occur but when compared to your peers the deviations are significant. To be fair, before we make a final determination on a bonus we want to give you the opportunity to respond to the discrepancies.

GC Exh. 13.

On or about March 13, 2006, Darrin Mantle injured his back while at work. Except for an unspecified number of customers located near his home, Mantle was restricted to light duty and did not perform any business travel for Respondent after about March 20. On that date, Mantle began receiving physical therapy for his back condition. His visits to a physical therapist were paid for by workers compensation.

In May, Mantle and Respondent's H.R. Director, Jan Harcharek exchanged emails regarding the bonus. Mantle asked that Respondent schedule a face to face meeting with him regarding the bonus. Harcharek informed Mantle that he must first respond in writing to Fleischer's March 2, 2006 memo.

With Harcharek's assistance, Mantle responded by email to Fleischer on May 25. His response stated:

> (Regarding violations of Respondent's SOP requiring technicians to fly on business between 9 a.m. and 5 p.m.):
> Specific events would (sic) occurred in which I took flights after 9AM[.] As example when doing startup for HiLex the 10:30AM flight was both cheaper and got me to the customer earlier than the flights before 9AM[.] I did notify Bill Collis prior to purchasing. I am willing to discuss this in more detail in person.
>
> (Regarding time sheets):
> During this time I had only one or two timesheets sent back that I am aware of. All of us were having issues understanding what was to be put on them. I am willing to discuss this in more detail in person.

> (Regarding compliance with instructions pertaining to @Road):
> During this time I was accused of not using the system properly. However, it has been shown that both I did use it as instructed and that the system was not reliable nor worked as the company believed. Example. Calls to me that it had not sent data, and that it would send data upon entering coverage area when in fact it would not always and did not always do this. I was in coverage area as I did get called on the phone thus proving I was both in range AND it sent no data. When I repeatedly asked if the logs showed I had turned off the phone or the @Road they did not. My requests to have a printout of the logs were never fulfilled[.] I have many other examples which I am willing to discuss in person.
>
> I look forward to meeting in person to discuss.

GC Exh. 15.

On June 13, Harcharek emailed Mantle suggesting that Respondent could schedule a meeting with him to discuss the bonus after Mantle returned to work from his back injury. Despite the wording of Harcharek's email, it appears from the record that Mantle was never off work due to his back injury, but instead was restricted to light duty. About two weeks later, Mantle suffered a heart attack, which required the insertion of two stents. He apparently sustained no heart damage as a result but returned to work shortly thereafter and remained on restricted duty due to his back condition.[8]

Events leading up to the termination of Darrin Mantle and the temporary assignment of Ristola and Parlett to the Woodbridge plant

In November 2005, Respondent published a policy handbook for its employees. Incorporated into that handbook were its policies relating to the Family Medical Leave Act of 1993 (FMLA), GC Exh. 2, pp. 11-14. FMLA generally requires an employer to provide up to 12 weeks of unpaid, job-protected leave annually to eligible employees for certain family and medical reasons.

A note on page 11 of the handbook states that:

> Effective 5/1/96,[9] Universal Dynamics will count applicable workers' compensation leave against FMLA leave. To clarify, if an employee's on the job injury meets the FMLA's definition of a "serious health condition", the time used for workers' compensation leave will count against the twelve weeks leave time available under the FMLA.

Respondent's Human Resources Director, Jan Harcharek, testified that in March 2005, Unadyn implemented a change in policy whereby employees taking a partial day off from work

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[8] From GC Exhibits 22 and 23, I infer that Mantle returned to work on light duty status in early July.

[9] Although there is no evidence in the record in this regard, I assume this date to be a typo and that it should read 5/1/06. First of all, the sentence is written in the future tense. Secondly, it would be unusual to announce a policy in November 2005 that supposedly had been in effect for 9 ½ years previously. I also assume that the date in the next sentence on page 11 should read 2007 rather than 1997.

were required to submit leave slips so that their leave would count against their FMLA leave. There is no evidence that this policy was ever enforced prior to August 30, 2006.

Attached to Respondent's position statement, GC Exh. 62 and cited at page 18 of its brief, is an email purportedly sent by Harcharek on March 10, 2005, to a number of employees, including Mantle, Parlett and Ristola. The email reads:

> Effectively immediately, leave slips must be submitted for all time taken under FMLA. This will enable us to better track your FMLA hours.

There is no evidence in this record that Respondent ever sent this email to the addressees or that they in fact received it. The part of the page above this email was redacted as privileged information when submitting it to the Board in its position statement.

Moreover, the email does not mention the policy stated in the handbook that workers compensation leave will count against FMLA leave. There is no evidence that any of the field service technicians were on notice that they were required to submit FMLA leave slips for physical therapy sessions covered by workers compensation until August 30, 2006, in the case of Mantle, and September 18, 2006 in the case of Parlett and Ristola.[10]

H.R. Director Harcharek sent Mantle forms to fill out for FMLA leave on June 28, after his heart attack. Mantle responded by emailing Harcharek that he was not on FMLA leave and did not request it. Harcharek responded on July 5, 2006, telling Mantle that she assumed that he was going to be out of work for some time due to the heart attack and that since this was not the case, he could ignore the paperwork she had sent him, GC Exh. 23.

Quentin Parlett also hurt his back in June 2006 and hasn't been able to travel overnight for work since July. He received physical therapy pursuant to a workers compensation claim from July to October 2006. Since October 2006, Parlett has been restricted to 30 minutes of traveling and is not allowed to do any lifting.

In July 2006, Loren Ristola strained his shoulder at work and began physical therapy pursuant to his workers compensation claim in late August. Ristola was also prohibited from taking long trips. Thus, by the beginning of September 2006 only two of Respondent's field service technicians were available to perform their normal tasks of traveling to customer's sites. Ristola started traveling out-of-state overnight again no later than February 12, 2007.

The Field Support Technicians organize; their union is certified.

On June 5, 2006, the field support technicians demanded that Respondent recognize their Union; Unadyn declined to do so. The Union filed a petition for a representation election on June 14, 2006. An election was held by mail ballots, which were counted on August 21, 2006. The Union was certified as the authorized bargaining representative of a six member unit on September 7, 2006.

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[10] Ristola testified that he had seen some portions, or a page of the handbook on August 1, 2006, Tr. 390. While it is not entirely clear what he saw and/or what he was told on this occasion, it is clear that he was not told that he would have to submit FMLA leave slips for his physical therapy sessions until September 18, 2006. It is also clear that Ristola was never required to submit such slips until after September 18, although he began his physical therapy in August.

Respondent requests leave slips from Mantle in order to count his physical therapy appointments against his annual allotment of FMLA leave.

On August 30, 2006, nine days after the Union prevailed in the representation election, H.R. Director Harcharek sent Darrin Mantle a letter informing him that Respondent had reassessed his situation and had determined that he qualified for FMLA coverage.[11] She sent him FMLA paperwork and certification forms for Mantle's physicians and asked him for a list of all time missed for treatment of his back injury and the heart attack, including partial days missed for physical therapy. Neither Ristola nor Parlett, both of whom had been undergoing physical therapy, had been notified as of this date that they must submit leave forms so that their therapy visits could be counted against their FMLA leave.[12]

Harcharek asked Mantle to complete the paperwork within 15 days and noted that Respondent counted workers compensation leave against the leave allowable under FMLA. At this point, Mantle had been undergoing physical therapy for five and a half months and Respondent had never asked him to submit leave slips for this treatment previously. Mantle testified that he did not receive Harcharek's letter until the following Thursday or Friday (September 7 or 8, 2006). Since the letter was not sent via certified mail, there is no evidence to the contrary.[13]

The Union is certified; Ristola and Parlett are required to perform production work at Woodbridge.

On September 7, the day the Union was certified, Bill Collis, the immediate supervisor of the field support technicians, called Ristola and Parlett and told them to report to the Woodbridge facility the next day. Collis told Parlett that he would be doing production work, which was way behind schedule. Parlett had never been asked to perform production work in his 18 years of employment with Respondent before this date. Collis sent a fax message to Ristola, to bring his tools. Like Parlett, Ristola had never performed production work during his six years with Unadyn.

Between 2002 and September 8, 2006, Parlett only reported to Woodbridge to conduct training for customers, his performance reviews, one or two times to fill in for his supervisor Bill Collis when Collis was not at the plant and on one occasion for a meeting regarding company policies. Similarly, since 2002, Ristola only came to Woodbridge to fill in for Collis when he was on vacation, once a year for special training, an occasional meeting and for his annual performance review.

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[11] Respondent's brief at page 4 quotes the second paragraph of this letter, GC Exh. 4, as informing Mantle that "[a]fter assessing your situation, it has been determined that you actually do qualify under the FMLA. Since 3/20/06 you have been going to doctor appointments for both of your health issues."

This quote is inaccurate. The letter states:

"After ***reassessing*** your situation, it has been determined that you actually qualify under the FMLA…(emphasis added)" Thus, the letter on its face indicates a change in policy.

[12] Parlett's physical therapy appointments began July 21, 2006; Ristola's began on August 27, although he notified Harcharek of his work-related shoulder injury on July 25.

[13] The intervening Monday, September 4, 2006, was Labor Day.

The next day, Friday, September 8, Parlett and Ristola reported to Collis. Field Support Technician Thomas Ferguson was also present. Collis sent Parlett and Ristola, but not Ferguson, to the panel shop, where they reported to Mark Fulton, the team leader in the panel shop. Fulton told Parlett and Ristola that Lou Potisek, the production manager, had come to him the day before and asked if Fulton had anything for Parlett and Ristola to do. Fulton told the two technicians that he had some busy work for them and assigned them work on a couple of dryers.[14] Fulton also told Parlett that his shop was not very busy.

On Monday, September 11, Ristola emailed Respondent's Vice President John Fleischer requesting that Fleischer meet with him and Parlett regarding their assignment to the production floor. Fleischer initially agreed to a meeting, but cancelled it when Ristola requested that Darrin Mantle participate as his and Parlett's union representative. Mantle, in his capacity as Union President, emailed Fleischer, asking that if Fleischer was not authorized to discuss union business, he wanted to know who was so authorized.

On Tuesday, September 12, Mark Fulton assigned Parlett to work on some devices called echo boxes. During the day, Fulton asked Parlett why Respondent's President Donald Rainville was hounding Parlett and Ristola. Parlett asked Fulton what he meant. Fulton replied that Rainville had come to him earlier and told him to make sure that Parlett and Ristola were kept busy.

Also, on September 12, Bill Collis informed Parlett and Ristola they must report to Woodbridge even on days on which they had scheduled physical therapy appointments. Initially, Collis told the two that they only had to come to Woodbridge on days on which they did not have appointments. Respondent has offered no explanation for this change. Moreover, it is apparent that Collis made this change pursuant to instructions from higher-level management (see Tr. 374). On the three days each week on which Parlett and Ristola had physical therapy, they spent 4-5 hours driving between Luray and Woodbridge and spent only a few hours at the factory.

On September 12, Mantle's supervisor, Bill Collis, sent Mantle an email reiterating that he was required to submit leave forms for time missed due to his physical therapy sessions, R. Exh. 7. Then, Mantle and Collis exchanged a number of emails related to FMLA leave. The final one sent by Collis asked Mantle, "are you saying you are not going to submit the leave forms…?" R. Exh. 8.

Back in the panel shop on September 13, Mark Fulton sent Ristola to report to a leadman named Harvey. Harvey told Ristola he didn't know what to have him do next because he was looking for something to do himself. Ristola performed repair work that day.

[14] Respondent's counsel accused Parlett of winking at Darrin Mantle or the counsel for the General Counsel during his testimony. When Parlett denied doing so, Respondent's counsel accused him of lying. I find Parlett's testimony fully credible. Not only was it corroborated by Ristola, Respondent never called Mark Fulton to testify. In its Answer, Respondent admitted that Fulton is, and was at this time, a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Not only is the testimony of Parlett and Ristola regarding what Fulton said to them uncontradicted, I draw an adverse inference from Fulton's failure to testify that if he had testified he would have corroborated their testimony.

The same day, CEO Rainville responded to Darrin Mantle's September 11 email by telling him that Ristola was not entitled to have union representation at a meeting with Fleischer because the meeting was not a disciplinary meeting. Mantle then prepared an unfair labor practice charge which he filed with the NLRB. He faxed a copy of this charge to Rainville on September 13. The charge, which was withdrawn and then refilled on October 6, alleged violations of Sections 8(a)(3) and (5) with regard to Respondent's requiring Ristola and Parlett to work at Woodbridge.[15]

Jan Harcharek informs Ristola and Parlett they must submit leave slips for physical therapy appointments, which will be counted against the FMLA leave.

During the day on September 18, both Ristola and Parlett were summoned to a meeting with H.R. Director Harcharek. Harcharek showed each of them Respondent's booklet of policies (GC Exh. 2) and directed them to page 20. She informed Ristola and Parlett that there was a change to the FMLA and leave form policy and that they had to begin to fill out leave forms whenever they had therapy visits or doctor's appointments. Harcharek told the two technicians that the policy change occurred in November 2005; however, it was not applied to either Ristola or Parlett until September 18, 2006.

Respondent terminates Darrin Mantle

On Monday, September 18, Mantle emailed H. R. Director Harcharek a request for the personnel files of all bargaining unit employees. That same day, Harcharek returned from vacation and sent Mantle an email asking him to fax the FMLA paperwork to her, if he had not done so already. Mantle responded, "this matter is under review. I have not requested FMLA leave," R. Exh. 9. The next day, Harcharek, at the direction of CEO Rainville, sent Darrin Mantle a letter informing him that he been terminated, "based on your repeated violations of Company policy," GC Exh. 5.[16]

On October 2, Jan Harcharek sent Ristola an email informing him that if he did not comply with Respondent's direction to submit leave forms for his therapy sessions with the "FMLA box" checked, he could be subject to discipline up to and including termination. An identical warning was given to Parlett. Respondent did not give Darrin Mantle a similar warning prior to his termination. After receiving these warnings, both Ristola and Parlett submitted the required FMLA leave forms.

Parlett worked at Woodbridge performing production work from September 8, to September 21, 2006. Ristola worked at the plant from September 8, to October 19.

[15] The October 6 charge included allegations relating to Mantle's subsequent termination and the failure of Respondent to give him a bonus.

[16] At the outset of the instant hearing, Respondent stipulated that, "the basis for the discharge of Mr. Darrin Mantle did not include his conduct prior to August 2006." However, former CEO Donald Rainville testified that other factors, mentioned at page 10 of Respondent's position statement, "were certainly considerations" in his decision to terminate Mantle, Tr. 488. These include Mantle's alleged failing to comply with Company policy regarding the scheduling of flights and failing to comply with Company policy with regards to keeping his phone and the @Road application active at required times while traveling, GC Exh. 62 at 10.

The Union's information requests

On September 25, 2006, Darrin Mantle informed H.R. Director Harcharek that he did not need each bargaining unit member's personnel file, if Respondent provided complete information regarding wages, benefits and other terms and conditions of employment. When he did not receive what he requested, Mantle filed an unfair labor practice charge, which he then withdrew when Respondent provided some of the information he wanted.

Mantle emailed Respondent's counsel on November 6, specifying information he believed fell within his request and was not provided. Among the items requested and at issue in the current proceeding are Mantle's requests for customer review sheets, auto insurance policies for unit members when on company business and Respondent's cell phone usage policy. Respondent, by counsel, responded by telling Mantle that it was evaluating these requests and suggesting that the Union and the company begin bargaining on November 29. On December 14, Mantle filed another charge, alleging in part a failure to provide the information requested on November 6.

Respondent provided much of the information requested on January 9, 2007. However it informed Mantle that it had no duty to produce "customer review sheets."[17] It provided a telephone usage policy rather than a cellphone usage policy and an auto insurance policy that had lapsed. Later that month, Unadyn filed an unfair labor practice alleging that the Union was refusing to bargain.

Loren Ristola's February 8, 2007 leave request

On Thursday, February 8, 2007, Loren Ristola sent an email to his supervisor, Bill Collis, entitled, "court appearance." The email stated:

> I will need to take off Wednesday-Friday next week for mediation in Richmond, Va. I will be able to work until lunch time Tuesday and will need the remainder of the day off as I have an appointment.

The mediation session concerned a second FLSA lawsuit filed by Ristola, Mantle and John Bruner, another field support technician, in November 2006.

Bill Collis called Ristola on Friday, February 9, 2007 and asked him why he needed 3-½ days off when the mediation was scheduled for Thursday at 1:00 p.m. Ristola told Collis that he needed to meet with his attorneys Wednesday afternoon, February 14, and was meeting with NLRB agents on Wednesday morning. Collis responded by telling Ristola that he could not grant his leave request for Wednesday, February 14, 2007, because he needed him to service a customer in Vandalia, Illinois.

Later, Collis called back and told Ristola he could take leave on February 14, if he finished his work at the customer, but not if he did not finish. As it turned out, Ristola was able to complete his assignment in Illinois and travel to Washington, D.C. on Tuesday evening, February 13, 2007.

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[17] These are customer evaluations of the service rendered to them by the field support technicians. GC Exhibit 34 is an example of such an evaluation by a customer for Darrin Mantle.

Prior to February 9, 2007, the only occasion on which Collis had denied a leave request from Ristola was for October 31, 2006. In that case, Collis relented when Ristola reminded him that Ristola's wife had a physician's appointment that day. Moreover, there is no evidence that Respondent had ever denied any field support technician's leave request prior to October 2006. Quentin Parlett's testimony, that he worked out potential conflicts between his leave and trips to a customer, with the customer, without intervention by Collis or other Unadyn management, is uncontradicted.

Analysis

The alleged Section 8(a)(4), (3) and (1) violations

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002).[18]

Protected Activity and Employer Knowledge

In the instant matter, it is uncontroverted that Darrin Mantle and Loren Ristola engaged in concerted protected activity by bringing their grievances regarding overtime pay to Respondent's President Donald Rainville and filing a lawsuit against Respondent and Rainville personally. It is also uncontroverted that Respondent was aware of Mantle and Ristola's protected union and concerted activities. Respondent was aware that Parlett had discussed overtime issues with Mantle and Ristola prior to the date that the latter two filed their lawsuit in February 2005, and that Mantle was seeking overtime pay for Parlett, as well as for himself and Ristola. Parlett has also attended union meetings, although there is no evidence that Respondent had actual knowledge that Parlett supported the Union or participated in union activities.

Animus and Discriminatory Motivation

Animus and discriminatory motive often depend upon an evaluation of a body of circumstantial evidence, *Yellow Ambulance Service,* 342 NLRB 804 (2004).[19] "Direct evidence of animus is not required," *Tubular Corp. of America,* 337 NLRB 99 (2001). Animus and discriminatory motive may be inferred from a number of factors, including the timing of the

[18] The *Wright Line* standard applies in both 8(a)(3) and 8(a)(4) cases, *Black's Railroad Transit Service,* 342 NLRB 549, 554-55 (2005). Nevertheless, the fact that Darrin Mantle filed an unfair labor practice charge in September 2006 is inconsequential in the resolution of this case. Respondent had sufficient animus towards him stemming from his lawsuit and the organization of the field support technicians that Respondent would have fired him at the first opportunity even if he hadn't filed the charge.

[19] An employer's knowledge of protected activity may also be based on circumstantial evidence, *Mays Electric Co.,* 343 NLRB 121, 127 (2004); *Metro Networks,* 336 NLRB, 63, 65 (2001).

alleged discriminatory action in relation to protected activity, disparate treatment and related statutory violations by a respondent, *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001).

In the instant case, there is direct evidence of animus, Donald Rainville's letter to bargaining unit employees exhorting them not to give the right to speak for them to Mantle and Ristola, GC Exhs. 60 and 61. Additionally, based on Cynthia Monroe's testimony and Parlett's conversation with Rainville and John Fleischer in March 2006, I infer that Rainville bore tremendous animus towards Darrin Mantle as a result of the FLSA lawsuit and somewhat less animus towards Ristola, because he deemed Mantle to be the ringleader of the technicians' efforts to get backpay and to organize.[20] However, I readily infer animus and discriminatory motivation from circumstantial evidence, as well.

The most obviously discriminatory act in this case is the assignment of Ristola and Parlett to Woodbridge. This required them to spend about four to five hours daily commuting in heavy traffic into the Washington, D.C. metropolitan area. Although the two technicians had been required to come to Woodbridge on other occasions since their "work-at-home" agreement in 2002, they had never been required to come in to perform production work.[21]

Even in the absence of direct evidence that Respondent was aware of Parlett's union activities or that it harbored animus towards him, as opposed to Mantle and Ristola, I find that his assignment to the Woodbridge facility in September 2006 violated Section 8(a)(3). Where an employer discriminates against an employee, irrespective of that employee's real or suspected union or protected concerted activities, as a consequence of or in an attempt to hide wrongful acts directed against other employees because of their protected conduct, the "innocent bystander" is protected by the Act, *Professional Eye Care,* 289 NLRB 1376, 1389-90 (1988). Regardless of whether Respondent was aware of Parlett's support for the Union and regardless as to whether it harbored animus towards Parlett personally, I conclude that this assignment was designed to indicate to those, particularly Ristola, the power Respondent had over its employees. Thus, I find the Parlett's assignment was undertaken in retaliation for Ristola's union and protected concerted activities, even if not in retaliation for such activity on the part of Parlett.

The alleged nondiscriminatory reason offered by Respondent for this assignment is completely incredible. Unadyn's former president, Donald Rainville testified that Ristola and Parlett were brought into Woodbridge because of a production backlog. First of all, while there is no temporal relationship between the backlog and this assignment, there is a very close relationship between the assignment and the field support technicians' decision to unionize. Indeed, Bill Collis ordered Ristola and Parlett to report to Woodbridge on the very day that the Union was certified.

The backlog had existed for many months before September 2006 and there is no indication that it was in any way alleviated by the production work performed by Ristola and Parlett at Woodbridge in September and October 2006. Indeed, Respondent had no idea how

[20] See GC Exhibits 46, 47 and 49.

[21] Parlett and Ristola's 2002 performance reviews, relied upon by Respondent, are consistent with Respondent's practice between 2002 and September 7, 2006 and inconsistent with the assignment of the two techicians to the production operation. Ristola and Parlett periodically "filled in" for their supervisor, Bill Collis. In September 2006, they weren't "filling in" for anybody. Nothing in either their performance reviews or the field support technicians' job description indicates that part of their duties is to perform regular production work.

to effectively use them to reduce the backlog. This is established by Ristola and Parlett's uncontradicted testimony that Respondent's agent, Mark Fulton, told them that he was assigning them "busy work."

Respondent's claim that the reassignment was nondiscriminatory is belied by the inconsistencies in the testimony of its agents. Bill Collis testified that the idea for bringing Ristola and Parlett into Woodbridge originated with him in the August-September timeframe (Tr. 571). He testified that he selected Ristola and Parlett because they did not live too far from Woodbridge and could not travel to customers.

Donald Rainville, on the other hand, gave no indication that the impetus for assigning Ristola and Parlett came from Collis (Tr. 650-54). Moreover, Collis admitted as much to Ristola on September 8 (Tr. 374). From Respondent's Exhibits 21 and 22, I infer that there was no consideration given to bringing Ristola and Parlett into the plant until sometime after August 26, 2006. I infer that the decision was in fact an immediate reaction to the certification of the Union on September 7, 2006 and the fact that 3 of the 5 field support technicians could not travel on company business.

Rainville also testified that John Bruner was called into Woodbridge to help out with the production backlog (Tr. 687). This is not true. As a result, I also do not credit Rainville's assertion, which is unsupported by any documentation, that field support technician Thomas Ferguson did production work to alleviate the backlog.

Although Collis' testimony, at Tr. 563-64, also intimates that Bruner helped out with the backlog, Bruner's timesheets establish that he was never at the Woodbridge plant after a decision was made to have the field support techs help reduce the production backlog. These timesheets indicate that during 2006, Bruner spent a week at Woodbridge in March 2006, when he was initially hired, four days during the week of June 12, 2006 and about eight hours on July 31 and August 1, 2006, GC Exh. 67.

Another ***very strong*** indication of discriminatory motive is the unexplained September 12, 2006 decision to require Ristola and Parlett to come to Woodbridge even on days on which they had physical therapy appointments, GC Exhs. 38, 53. Collis testified that initially Respondent decided that the two technicians would not have to come to Woodbridge on therapy days, Tr. 572.

Although, Collis informed Ristola and Parlett of this change, it is obvious from his conversation with Ristola on September 8 (Tr. 374) that he is not the person who decided to require the two to drive to Woodbridge on days when they had physical therapy. I infer that the decision to put Ristola and Parlett to this considerable inconvenience in exchange for a miniscule benefit to Respondent was motivated by Rainville's[22] anger at the unionization of the field support technicians and his lingering animus emanating from the FLSA lawsuit.

Assignment of Ristola and Parlett to Woodbridge also violated Section 8(a)(5) of the Act

Respondent argues that Ristola and Parlett had always been subject to assignment to Woodbridge even after they began working at home in 2002. However, even assuming that Respondent had a policy that required them to report to Woodbridge whenever they were

[22] Respondent's Vice-President, John Fleischer, who did not testify, may also have had a role in making this decision.

needed, it never enforced that policy until the day the Union was certified.[23] The Board has held that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over. See *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. sub nom.in relevant part *Hyatt Corp. v. NLRB,* 939 F.2d 361 (6th Cir. 1991); *Vanguard Fire & Security Systems,* 345 NLRB No. 77 (2005).

It is uncontroverted that Respondent did not notify the Union in advance of assigning Parlett and Ristola to Woodbridge and did not offer it the opportunity to bargain over this change in practice. Respondent argues that it did not violate the Act because the assignment was not a material change in the technicians' working conditions. I find that requiring them to commute 4-5 hours per day, even when they had physical therapy appointments in the Luray area was a material change in the terms and conditions of their employment. Indeed, the materiality of this change is established by the fact that in 2002 one of the principal reasons that Loren Ristola tendered his resignation from Unadyn was the commute. Furthermore, avoidance of the commute between Luray and Woodbridge was a significant part of the agreement between Ristola and Respondent to keep him as a Unadyn employee (Tr. 368).

Respondent's enforcement of its policy requiring employees to submit FMLA leave slips for physical therapy appointments violated Sections 8(a)(5) and 8(a)(3)).

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses, *National Association of Letter Carriers, Local 3825,* 333 NLRB No. 41 (February 20, 2001); *Pergament United Sales,* 296 NLRB 333, 334 (1989), *enfd.* 920 F. 2d 130 (2d Cir. 1990); *Meisner Electric, Inc.,* 316 NLRB 597 (1995); *Hi-Tech Cable Corp.,* 318 NLRB 280 (1995); *Williams Pipeline Co.,* 315 NLRB 630 (1994). Due process considerations are satisfied when unpled violations are found which have been fully litigated, *Seton Co.,* 332 NLRB 979, 981 at n. 9 (2000).

An employer's obligation to bargain before making changes in the terms and working conditions of unit members commences not on the date of certification, but on the date of the election, *Mike O'Connor Chrevolet,* 209 NLRB 701, 704 (1973); *Ramada Plaza Hotel,* 341 NLRB 310, 315-316 (2004). In the instant matter, assuming that Respondent had a policy requiring the field service techicians to submit leave slips for physical therapy sessions or any FMLA leave slips, it is Respondent's own documents that establish that it did begin to enforce this policy until August 30, 2006, after unit members had selected the Union to represent them. Moreover, any defense to an 8(a)(5) violation would also have applied to the 8(a)(3) allegation regarding Darrin Mantle's discharge; therefore, Respondent was not prejudiced by the General Counsel's failure to allege an 8(a)(5) violation.

It was imperative both to the General Counsel and Respondent to litigate the issue of whether Respondent's FMLA leave policy and its enforcement of that policy predated Unadyn's knowledge of the technicians' union activities. The General Counsel was compelled to show

[23] Whether or not Respondent violated Section 8(a)(5) does not depend on whether or not it was aware that the Union had been certified when it assigned Ristola and Parlett to Woodbridge. An employer's obligation to bargain before making changes commences not on the date of certification, but on the date of the election, *Mike O'Connor Chrevolet,* 209 NLRB 701, 704 (1973); *Ramada Plaza Hotel,* 341 NLRB 310, 315-316 (2004).

that Mantle was not fired for failing to comply with a non-discriminatory company policy. Conversely, Respondent's defense to the 8(a)(3) allegation concerning the Mantle discharge necessarily required it to show that he violated a pre-existing and nondiscriminatory policy. It attempted to do so both at trial and in its brief. This is the same evidence that would be required to defend against an 8(a)(5) violation. However, Respondent's documents show that the policy, if it existed, was never enforced or implemented with respect to the field support technicians until August 30.

Respondent defended against the allegation that it terminated Darrin Mantle in violation of Section 8(a)(3) by arguing that Mantle was insubordinate by refusing to comply with a policy that had been in place as early as March 2005, long before the Union demanded recognition, Respondent's brief at page 27. If Respondent was enforcing this policy prior to the demand for recognition, Unadyn would have introduced evidence of this fact. GC Exhibits 22 and 23, Mantle's June 28, 2006 letter and Ms. Harcharek's July 5, response, establish just the opposite. Respondent's own documents, specifically Ms. Harcharek's letters of July 5, and August 30, 2006, GC Exhs. 4 and 23, show that Respondent began enforcing the leave slip requirement nine days after the field support technicians selected the Union as their collective bargaining representative. As there is absolutely no explanation for this sudden change, I infer that Respondent commenced enforcement of this policy in retaliation for Mr. Mantle's union activities and that the enforcement of this policy violates Section 8(a)(3), as well as 8(a)(5).

Respondent violated Section 8(a)(3) in terminating Darrin Mantle

Respondent acknowledges that the General Counsel has established that Darrin Mantle engaged in protected activities, that Respondent was aware of those activities and that he suffered an adverse employment action, Respondent's brief at page 25. It correctly notes that the issue in this case is whether Mantle's termination was discriminatorily motivated.

First of all, it is a violation of Section 8(a) (3) to discipline or discharge an employee for refusing to comply with an illegal policy. A refusal to comply with an unlawful order does not constitute insubordination upon which a sustainable discharge can be based, See *Quantum Electric, Inc.,* 341 NLRB 1270, 1280-81 (2004); *Kolkka Tables & Finnish-American Saunas,* 335 NLRB 844, 849 (2001); *AMC Air Conditioning Co.,* 232 NLRB 283, 284 (1977).

Mantle was fired for refusing to comply with a policy, requiring FMLA leave slips for his physical therapy appointments, which was enforced with a discriminatory motive in violation of Section 8(a)(3), and in violation of its duty to bargain under Section 8(a)(5) of the Act. Given the nexus between the counting of the ballots and the August 30 letter, and the absence of any alternative explanation for the sudden enforcement of this requirement, I infer that Respondent acted pursuant to a discriminatory motive in requiring Mantle to submit FMLA leave forms on August 30. I also base this inference on the obviously discriminatory motive in requiring Ristola and Parlett to report to Woodbridge starting on the day the Union was certified, *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001).[24]

Moreover, I find that the reason advanced for Mantle's discharge is pretextual. Respondent was looking for an excuse to terminate Mantle ever since he and Ristola filed the

[24] As discussed earlier, the General Counsel did not plead the sudden and unexplained enforcement of the leave slip policy as either an 8(a)(3) or 8(a)(5) violation. On this record, it is obvious that the sudden, unexplained enforcement of this policy, immediately following the Union's certification, violated both sections of the statute.

first FLSA lawsuit. I infer that its desire to get rid of him was greatly enhanced by his successful venture in organizing the field support technicians. I conclude that the reasons given for his discharge are pretextual from the failure of Respondent to give Mantle the same warning that it gave Parlett and Ristola as to the consequences of a failure to submit FMLA leave forms and its failure to make certain that the 15 days from receipt of its August 30 letter had, in fact, elapsed.[25] Moreover, Respondent has offered no explanation for why the submission of leave forms became so important to it after not enforcing its policy with respect to Mantle for over 5 months. This indicates that enforcement of the policy was not only discriminatory, but not the sort of concern that would lead it to terminate an employee for noncompliance.[26]

Respondent violated Section 8(a (1) in not giving Darrin Mantle a bonus in February 2006 for work performed in 2005.

Respondent paid Quentin Parlett and Loren Ristola a bonus of 5 percent of their salary in February 2006 for work performed in 2005. On March 2, 2006, Respondent's Vice President John Fleischer informed Mantle that he was not going to receive this bonus unless he satisfactorily addressed alleged deficiencies in his job performance in the areas of:

1. Scheduling flight times;
2. Not following instructions in filling out timesheets; and
3. Following instructions regarding the use of the @Road tracking system.

First of all, Mantle addressed the issues raised by Fleischer, albeit belatedly, in his May 25, 2006 response. Respondent has offered no explanation as to why this response does not sufficiently address the issues raised by Fleischer and has not established that the response is inaccurate. It has merely tried to contradict Mantle's response with undocumented assertions.

Secondly, on the basis on Cynthia Monroe's testimony, I find that Respondent had decided terminate Darrin Mantle at the first convenient opportunity by June 2005 in violation of Section 8(a)(1). Thus, I find that the burden of proof has shifted to require Respondent to establish that it had a non-discrimination basis for withholding of Mantle's bonus. In evaluating Respondent's non-discriminatory explanation for denying Mantle a bonus, it is instructive first to look at what ***documented*** alleged misconduct Mantle engaged in—prior to the time Respondent decided to get rid of him.

First of all, Mantle had taken the lead in filing a lawsuit. Otherwise, the record herein establishes that the following occurred on the dates set forth below:

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[25] The August 30 letter informed Mantle to complete the leave forms within *15 days of receipt*. Not having sent the August 30 letter by certified mail, Respondent had no idea when Mantle received its letter when it terminated him on day 19. His uncontradicted testimony is that he had the letter for 10 or 11 days and was still in the process of deciding whether to comply with Respondent's direction to submit the forms.

[26] Respondent has also raised a dispute it had with Mantle in August 2006 regarding who would pay for his internet service. I do not understand Respondent to be contending that it would have fired Mantle on the basis of this dispute in the absence of the FMLA leave form issue. Thus, I deem the internet service fee matter to be irrelevant to the resolution of this case. Moreover, since Respondent had simply refused to pay for expenses that Mantle had incurred, it is difficult to see why this dispute would be grounds for termination in the first place. Moreover, from GC Exhibit 78, it appears that negotiations regarding this issue may still have been in progress when Mantle was terminated.

February 14, 2005: Donald Rainville demanded an explanation for Mantle's time sheet regarding the time it took him to travel from his home to the airport for a business trip. Mantle explained that the sheet reflected the time he left home, minus the time he stopped to get breakfast. There is no indication that this was either false or improper, GC Exh. 77(a);

March 11, 2005: Bill Collis appeared to accept Mantle's explanation that he was saving Respondent money by flying to a customer prior to 9:00 a.m., which was generally contrary to Unadyn's standard operating procedure, GC Exh. 69;

April 28, 2005: Respondent's Quality Control Manager, Annette Kinney, questioned Mantle as to why he clocked out from his hotel on two occasions; rather than from the factory at which he had been working. Mantle's explanation, which was accepted by Kinney, was that he did clock out at the factory on one day. His explanation for the second day, that he was trying to access a work-related email, is uncontradicted, GC Exh. 12(d);

April 29, 2005: Kinney questioned Mantle as to why he logged in at 6:18 a.m. Mantle and Kinney seemed to agree that the cellphone was showing eastern time, rather than Pacific or Central time as it was supposed to. Kinney appeared to be satisfied with the clarification, GC Exh. 12(f);[27]

May 27, 2005: @Road indicated that Mantle had logged off the system, when he had not done so, GC Exh. 70;

June 30, 2005: Kinney notified Mantle that she did not have a clock time for him. Mantle responded that his phone was not working. Kinney appeared to be satisfied with the explanation, GC Exh. 12 (g).

Thus, in June when Bill Collis told Cynthia Monroe that Respondent was looking for a way to get rid of Darrin Mantle, he had committed only one documented transgression that would lead Respondent to terminate him—filing the lawsuit.[28]

This record herein contains the following evidence regarding "transgressions" by Mantle in 2006. However, the bonus that Respondent declined to give him was for work performed in 2005, so these incidents arguably provide no basis for withholding the bonus:

February 22, 2006: Bill Collis questioned Mantle's timesheets for February 15-17, 2006. Mantle responded by saying that the timesheets were consistent with the Fair Labor Standards Act. It is unclear whether that is correct or not, R. Exh. 1;

February 22, 2006: Respondent's Vice-President, John Fleischer, informed Mantle that in calendar year 2005, 28% of Mantle's flight departures in the morning were prior to 9:00 a.m. and only 10% of his evening departures were after 5:00 p.m. Fleischer stated, "this performance is remarkably deficient compared to your peers," R. Exh. 2. There is no evidence in the record as to whether the assertions in the letter are accurate.

What is clear from the record is that technicians often flew outside the parameters of Respondent's standard operating procedures for a variety of reasons; for example, lower airfares, availability of flights and shorter layovers for connecting flights.It is also clear that

[27] Kinney did not testify in this proceeding.

[28] Even if I were to credit Collis' testimony that he told Monroe in June 2005, that Mantle was going to "crash and burn" for creating a lot of problems and being defiant, I would infer that, given the relatively innocuous misconduct, if any, on the part of Mantle, that Respondent already intended to get rid of Mantle for filing the FLSA lawsuit.

Respondent condoned deviations from the parameters of the SOP when there was a good reason for such deviations, Tr. 575.[29]

March 1, 2006: Annette Kinney contacted Mantle to inform him that she was not able to track him on @Road. She concluded that the problem was a dead battery in his Nextel cellphone, GC Exh. 12 (a). By all accounts, the @Road system did not work properly for any of the technicians on numerous occasions.

March 6, 2006: Kinney again contacted Mantle to inform him that she was not picking him up on @Road. There is no indication in the record that Mantle was at fault, GC Exh. 12(b).

Bill Collis testified that, although all the technicians had problems with the @Road system, only Mantle turned it off. He also testified that while Mantle complied with Respondent's travel SOPs about 25 percent of the time, other technicians complied 75-90 percent of the time, Tr. 590-91. Similarly, Donald Rainville testified that while other technicians' cell phones always, or almost always worked, Mantle's hardly ever worked, Tr. 662. There is no documentation to support these assertions and in light of Collis' and Rainville's false testimony that John Bruner was called into Woodbridge to assist in alleviating the production backlog, I decline to credit this testimony because it is not supported by such evidence.

Additionally, Quentin Parlett testified that the majority of the flights he took between March 2005 and 2006 were between 8:30 a.m. or 9:00 a.m. and 5:00 p.m., and that he did this at least several times each month, Tr. 293. Parlett was also interrogated by Bill Collis on September 20, 2005 as to whether he had turned off the @Road application, GC Exh. 45 (page marked UNV02193 at the bottom). Given Parlett's and Ristola's testimony and GC Exhibits 45, 50 and 71, I find that Respondent has failed to establish that there was a significant difference between Mantle's compliance with Respondent's rules in 2005, as compared with that of other field support technicians.

From the evidence discussed above, I conclude that Respondent withheld a bonus from Darrin Mantle in February 2006 in retaliation for his concerted protected activity regarding his claim to overtime pay under the Fair Labor Standards Act.

Respondent violated Section 8(a)(1) in coercing Loren Ristola regarding his February 8, 2007 leave request

At first blush, Respondent appears to have a valid non-discriminatory reason for Bill Collis' inquiry into the reasons for Loren Ristola's February 8, 2007 leave request and its initial denial of his request for leave for February 14, 2007. However, the testimony of Ristola and Parlett that Respondent never questioned them about the reasons they were requesting leave, and never denied their leave requests until after the field support technicians organized, is uncontradicted. Respondent made no attempt to rebut Parlett's testimony that for 18 years prior to the Union's certification, he was left to work out any potential conflicts between his leave and customers' demands with the customer, without any input from management.

On this basis I conclude that the inquiry to Ristola and initial denial of his leave request is part of a pattern of coercion and retaliation embarked upon by Respondent on September 7,

[29] Even assuming that Mantle deviated from the parameters of the SOP more often than Ristola and Parlett, this could be the result of his living near much smaller airports (Springfield and Columbia, Missouri, versus Dulles International Airport, which is within driving distance of Luray).

2006. The initial denial of his leave request for October 31, although unplead, was also part of this pattern. I therefore find that Respondent violated Section 8(a)(1) as alleged in interrogating and coercing Ristola about the leave request submitted on February 8, 2007.

Respondent violated Section 8(a)(5) and (1) in failing to provide the Union all the relevant information it requested and in not providing some of this information in a timely fashion.

When a collective bargaining representative seeks information from an employer regarding matters pertaining to bargaining unit employees, the request is presumptively relevant and the employer generally has a duty to provide such information. Unreasonable delay in furnishing relevant information is as much a violation of the Act as a refusal to furnish any information at all, *Bundy Corp.,* 292 NLRB 671 (1989). In the instant case, the information that the Union requested and which is still at issue, pertains only to bargaining unit members and thus is presumptively relevant. Respondent has not rebutted the presumption.

For example, customer review sheets, concerning the service rendered by bargaining unit members, which Respondent has refused to provide, could be used by the Union in collective bargaining negotiations with regard to how field support technicians are to be compensated in the future. Indeed, as Respondent concedes at page 59 of its brief, "customer satisfaction" was a factor in awarding bonuses to the field support technicians prior to August 2004. Moreover, they may be relevant to the unresolved dispute between Respondent and the Union as to whether Darrin Mantle's 2005 bonus was withheld unfairly.[30]

The automobile insurance policy and cellphone usage policies and records regarding compliance with the cell phone policy, which either have not been provided or were not provided in a timely manner, are also obviously potentially useful to the Union in collective bargaining negotiations. Moreover, the information requested regarding the cellphone policy may be relevant to the dispute regarding the withholding of Darrin Mantle's 2005 bonus. Thus, I find that Respondent was required to provide the Union with the requested customer review sheets, automobile insurance policy and cellphone usage policy and has failed to set forth a sufficient explanation why these documents were not provided in a timely manner. Thus, I find that Respondent violated Section 8(a)(5) as alleged and that the Union's certification year should be extended for a three-month period as requested by the General Counsel at page 51 of its brief.

Summary of Conclusions of Law

1. Since February 2006, Respondent has violated Section 8(a) (1) in withholding a bonus from Darrin Mantle for work performed in 2005;

2. Respondent violated Section 8(a) (3) and (1) in terminating the employment of Darrin Mantle in September 2006.

3. Respondent violated Section 8(a) (5), 8(a) (3) and (1) in requiring Loren Ristola and Quentin Parlett to report to its Woodbridge facility beginning on September 8, 2006.

4. Respondent violated Section 8(a)(5) in commencing enforcement of its policy with regard to the submission of leave slips for physical therapy sessions without first notifying the

[30] Respondent has taken the position that it has not denied Mantle the bonus, but that he has failed to take the next required step, i.e., arranging a meeting with Respondent's Vice-President John Fleischer.

Union of this change and offering it an opportunity to bargain over the enforcement of this policy.

5. Respondent violated Section 8(a) (3) and (1) in commencing enforcement of its leave slip policies on August 30, 2006, in retaliation for employees' union activities.

6. Respondent violated Section 8(a) (1) in coercing Loren Ristola regarding his February 8, 2007 request for leave.

7. Respondent violated Section 8(a)(5) in failing to provide in a timely fashion to the Union all the information it requested that is relevant to its role as the collective bargaining representative of its field support technicians.

Remedy

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

The Respondent having discriminatorily discharged Charles Darrin Mantle, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The law is settled that when an employer's unfair labor practices intervene and prevent the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices, *Mar-Jac Poultry Co*., 136 NLRB 785 (1962). In the instant case, on September 7, 2006, the Union was certified by the Board as the exclusive bargaining representative of an appropriate unit of Respondents' employees. I have found that during the certification year Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act by refusing to supply and/or refusing to timely supply the Union with a copy of the Company's customer survey sheets, cellphone and automobile insurance policies, and records related to the cellphone policy. Respondent deliberately failed and refused to supply the aforesaid information. Moreover, the Union's ability to establish a bargaining relationship was undermined by Respondent's unlawful discharge of the Union's president and retaliatory acts directed at virtually every bargaining unit member. In view of these circumstances, I conclude that a 3-month extension of the certification year is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

[31] 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.

ORDER

The Respondent, Universal Dynamics, Inc., Woodbridge, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the Association of Unadyn Field Support Technicians, or any other union.

(b) Unilaterally enforcing policies, including but not limited to policies regarding the submission of leave slips that were not enforced with respect to the field support technicians prior to August 21, 2006, without affording the Union prior notice and an opportunity to bargain over the enforcement of such policies.

(c) Failing to provide, in a timely manner, information that is requested by the Union that concerns the terms and conditions of employment of field support technicians.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Charles Darrin Mantle 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 Charles Darrin Mantle whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Make Quentin Parlett and Loren Ristola whole for any pecuniary loss attributable to their assignment to the Woodbridge facility in September and October 2006.

(d) Pay Charles Darrin Mantle a bonus in the amount of 5 percent of his salary for work performed in 2005.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Charles Darrin Mantle in writing that this has been done and that the discharge will not be used against him in any way.

(f) Rescind any unilateral and discriminatory changes made after August 21, 2006 in the enforcement of its leave slip or other policies and offer the Union an opportunity to bargain with respect to the enforcement of such policies.

(g) Before implementing any changes in the wages, hours or other terms and conditions of employment of field support technicians, notify, and upon request, bargain collectively and in good faith with the Union as the exclusive bargaining representative of Respondent's field support technicians.

(h) Provide the Union with all relevant information previously requested, including but not limited to customer review sheets, cellphone usage policies and records regarding

compliance with those policies and automobile insurance policies for field support technicians traveling on Respondent's business.

(i) 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.

(j) Within 14 days after service by the Region, post at its Woodbridge, Virginia facility, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 5, 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 any time since February 16, 2006.

(k) Within 14 days after service by the Region, email copies of the attached notice marked Appendix, to all field support technicians who have been employed by the Respondent since February 16, 2006. The notice shall be emailed to the last known email address of each of these employees after being signed by the Respondent's authorized representative.

(l) 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., May 22, 2007.

_____
Arthur J. Amchan
Administrative Law Judge

[32] 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 or otherwise discriminate against any of you for supporting the Association of Unadyn Field Support Technicians or any other union, or for engaging in protected concerted activity.

WE WILL NOT coerce you with regard to your requests for leave in retaliation for your supporting the Association of Unadyn Field Support Technicians or any other union, or for engaging in protected concerted activity.

WE WILL NOT give you onerous assignments in retaliation for your support of the Association of Unadyn Field Support Technicians or any other union, or for engaging in protected concerted activity.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit consisting of our field support technicians.

WE WILL, within 14 days from the date of this Order, offer Charles Darrin Mantle 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 Charles Darrin Mantle whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL pay Charles Darrin Mantle a bonus in the amount of 5% of his wages in 2005 for the work he performed in 2005.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Charles Darrin Mantle, 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.

WE WILL provide the Union in a timely manner with information it requests which is relevant to the wages, hours and other terms and conditions of field support technicians' employment.

WE WILL rescind any unilateral changes and discriminatory changes made after August 21, 2006 in the enforcement of our leave slip or other policies and offer the Union an opportunity to bargain with respect to the enforcement of such policies.

UNIVERSAL DYNAMICS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor

Baltimore, MD 21202-4061

Hours: 8:15 a.m. to 4:45 p.m.

410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.