Intertape Polymer Corp. *and* Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO. Cases 07–CA–273203 and 07–CA–273901

August 25, 2023

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

On November 2, 2021, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has 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, Order, and Notice to Show Cause.

The issues presented in this case are whether the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by suspending and issuing disciplinary notices to union steward Robert Tremper and maintenance employee Mike Abbott for their protected conduct in the course of an informal grievance meeting on February 3, 2021,[1] and whether the Respondent violated Section 8(a)(3) and (4) by issuing disciplinary notices to Tremper and union committeeman Mario Pruccoli on March 8 because of their union activity and because Pruccoli filed an unfair labor practice charge naming Tremper as a discriminatee. Applying *Wright Line*,[2] the judge found that the General Counsel failed to meet her burden of establishing that the employees' protected activity was a motivating factor in the Respondent's decision to discipline them. He therefore dismissed the complaint in its entirety.

After the judge issued his decision, the Board issued its decision in *Lion Elastomers LLC*,[3] in which it overruled *General Motors LLC*[4] and reinstated the Board's traditional setting-specific standards for determining whether an employee has lost the Act's protection by engaging in misconduct in the course of Section 7 activity. The allegations involving the Respondent's discipline of Tremper and Abbott for their conduct in the course of the February 3 informal grievance meeting appear to be governed by the loss-of-protection standard set forth in *Atlantic Steel*, which the Board reinstated in *Lion Elastomers.*[5] Because the parties have not had an opportunity to address the impact of *Lion Elastomers* on these allegations, we shall sever and retain the allegations (set forth in paragraphs 7 to 9 of the consolidated complaint) and issue a notice to show cause why they should not be remanded to the judge for further proceedings.[6]

Our analysis of the remaining allegations involving the Respondent's March 8 discipline of Tremper and Pruccoli is governed by the longstanding framework established in *Wright Line* for cases turning on employer motivation. Applying that framework, we find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining the employees. As discussed in greater detail below, our consideration of these allegations has led us to reexamine the Board's recent decision in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019) addressing the General Counsel's burden under *Wright Line.*

In *Tschiggfrie*, the Board majority, then-Member McFerran concurring in the result, sought to clarify the General Counsel's burden under *Wright Line* in response to criticism from the United States Court of Appeals for the Eighth Circuit and what it described as confusion in a number of the Board's decisions. As discussed below, however, the majority's clarification was unnecessary and subject to misinterpretation. In our decision today,

[1] All dates hereafter refer to 2021, unless otherwise specified.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[3] 372 NLRB No. 83 (2023).

[4] 369 NLRB No. 127 (2020). In *General Motors*, the Board held that it would no longer apply various setting-specific standards to determine whether employers have unlawfully disciplined or discharged employees who allegedly engaged in "abusive conduct" in connection with activity protected by Sec. 7 of the Act and would instead analyze such cases under *Wright Line*. Accordingly, the *General Motors* Board overruled: (1) the four-factor test governing employees' conduct towards management in the workplace set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); (2) the totality-of-the-circumstances test governing social-media posts and most conversations among employees in the workplace set forth in *Pier Sixty, LLC,* 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017), and *Desert Springs Hospital Medical Center,* 363 NLRB 1824, 1824 fn. 3 (2016); and (3) the test governing picket-line conduct set forth in *Clear Pine Mouldings, Inc*., 268 NLRB 1044, 1046 (1984).

[5] 372 NLRB No. 83.

[6] The parties litigated the allegations under the *Wright Line* framework and the judge applied *Wright Line* in his decision. Although counsel for the General Counsel informed the judge and the parties at the hearing that the General Counsel was seeking to have the Board overturn *General Motors* and return to the *Atlantic Steel* standard, the judge directed the parties not to address the application of *Atlantic Steel* in their post-hearing briefs.

We express no view as to the judge's comments regarding the merits of the complaint allegations under *Atlantic Steel.*

we explain that the Board in *Tschiggfrie* did not add to or change the General Counsel's burden under *Wright Line*. Rather, the Board merely reaffirmed the principle, already embedded in the *Wright Line* framework, that the General Counsel is required to establish that protected activity was a "motivating factor" in the adverse employment action alleged to be unlawful. To the extent *Tschiggfrie* has been interpreted as modifying or heightening the General Counsel's *Wright Line* burden, we reject that interpretation, and we reaffirm that the General Counsel's burden under *Wright Line* remains the same as it has been throughout decades of Board jurisprudence.

I. BACKGROUND

The Respondent manufacturers adhesive tape and other packaging products at a facility in Marysville, Michigan. Local 1149 International Union, United Automotive, Aerospace and Agricultural Workers of America, AFL–CIO (the Union) represents the Respondent's production and maintenance workers at the Marysville facility. The Respondent and the Union were parties to a collective-bargaining agreement which by its terms was effective from May 3, 2018, to May 2, 2021. Mike Abbott was employed by the Respondent as a maintenance electrician. Robert Tremper and Mario Pruccoli were both production employees. Tremper was a union steward, and Pruccoli was a union committeeman.

On February 3, 2021, at approximately 2 a.m., a machine at the Marysville facility known as the Banbury caught fire. Abbott extinguished the fire. At approximately 6:45 a.m., Maintenance Manager John Zuzga arrived at the facility. After inspecting the Banbury himself, Zuzga requested that Abbott show him what he had done to put out the fire. As they were walking toward the Banbury, Abbott asked Zuzga to get a lock for the machine. Zuzga said that the machine did not need to be locked out because no one was going to touch it.[7] Abbott disagreed and asked for a union representative. Union steward Tremper was then summoned.

When Tremper arrived, he offered to go with Abbott and Zuzga to inspect the Banbury. Zuzga replied that Abbott had requested union representation to address "the lock situation" and that Tremper did not need to accompany them to the Banbury to resolve that issue. Zuzga added that when they were "done looking at the situation and . . . identify there's no use for a lock" he wanted Abbott to explain "why he pulled so many resources away from the company for something that was unnecessary."[8] Abbott responded that Zuzga would have known what was going on if he had come to the facility earlier, and he noted that the fire had occurred several hours before Zuzga arrived. Zuzga replied, "You don't get to tell me when I work, when I come in." Zuzga then moved the conversation from the production floor to his office, where it was less noisy.

Once in his office, Zuzga asked Abbott to explain why the Banbury needed to be locked out when he was just going to look at it and ask Abbott questions. Abbott explained that the previous maintenance manager, Mark St. Pierre, whom Zuzga had replaced approximately 4 months earlier, would put his own or a department lock on equipment that remained down at the end of a shift, and that was the past practice. Zuzga responded that St. Pierre was no longer in charge, the past practice was not company policy, and company policy did not require him to lock out the Banbury because nobody was going to work on it and they were only going to inspect it.

Zuzga then ordered Tremper to go back to work and Abbott to go with him to inspect the Banbury, noting that there would be "repercussions" if they failed to comply. Tremper insisted that he had to go with Abbott to inspect the Banbury because Zuzga had just threatened Abbott with discipline. Zuzga denied that he had threatened to discipline Abbott. Tremper nevertheless continued to insist on accompanying them to the Banbury. Zuzga then informed Abbott that he was suspended "because I

[7] Locking out is a safety practice of putting a lock on a machine in order to prevent an unexpected startup or release of energy during service and maintenance. The Respondent supplies each employee with four padlocks for that purpose. The padlocks have the employee's name on them, and only the employee has the keys for their padlocks. The Respondent also has "department" locks which are not assigned to any particular employee. It is undisputed that the past practice at the facility was for a supervisor or the maintenance manager to replace an employee's lock with a department lock at the end of the employee's shift if a machine was likely to be placed back into service before the employee returned to work. Otherwise, the Respondent would either have to cut the employee's lock off or ask the employee to return to the facility when the machine was ready to be placed back in service.

Although Abbott placed his own lock on the Banbury when he extinguished the fire, his shift was ending soon, and he was scheduled to be off work for the next 3 days. He therefore asked Zuzga to bring another lock to replace his own lock, in accordance with past practice. Zuzga refused because, in his view, the lockout/tagout procedure was "unnecessary" and there was "no use for a lock." Zuzga testified that he told Abbott, "I'm not going to be touching the equipment. I'm not going to do anything that would require me to lock anything out . . . . [T]he lockout/tagout procedures affect somebody that's going to use the equipment." Thus, Zuzga appeared to be taking the position that company policy did not require locking out the Banbury.

[8] When asked at the hearing to explain what he thought was "unnecessary," Zuzga testified as follows:

> The lockout/tagout. . . . [H]is whole premise behind wanting a union rep was . . . that me not bringing a lock is creating an unsafe situation and that warranted him getting a union rep. My point . . . was when we're done looking at the situation and we identify there's no use for a lock, that I wanted [Abbott] to explain what the reason behind all of this was.

can't work with you right now," after which he immediately turned to Tremper and said he was not going to "allow the Union to bully management."

Abbott then left Zuzga's office, but Tremper remained and attempted to ask a series of questions about Abbott's suspension. Zuzga declared that the meeting was over and told Tremper to leave his office.[9] Tremper asked if Zuzga was giving him a "direct order" to leave, and when Zuzga responded that he was, Tremper complied.

Two weeks later, on February 16, the Respondent issued a written "Verbal Warning" to Abbott.[10] On the same date, the Respondent issued a "Final Warning Disciplinary Action" to Tremper and suspended him for 5 days without pay.[11] Union committeeman Mario Pruccoli and Production Manager Steve Mathews were both present when Zuzga issued Tremper the final warning and suspension. Pruccoli testified that Zuzga said he was disciplining Tremper "for being insubordinate while representing an employee." Pruccoli then informed Zuzga and Mathews that he intended to file an unfair labor practice charge alleging that the Respondent violated the Act by disciplining Tremper.

On February 19, Pruccoli filed an unfair labor practice charge alleging that the Respondent violated Section 8(a)(3) and (1) by disciplining Tremper and Abbott because of their union activity and support. On the same date, Pruccoli filed grievances alleging that the Respondent's discipline of Tremper and Abbott violated both the collective-bargaining agreement and the Act. The Respondent received the grievances on February 22 and, on February 24, the Regional Director for Region 7 sent a letter to Production Manager Mathews notifying him of the unfair labor practice charge.

On February 25, Tremper returned from his suspension. On February 26, Tremper and Pruccoli were operating the multihead slitter machine, along with another employee.[12] Near the end of their shift, lead production supervisor Aaron Jamison, who was filling in for Tremper and Pruccoli's usual supervisor, told Tremper to clean up several rolls of tape that had fallen on the floor. Tremper immediately began doing so. Jamison did not say anything to Pruccoli. After Tremper and Pruccoli left for the day, Jamison returned and took photographs. The photographs show several rolls of tape under the machine and a cutter blade with smudges and a few small pieces of tape on it. On the same date, Jamison sent an email to the Respondent's human resources department with a proposed "Progressive Disciplinary Action Disciplinary Layoff" for Pruccoli and a proposed "Progressive Disciplinary Action Written Warning" for Tremper, citing Rule 6 of the Respondent's work rules, which proscribes "Failure to work efficiently and/or competently on work assigned."[13] Jamison did not recommend discipline for the third employee who was operating the slitter machine.[14]

[9] Zuzga testified that instead of complying, Tremper stood in the doorway and asked in an aggressive tone, "Are we men here? We can't talk? We're men. . . . . Are you a man?" Tremper testified, in contrast, that Zuzga was yelling and in order to restore calm, he (Tremper) said, "We are men here. We can discuss it. We don't need to be yelling." Tremper testified further that as an employee, he would have left Zuzga's office immediately, but he believed that he and Zuzga were equals when dealing with each other in their respective roles as representatives of the Union and the Respondent, and therefore Zuzga could not cut off his investigation of Abbott's suspension by unilaterally ending the meeting.

[10] Abbott's warning states, in relevant part:

> We started to walk [toward the machine], and you stopped and told me I needed a safety lock. I told you that I did not because I would not be touching or going in the equipment. You said I did need to lock it out and asked for your Union Rep. As we were walking you stated to me, "If you would have come in earlier you would know what is going on." And I replied that isn't how this works and you don't get to tell me when I should be here and you said "Well, you should have been."
>
> This is a violation of company work rule #21: Indirect Insubordination: challenge and abuse of directions given by supervision or management. Future violations will lead to further disciplinary action, up to and including termination.

[11] Tremper's warning states, in relevant part:

> During a meeting . . . on February 3, 2021, you were directed by Jon [Zuzga] to leave his office and return to your work area due to your unacceptable behavior. You were insubordinate and refused to leave Jon's office stating you were not going to leave his office and he can't kick you out and challenging him as to whether he was giving you a direct order or not. He had to give you multiple directives to leave before you complied. In addition, you interfered with a manager's investigation and ability to understand work that had been performed on a critical piece of equipment. You were disruptive, verbally combative and impeding the discussion regarding the work the employee had done.

The warning also states that Tremper will be terminated if, anytime in the next 3 years, he "interferes with other employees' ability to work and conduct business" or "behaves in a threatening or intimidating manner."

[12] The multihead slitter machine requires three operators to run and has three workstations: the front, the middle, and the back. It runs on all three shifts.

[13] Tremper's proposed written warning stated that he "was directed to remove rolls of tape on the floor under the distributor and dispose of them. This was not done. Employee failed to ensure that work cell was clean at the end of the shift." Pruccoli's proposed disciplinary layoff notice stated that he "failed to properly clean the cutter at the end of the shift" and "failed to ensure that work cell was clean at the end of the shift."

[14] Jamison testified that the area around the third employee's workstation was clean.

At the hearing, Jamison testified that he walked through the plant every day at the start of his shift, but he did not know when he had last inspected an area for cleanliness. He also testified that he had never looked for smudges or tape on the cutter blades before and struggled to explain why he decided to do so on February 26. He first testified that he decided to inspect the cutter blades because he saw Tremper talking to Pruccoli at the end of their shift and he "didn't know how long they had been talking and not doing their jobs." He later testified that an employee, whose name he could not remember, informed him that the cutter blades were dirty.

The Respondent maintains a progressive disciplinary policy under which employees are subject to successive levels of discipline for violations of each "Category 1" work rule, in the following order: a verbal warning for the first offense, a written warning for the second offense, a disciplinary layoff for the third offense, and discharge for the fourth offense.[15] Although Jamison testified at length regarding his role in preparing the proposed disciplinary notices for Tremper and Pruccoli, he offered no explanation for recommending second-step discipline for Tremper and third-step discipline for Pruccoli, even though it appears that neither had previously been disciplined for violating Rule 6. Nor did Jamison explain why he recommended that Pruccoli receive harsher discipline (a disciplinary layoff) than Tremper (a written warning).

Tremper and Pruccoli were not informed of their alleged improper cleaning for 2 weeks after it was discovered. On March 8, they were each issued a "Verbal Warning" containing identical language to that proposed by Jamison. Tremper and Pruccoli asked Jamison why they were being singled out for discipline when no one had ever been written up for improper cleaning before, and they "didn't clean . . . up any different than any other day." Jamison responded that it was a "consistency issue," implying that not all supervisors disciplined employees for improper cleaning.

When Pruccoli arrived at his workstation on March 10, he noticed that the employee who operated the slitter machine on the prior shift had left smudges on all five blades. Pruccoli pointed out the dirty blades to his supervisor, Joe Picarello, who laughed and walked away, stating that he was not going "to get in the middle of this."

Jamison testified that he "believed" he had disciplined other employees for improper cleaning and had taken photographs of other infractions, but the Respondent offered no documentary evidence of similar discipline or photographs. Tremper testified that he had always cleaned his workstation the same as he did on February 26, but he had never been disciplined for improper cleaning before.[16] Tremper and Pruccoli further testified that in their respective roles as union committeeman and union steward, they were not aware of any prior disciplinary actions for failing to clean cutter blades or inadequate cleaning in general.

II. THE JUDGE'S DECISION AND EXCEPTIONS

Consistent with the Board's decision in *General Motors*,[17] the judge applied the *Wright Line* framework to determine whether the Respondent violated Section 8(a)(3) and (1) by suspending and issuing disciplinary notices to Tremper and Abbott for their conduct during the February 3 informal grievance meeting. The judge found that Tremper and Abbott were engaged in protected union activity when they met with Zuzga on February 3 and that the Respondent had knowledge of that activity. However, the judge found no evidence of union animus on the part of Zuzga or any other management official involved in the discipline.[18] The judge also stated that there was "no causal connection" between the alleged unlawful animus and the discipline. Accordingly, the judge found that the General Counsel failed to sustain her burden under *Wright Line* of proving that union or other protected activity was a motivating factor in the Respondent's decision to suspend and issue disciplinary notices to Tremper and Abbott.

Similarly, the judge found no evidence that Jamison's decision to discipline Tremper and Pruccoli was motivated by union or other protected activity. As a preliminary matter, the judge found that Jamison's testimony regarding the discipline seemed "fishy." For instance, the judge observed that it seemed like Jamison went out of his way to take photographs of the alleged improper cleaning, and although Jamison testified that he had taken photographs of other improprieties, no such photographs were submitted in evidence. The judge also observed that Jamison's testimony that he had disciplined other employees for improper cleaning was not corroborated by documentary evidence. The judge therefore found the mutually corroborative testimony of Tremper and Pruccoli that they knew of no such discipline to be more reliable. In addition, the judge found that

[15] The Respondent's work rules are broken down into two categories. Violations of Category 1 rules are subject to progressive discipline, while violations of Category 2 rules may result in immediate discharge. Rule 6 is a Category 1 rule.

[16] Tremper had been employed as a multihead slitter operator for 4 years.

[17] 369 NLRB No. 127.

[18] The judge also observed that the Respondent has had a long and successful bargaining relationship with the Union, including a policy of holding monthly grievance meetings with union representatives.

Jamison's shifting testimony regarding how he came to discover the dirty cutter blades on February 26, his failure to recommend discipline for the third person who was working on the machine, and his failure to inform Tremper and Pruccoli of their inadequate cleaning for 2 weeks cast doubt on the reliability of his testimony.

The judge nonetheless found that the General Counsel failed to sustain her burden under *Wright Line* of proving that the filing of the unfair labor practice charge by Pruccoli, or Tremper and Pruccoli's union activity, was a motivating factor in the discipline. The judge credited Jamison's testimony that he did not know that the unfair labor practice charge had been filed when he decided to discipline the employees on February 26, and the judge found no evidence that any other supervisor or management official was involved in the decision. The judge also found that Jamison himself did not exhibit antiunion animus. Accordingly, the judge found that the Respondent did not violate Section 8(a)(3) or (4) by disciplining Tremper and Pruccoli, and he recommended that the complaint be dismissed in its entirety.

The General Counsel excepts to the dismissals, contending that the judge erroneously discounted or ignored evidence of animus, including, among other things, Zuzga's statement characterizing Abbott's request for union representation as a waste of time and his statement immediately after suspending Abbott that he was not going to allow the Union to bully management. The General Counsel also contends that the judge ignored his own findings establishing that the Respondent's proffered reasons for disciplining Tremper and Pruccoli on March 8 were pretextual.

In addition, the General Counsel requests that the Board overrule *General Motors* and reinstate the standard set forth in *Atlantic Steel* for determining whether an employer has unlawfully disciplined or discharged an employee for alleged misconduct in the course of Section 7 activity. Applying the *Atlantic Steel* standard, the General Counsel contends that the Board should find Tremper was engaged in protected activity on February 3, his conduct did not lose the protection of the Act, and the Respondent violated Section 8(a)(3) and (1) by taking disciplinary action against him for his protected conduct.

The General Counsel also urges the Board to overrule *Tschiggfrie*. The General Counsel argues that *Tschiggfrie* impermissibly altered the *Wright Line* framework by, among other things, precluding the finding of a violation where the evidence on the record as a whole supports a reasonable inference that animus toward union or other protected activity was a motivating factor in an employer's decision to take adverse action against an employee, but there is no evidence of "particularized" animus toward the employee's own protected activity.[19]

[19] The General Counsel also urges us to overrule *Electrolux Home Products,* 368 NLRB No. 34 (2019). In *Electrolux*, a Board majority held that although the Board may find in all the circumstances of a particular case that the General Counsel has carried her initial *Wright Line* burden based on a showing that an employer's proffered justification for an adverse action is pretextual, such a finding is not compelled. The General Counsel contends that *Electrolux* frustrates the purposes and policies of the Act by permitting employers who proffer pretextual explanations for discriminatory employment actions to avoid liability. Because this case does not present the specific issue in *Electrolux*—there is additional evidence of animus in this case, apart from pretext, that supports the General Counsel's case—we need not revisit *Electrolux* today.

Unlike her colleagues, Member Wilcox would revisit *Electrolux* and find that it was wrongly decided. First, she believes that *Electrolux* unduly narrows the probative value of pretext in establishing unlawful motivation. See *Transportation Management*, 462 U.S. at 398 ("[I]t is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice."); *Wright Line*, 251 NLRB at 1084 ("Examination of the evidence may reveal . . . that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive."). Second, in Member Wilcox's view, by placing the burden on the General Counsel to disprove hypothetical legitimate motives for the employer's action, *Electrolux* blurs the respective *Wright Line* burdens of the General Counsel and the employer. See *Transportation Management*, 462 U.S. at 401 fn. 6 (the Act requires the General Counsel "only to prove the unfair labor practice, not to disprove an affirmative defense."). Requiring the employer to clarify the issue of causation when the evidence supports a reasonable inference of discriminatory motivation is both fair, because the employer acted at least in part from an unlawful motive, and efficient, because the employer alone has access to its motive. Id. at 403; *Wright Line*, 251 NLRB at 1087, 1088-1089.

In sum, Member Wilcox would overrule *Electrolux* and reaffirm the principle that an employer's reliance on a pretextual reason for an adverse action, coupled with its failure to present any credible reason for the action, both "rais[es] an inference of discriminatory motive" and precludes the employer from establishing that it would have taken the same action even in the absence of the protected conduct. See *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)); *Rood Trucking Co*., 342 NLRB 895, 897-898 (2004); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Wright Line*, 251 NLRB at 1088 fn. 12 ("The absence of any legitimate basis for an action . . . may form part of the proof of the General Counsel's case."). See also *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("[I]f the evidence establishes that the reasons given for the [employer's] action are pretextual . . . the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."). Member Wilcox would further find that in some circumstances, a finding of pretext, standing alone, may be sufficient to support an inference of discriminatory motive. Finally, she would reaffirm that a discriminatory motive, otherwise established, is not disproven by evidence that the employer did not take similar actions against other union supporters or the absence of

The Respondent contends that the judge correctly applied extant Board law in finding that its discipline of Tremper, Abbott, and Pruccoli was lawful.

III. ANALYSIS

As discussed above, we are severing the allegations concerning the Respondent's discipline of Tremper and Abbott for their conduct during the February 3 meeting and issuing a notice to show cause why those allegations should not be remanded to the judge for further consideration in light of *Lion Elastomers*.[20]

For the reasons discussed below, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by issuing verbal warnings to Tremper and Pruccoli on March 8. In analyzing these allegations, we confirm that *Tschiggfrie* did not alter the Board's longstanding articulation of the General Counsel's evidentiary burden under *Wright Line*.

A. The Wright Line framework

Where it is alleged that an employer has violated the Act by taking adverse action against an employee, and the critical question is whether the adverse action was motivated by animus or hostility toward union or other protected activity, the Board has for more than 40 years—with the endorsement of the Supreme Court[21]—applied the *Wright Line* framework. In *Wright Line*, the Board set forth a two-part "test of causation" to determine the relationship, if any, between "employees' protected activities and actions on the part of their employer which detrimentally affect their employment."[22] Under this framework, the *Wright Line* Board explained, the General Counsel must first "make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden . . . shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."[23] If the employer fails to meet its burden, the Board will conclude that a causal relationship exists between the protected activity and the adverse action and a violation will be found.[24]

The Board has often summarized the elements usually required to sustain the General Counsel's initial burden under *Wright Line* as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) animus against union or other protected activity on the part of the employer.[25] Motivation is a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole.[26] Circumstan-

other unfair labor practice allegations. See, e.g., *Fresh & Greens of Washington, D.C., LLC*, 361 NLRB 362, 362 fn. 1 (2014) and cases cited there; *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1339 (2007) (collecting cases), rev. denied 310 Fed. Appx. 452 (2d Cir. 2009).

[20] As discussed above, Tremper and Abbott were disciplined for their conduct in the course of a meeting with management at which Tremper, in his role as a union steward, was representing Abbott regarding a potential safety concern and departure from past practice and later regarding Abbott's suspension. Inasmuch as Tremper and Abbott were both disciplined for conduct in the course of an alleged protected conversation with a manager in the workplace, it appears that *Atlantic Steel* provides the appropriate standard. See *Lion Elastomers*, 372 NLRB No. 83, slip op. at 1. See also *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014) (explaining that "the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act"), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

We recognize that the General Counsel did not argue on exceptions that the allegations involving Abbott should be analyzed under the *Atlantic Steel* standard. However, it is well established that the Board is not limited to the particular legal theory advanced by the General Counsel. See *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL–CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017), enfd. 888 F.3d 1313 (D.C. Cir. 2018); *W.E. Carlson Corp.*, 346 NLRB 431, 434 (2006).

[21] *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[22] 251 NLRB at 1083.

[23] Id. at 1089. The Board stated that it would apply this framework in "cases alleging violation of Sec[.] 8(a)(3) or violations of Sec[.] 8(a)(1) turning on employer motivation." Id. at 1089. However, the Board has also applied the *Wright Line* framework in cases involving alleged violations of Sec. 8(a)(4) where the employer's motive was at issue. See, e.g., *S. Freedman & Sons, Inc.,* 364 NLRB 1203, 1205 (2016), enfd. 713 Fed. Appx. 152 (4th Cir. 2017); *Freightway Corp.*, 299 NLRB 531, 532 fn. 4 (1990) (stating that *Wright Line* applies to 8(a)(4) as well as 8(a)(3) violations).

[24] Under this framework, the relative contribution of an employer's lawful and unlawful motives for the action against the employee is not decisive. As the Board explained, "where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." 251 NLRB at 1089 fn. 14.

[25] See *Tschiggfrie,* 368 NLRB No. 120, slip op. at 6 & fn. 13, and cases cited there. These elements are not, invariably, required to be met. Thus, an employer will also violate the Act when its motive for adverse action is demonstrated to be an effort to retaliate against employees because of the union activity of other employees, or because it retaliates against an employee wrongly believing that the employee has engaged in protected activity. See, e.g., *Napleton 1050 d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No 6, slip op. at 1 fn. 2, 14-17 (2018) (employer violated Sec. 8(a)(3) by taking adverse action against two employees in order to punish the employees as a group), enfd. 976 F.3d 30 (D.C. Cir. 2020); *AdvancePierre Foods*, *Inc.,* 366 NLRB No. 133, slip op. at 26 fn. 43 (2018) ("It is well settled that adverse action motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity is violative of Sec[.] 8(a)(1) and/or (3) of the Act."), enfd. 966 F. 3d 813 (D.C. Cir. 2020).

[26] See *Tschiggfrie,* 368 NLRB No. 120, slip op. at 3, 8, and cases cited there. See also *Wright Line*, 251 NLRB at 1083 ("In modern day labor relations, an employer will rarely" admit "that it has disciplined

tial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee.[27] The General Counsel may also use the employer's own response to the charges to establish animus and discriminatory motive.[28] This includes proof that the employer's asserted reasons for the adverse action were pretextual.[29] As the Board explained in *Wright Line*, "[t]he absence of any legitimate basis for an action . . . may form part of the proof of the General Counsel's case."[30]

If the General Counsel makes the initial showing, the burden of persuasion shifts to the employer to establish that it would have taken the same action for a legitimate reason.[31] The employer cannot meet its burden merely by showing that it had a legitimate reason for the action; rather, it must demonstrate that it would have taken the same action even in the absence of the protected conduct.[32]

Consistent with established precedent, the employer's burden also cannot be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon. Indeed, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer.[33]

B. Tschiggfrie Properties

The General Counsel in this case suggests that this well-established *Wright Line* framework was subsequently modified in *Tschiggfrie Properties*.[34] She suggests that *Tschiggfrie* added a requirement that the General Counsel must show animus specific to a particular discriminatee's protected activities. We acknowledge that the Board's decision in *Tschiggfrie* was imprecise and, therefore, susceptible to misinterpretation. Because the decision has caused significant confusion for parties before the Board, we take this opportunity to make clear that *Tschiggfrie* did not alter the General Counsel's burden under the longstanding *Wright Line* framework.[35]

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an employee because it detests unions or will not tolerate employees engaging in union or other protected activities"); *NLRB v. Link-Belt Co*., 311 U.S. 584, 602 (1941) ("[T]he Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence.").

[27] In determining whether circumstantial evidence supports a reasonable inference of discriminatory motive, the Board does not follow a rote formula and has relied on many different combinations of factors. See, e.g., *United Scrap Metal PA, LLC*, 372 NLRB No. 49, slip op. at 3 (2023); *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op. at 6-7 (2022); *Security Walls, LLC*, 371 NLRB No. 74, slip op. at 4 (2022); *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 1-2 (2021); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2-3 & fn. 6 (2020), enfd. 5 F.4th 759 (7th Cir. 2021); *Tschiggfrie,* 368 NLRB No. 120, slip op. at 4, 8; *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 12 (2018); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

[28] "It is well settled that when determining whether the General Counsel has established a prima facie case of unlawful discharge (or other allegedly discriminatory act), the Board can consider all of the record evidence, including the respondent's explanation for the discharge." *The Painting Co.*, 330 NLRB 1000, 1001 fns. 8 & 13 (2000) (citing *Holo-Krome v. NLRB*, 954 F.2d 108, 113-115 (2d Cir. 1992)), enfd. 298 F.3d 492 (6th Cir. 2002).

[29] See, e.g., *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004), and cases cited there.

[30] 251 NLRB at 1088 fn. 12 (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)).

[31] Id. at 1089.

[32] See, e.g., *NCRNC, LLC d/b/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1–2 fn. 5 (2022), and cases cited there.

[33] *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) ("[I]f the evidence establishes that the reasons given for the [employer's] action are pretextual . . . the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."); *Limestone Apparel Corp.*, 255 NLRB 722 (same). See also *Transportation Management*, 462 U.S. at 398 ("[I]t is undisputed that if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice."); *Wright Line*, 251 NLRB at 1084 ("Examination of the evidence may reveal . . . that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.").

[34] 368 NLRB No. 120.

[35] We disagree with our concurring colleague's attempt to cast this portion of our decision as dicta. Everyone agrees that the allegations involving the Respondent's March 8 discipline of Tremper and Pruccoli should be addressed under the *Wright Line* framework. Our restatement and clarification of the governing legal standard in this case cannot reasonably be characterized as dicta.

As a general matter, the Board has a duty to clarify ambiguities in its precedent that may cause confusion for parties, including the General Counsel. Cf. *Guardsmark, LLC,* 363 NLRB 931, 933 (2016) (clarifying uncertainty over when the prohibition on preelection captive-audience meetings begins in mail-ballot elections). See *E.I du Pont de Nemours & Co v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012) (the Board is obligated to ensure consistency in its caselaw). Our colleague sees no need to make any clarification in the present case. We respectfully disagree. That the clarification is necessary is plainly evident from the General Counsel's brief in this and other recent cases urging the Board to overrule *Tschiggfrie* and misconstruing it as modifying or heightening the General Counsel's burden under *Wright Line*, and the judge's application of a heightened standard in this case. As discussed in greater detail below, in concluding that the General Counsel did not meet her burden under *Wright Line*, the judge failed to consider the evidence on the record as a whole and disregarded compelling circum-

In *Tschiggfrie* the Board majority, then-Member McFerran concurring in the result, attempted to respond to criticism of the *Wright Line* framework from the Eighth Circuit and what it described as confusion in a number of the Board's decisions. In its original decision in *Tschiggfrie,* the Board unanimously found that the respondent violated Section 8(a)(3) and (1) of the Act by, among other things, issuing employee Darryl Galle a written warning and discharging him, but the members of the panel disagreed as to the correct formulation of the General Counsel's burden under *Wright Line*.[36] A majority of the panel affirmed the judge's statement that to carry the initial burden, the General Counsel is required to show "union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer," but the General Counsel is not required to establish "a connection between the antiunion animus and the specific adverse employment action."[37] Former Acting Chairman Miscimarra disagreed with the judge's characterization of the General Counsel's *Wright Line* burden and expressed the view that the General Counsel "must establish a link or nexus between the employee's protected activity and the employer's decision to take the employment action alleged to be unlawful."[38]

On review, the United States Court of Appeals for the Eighth Circuit found that the Board misapplied the *Wright Line* standard.[39] The court explained that under its precedent, "the General Counsel must prove a connection or nexus between the animus and the [adverse action]," and "proving '[s]imple animus toward the union is not enough.'"[40] Because, in the court's view, the Board failed to analyze causation properly and did not hold the General Counsel to his burden under *Wright Line*, the court denied enforcement as to the discharge and remanded the case to the Board to apply *Wright Line* consistent with its opinion.[41]

Applying the court's analysis as the law of the case on remand, the Board found that the General Counsel met his burden under *Wright Line* of establishing that union animus was a "motivating factor" in the respondent's decision to discharge Galle.[42] Thus, the Board found that Galle engaged in union activity, the respondent had knowledge of that activity, and the respondent exhibited animus toward that activity.[43] In addition, consistent with the court's opinion, the Board found that the General Counsel "established a connection or nexus between the [r]espondent's animus toward Galle's union activity and its decision to discharge him."[44] The Board further found that the respondent failed to meet its burden of establishing that it would have discharged Galle, even absent his union activity.[45] The Board therefore unanimously affirmed its finding in the underlying decision that the Respondent violated Section 8(a)(3) and (1) by discharging Galle.[46]

The Board majority, with then-Member McFerran concurring in the result, then sought to clarify the General Counsel's burden under *Wright Line* in response to the Eighth Circuit's criticism.[47] The majority observed that the Board has commonly summarized the elements required to support the General Counsel's burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) union animus, or animus against protected activity, on the part of the employer.[48] However, administrative law judges have occasionally included as a fourth element that the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action.[49] In response, the Board has

stantial evidence of discriminatory motive, including pretext, timing, and disparate treatment.

[36] 365 NLRB No. 34, slip op. at 1 fn. 1 (2017), enf. denied in relevant part and remanded 896 F.3d 880 (8th Cir. 2018).

[37] 365 NLRB No. 34, slip op. at 1 fn. 1 (citing *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011)) and slip op. at 8 fn. 2 (citing *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015)).

[38] 365 NLRB No. 34, slip op. at 1 fn. 1 (citing *Wright Line*, 251 NLRB at 1089; *Libertyville Toyota*, 360 NLRB at 1306 fn. 5 (then-Member Miscimarra, concurring in part and dissenting in part); *Starbucks Coffee Co*., 360 NLRB 1168, 1172 fn. 1 (2014) (then-Member Miscimarra, concurring); *AutoNation, Inc. v. NLRB*, 801 F.3d at 775 (holding that "there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker"); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554–555 (8th Cir. 2015) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive.") (alterations and internal quotations omitted in original), denying enf. of 361 NLRB 216 (2014)).

[39] 896 F.3d at 886-887.

[40] Id. at 886 (quoting *Nichols Aluminum*, 797 F.3d at 554).

[41] Id. at 887, 889.

[42] 368 NLRB No. 120, slip op. at 3.

[43] Id., slip op. at 3–4.

[44] Id., slip op. at 4. The majority found that the General Counsel established a motivation link or nexus between the respondent's animus and the discharge based on the respondent's prior unlawful discipline of Galle for his union activity, its failure to conduct a meaningful investigation of the misconduct for which Galle was allegedly discharged, and its shifting explanations for the discharge. Id.

[45] Id., slip op. at 4–5.

[46] Id., slip op. at 5.

[47] Id., slip op. at 5–8.

[48] Id., slip op. at 5–6.

[49] In at least one case, the Board itself included a fourth "nexus" element as a part of the General Counsel's initial burden. *American*

corrected judges if they included a fourth "nexus" element. For example, in *Mesker Door,* the Board stated that the judge erred by "describ[ing] the General Counsel's initial burden as including a fourth 'nexus' element."[50] Since *Mesker Door* was decided, the Board has repeatedly and consistently described the General Counsel's burden as including only three elements.[51]

Nothing in *Tschiggfrie* changed this. Indeed, the majority and the concurring Board Member all explicitly reaffirmed the Board's traditional three-element formulation of the General Counsel's burden. The majority explained that the *Wright Line* framework "is inherently a causation test," and therefore "identification of a causal nexus as a separate element that the General Counsel must establish to sustain his burden of proof is superfluous."[52]

The majority observed, however, that in some cases decided after *Mesker Door*, in rejecting a fourth "nexus" element, the Board used language that, in the majority's view, could be interpreted as suggesting that the General Counsel necessarily satisfies his initial burden by pointing to *any* evidence of general animus toward union or other protected activity alone. Specifically, the majority observed that in *Libertyville Toyota* and subsequent cases, the Board stated that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action."[53] The *Tschiggfrie* majority stated that "[t]his statement can easily be interpreted—and has been interpreted by the Eighth Circuit—as contrary to *Wright Line*'s requirement that the General Counsel prove that an employee's protected conduct was a 'motivating factor' in the employer's decision to take an adverse action because it strongly suggests that the General Counsel *necessarily* satisfies his initial burden through evidence of general animus or hostility toward union or other protected activity alone."[54] The majority additionally stated that even assuming the *Libertyville Toyota* formulation is not inconsistent with *Wright Line*, it has engendered "enough confusion, disagreement, and, perhaps most importantly, difficulty in securing enforcement of Board orders" to warrant clarification.[55]

In order to address these concerns, the majority observed that "the General Counsel does not *invariably* sustain his burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity."[56] Instead, the majority stated, the General Counsel must produce evidence "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee."[57] The majority therefore overruled *Mesker Door*, *Libertyville Toyota*, and similar cases "to the extent they suggest that the General Counsel necessarily satisfies his burden of proof under *Wright Line* by simply

Gardens Management Co., 338 NLRB 644, 645 (2002). However, the Board has not done so since 2002. In other cases, individual Board members advocated in favor of adding a fourth "nexus" element. See, e.g., *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003) (former Member Schaumber); *Starbucks Coffee*, 360 NLRB at 1172 fn. 1 (former Chairman Miscimarra). Other individual members expressed the view, adopted by the majority in *Tschiggfrie*, that because *Wright Line* is ultimately a causation test, adding a fourth element to the General Counsel's burden is logically superfluous. See, e.g., *Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3–4 fn. 8 (2018) (former Chairman Kaplan), enfd. 781 Fed. Appx. 946 (11th Cir. 2019); *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 11–12 fn. 25 (former Chairman Ring); *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53 fn. 2 (2013) (former Member Johnson).

[50] 357 NLRB at 592 fn. 5.

[51] See, e.g., *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 fn. 7 (2018); *Neises Construction Corp.*, 365 NLRB No. 129, slip op. at 1-2 fn. 6 (2017); *Advanced Life Systems, Inc.*, 364 NLRB 1711, 1712 fn. 6 (2016), enf. denied in part on other grounds 898 F.3d 38 (D.C. Cir. 2018); *HTH Corp.*, 361 NLRB 709, 709 fn. 2 (2014), enfd. in relevant part 823 F.3d 668 (D.C. Cir. 2016); *Libertyville Toyota*, 360 NLRB at 1301 fn. 10.

[52] 368 NLRB No. 120, slip. op at 7.

[53] Id., slip op. at 6 (quoting *Libertyville Toyota*, 360 NLRB at 1301 fn. 10 (emphasis in original)). In *Tschiggfrie*, the majority referred to this articulation of the General Counsel's burden as the *Libertyville Toyota* formulation. Id., slip op. at 6 fn. 18.

The Board applied the *Libertyville Toyota* formulation of the General Counsel's *Wright Line* burden in subsequent cases, including *East End Bus Line, Inc*., 366 NLRB No. 180, slip op. at 1 fn. 7 (2018); *Kitsap Tenant Support Services,* 366 NLRB No. 98, slip op. at 11 fn. 25; *Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3-4 fn. 8; *Rainbow Medical Transportation, LLC*, 365 NLRB No. 80, slip op. at 1 fn. 1 (2017); *Michigan State Employees Assn. d/b/a American Federation of State County 5 MI Loc Michigan State Employees Assn., AFL–CIO*, 364 NLRB 837, 841 fn. 17 (2016); *Dish Network, LLC*, 363 NLRB 1307, 1307 fn. 1 (2016), enfd. mem. 725 Fed. Appx. 682 (10th Cir. 2018); *Commercial Air, Inc.*, 362 NLRB 379, 379 fn. 1 (2015); *Nichols Aluminum,* 361 NLRB at 218 & fn. 7.

[54] 368 NLRB No. 120, slip op. at 7–8 fn. 25 (emphasis added).

[55] Id., slip op. at 8–9 fn. 26. In this regard, the majority observed that the Eighth Circuit will not enforce a violation under *Wright Line* if the Board applies the *Libertyville Toyota* formulation, id., slip op. at 6 (citing *Nichols Aluminum*, 797 F.3d at 548), and the Seventh Circuit, although it has not denied enforcement because the Board applied the *Libertyville Toyota* formulation, has been critical of it and has expressly declined to endorse it, id., slip op. at 7 (citing *AutoNation*, 801 F.3d at 769 (enforcing the Board's decision, but stating "we do not endorse all of the Board's language in its opinion")).

[56] Id., slip op. at 8 (emphasis in original).

[57] Id.

producing *any* evidence of the employer's animus or hostility toward union or other protected activity."[58] The majority was careful to point out, however, that it was not taking issue with the Board's traditional three-element formulation of the General Counsel's *Wright Line* burden or seeking to add a fourth "nexus" element.[59]

The majority was also careful to explain that it was *not* adopting the Eighth Circuit's formulation of the General Counsel's initial burden, which could be interpreted to suggest that the General Counsel must provide direct evidence that an employer harbored animus against an alleged discriminatee's specific protected activity and that evidence of general animus, by itself, can never support an inference of discriminatory motivation.[60] The majority emphasized "we do not hold . . . that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*."[61] Rather, the majority stated that it adhered to the longstanding principle that "[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole."[62] The majority observed, however, that "some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden."[63] As an illustrative example, the Board explained that an employer's statement that it will fire anyone who engages in union activities, although "general" in that it is not aimed at any particular employee, may give rise to a reasonable inference that a causal relationship exists between an employee's union activities and the employer's decision to take adverse action against the employee.[64] In contrast, the Board stated that isolated, one-on-one threats or interrogation directed at someone other than the alleged discriminatee "*may* not be sufficient to give rise to such an inference."[65]

We acknowledge that *Tschiggfrie* was a well-meaning attempt to clarify the General Counsel's burden under *Wright Line*. As explained by then-Member McFerran in her separate opinion, however, the majority's "clarification" was unnecessary.[66] As the majority itself acknowledged, the relevant causation principles were "'already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases.'"[67] Under *Wright Line*, the Board's task has always been "to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment."[68] As discussed above, to accomplish that task, the Board in *Wright Line* set out a two-part "causation test."[69] The General Counsel must initially establish that protected activity was a "motivating factor" in an adverse employment action.[70] To carry her burden, the General Counsel is only required to show that protected activity "played a role in the employer's decision."[71] The burden of persuasion then shifts to the employer. To meet its burden, the employer must demonstrate that "the same action would have taken place even in the absence of the protected conduct."[72] If the employer is unable to carry its burden, the Board will conclude that a causal relationship exists between the protected activity and the adverse action and will find a violation.[73] On the other hand, if the employer proves that the action would have been

[58] Id., slip op. at 7 (emphasis in original).

[59] Id., slip op. at 8.

[60] Id.; see also *Tschiggfrie*, 896 F.3d at 886-887 ("[G]eneral hostility toward the union does not itself supply the element of unlawful motive.") (quoting *Nichols Aluminum*, 797 F.3d at 554–555).

[61] 368 NLRB No. 120, slip op. at 8 (emphasis in original).

[62] Id. (quoting *Embassy Vacation Resorts*, 340 NLRB at 848).

[63] Id.

[64] Id.

[65] Id. (emphasis added).

[66] Id., slip op. at 10.

[67] Id., slip op. at 8 fn. 26 (quoting concurring opinion). Similarly, the majority independently emphasized that its decision was "consistent with *Wright Line* itself and years of Board and court precedent applying it." Id., slip op. at 8.

[68] *Wright Line*, 251 NLRB at 1089.

[69] Id.

[70] Id.

[71] Id.; *Transportation Management,* 462 U.S. at 398-399 (holding that "[the Board's] construction of the Act—that to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is *in any way* motivated by a desire to frustrate union [or other protected] activity—was plainly rational and acceptable") (emphasis added); id. at 401 (holding that under Sec. 10(c), the General Counsel has the burden of proving that "a discharge or other adverse action . . . is based *in whole or in part* on antiunion animus"). See also *Advanced Life System*, 898 F.3d at 47 ("[T]o establish that an employer has discriminated against its employees' exercise of their Sec[.] 7 right to collective activity, the General Counsel must show that an employer took adverse action against an employee, 'at least in part,' because of that employee's union involvement.") (emphasis omitted); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 422 (D.C. Cir. 1996) ("The General Counsel need not establish that an employee's union activity was the sole motive for the discharge; it is sufficient for purposes of establishing a violation of the Act that union affiliation or activity was one of the reasons for the discharge.") (citing *Transportation Management,* 462 U.S. at 398, 401).

[72] *Wright Line*, 251 NLRB at 1089.

[73] Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 fn. 11 (1989) ("In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that [the unlawful consideration] *did* make a difference to the outcome.") (emphasis in original).

taken anyway, no violation will be found even though the General Counsel initially established that the action was motivated in part by unlawful considerations.

Notably, *Mesker Door* and *Libertyville Toyota*—cases the *Tschiggfrie* majority thought it was necessary to overrule in part—actually faithfully applied this longstanding analytical framework. In *Mesker Door*, the Board did not relieve the General Counsel of the initial burden to show that protected activity was a "motivating factor" or "played a role" in an adverse employment action or otherwise stray from the causation test established in *Wright Line*. In *Mesker Door*, the Board simply stated that the judge erred by "describ[ing] the General Counsel's initial burden as including a fourth 'nexus' element."[74] Similarly, in *Libertyville Toyota*, the Board correctly described the General Counsel's burden under *Wright Line* as requiring proof "that an employee's union or other protected activity was a motivating factor in the employer's action against the employee" and corrected the judge's and then-Member Miscimarra's description of the General Counsel's *Wright Line* burden as including a separate "nexus" element, noting that

> [P]roving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some *additional* showing of particularized motivating animus towards the employee's own protected activity or to *further* demonstrate some *additional*, undefined 'nexus' between the employee's protected activity and the adverse action.[75]

Contrary to the view of the *Tschiggfrie* majority, then, *Mesker Door* and *Libertyville Toyota* did not alter the nature of the General Counsel's initial burden or its ultimate purpose, which is to show that protected activity was a "motivating factor" in an employer's decision to take an adverse employment action.[76] Thus, it was unnecessary to overrule the Board's statements in *Mesker Door* and *Libertyville Toyota* or to otherwise clarify the General Counsel's initial burden under *Wright Line*. By taking this unnecessary step, the *Tschiggfrie* majority inadvertently led parties and judges to believe that the Board would require the General Counsel to make some further or additional showing to carry the initial *Wright Line* burden in future cases.[77] We affirm today that no such additional showing is required.

[74] *Mesker Door*, 357 NLRB at 592 & fn. 5 (summarizing the elements commonly required to support the General Counsel's *Wright Line* burden as "union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer" and stating that the judge erred by "describ[ing] the General Counsel's initial burden as including a fourth 'nexus' element."). Compare *Tschiggfrie*, 368 NLRB No. 120, slip op. at 6 and 8 (summarizing the elements required to support the General Counsel's burden as "(1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer" and stating "[w]e neither take issue with the Board's long-time use of a three-element formulation of the General Counsel's *Wright Line* burden nor seek to add a fourth "nexus" element to that formulation").

[75] 360 NLRB at 1301 fn. 10 (emphasis added in part).

[76] To be clear – contrary to the Eight Circuit's interpretation and the view of the *Tschiggfrie* majority – the Board in *Libertyville Toyota* did not suggest that the General Counsel necessarily satisfies her burden under *Wright Line* by producing *any* evidence of the employer's animus or hostility toward union or other protected activity. Rather, it was simply responding to the judge's description of the General Counsel's initial burden as including a fourth "nexus" element (id. at 1326) and responding to former Member Miscimarra, who argued that "the judge correctly articulate[d] the General Counsel's burden" (id. at 1306 fn. 5 (Member Miscimarra, concurring in part and dissenting in part)). As the Seventh Circuit observed in enforcing the Board's decision in *Libertyville Toyota* "what the Board was saying . . . was that there was no need to prove *additional* animus" beyond that which is required to establish that protected activity was a "motivating factor" in the contested action. *AutoNation*, 801 F.3d at 775 (emphasis in original). Indeed, the Board's analysis has consistently focused on whether the evidence of animus in a particular case is "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB at 1089. The case-specific nature of the inquiry, moreover, exposes the flaw in our concurring colleague's call for an "analytical outer limit of the generality of animus evidence." But to be clear, we acknowledge there will be cases in which the particular facts demonstrate that the General Counsel's evidence falls short. See, e.g., *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (Board found that union animus motivated employer's actions taken against several employees, but nonetheless reversed the judge's finding that the employer unlawfully failed to recall a particular laid-off union supporter because there were "insufficient facts to show that the animus against union activity was a motivating factor in the decision not to recall him"), enfd. mem. 156 Fed. Appx. 330 (D.C. Cir. 2005); *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn. 2 & 939–941 (1998) (Board found insufficient evidence that the employer's discharge of known union supporters was motivated by antiunion animus where the General Counsel's evidence of animus was "modest and temporally remote," "too equivocal in its implications," and overall "far too weak" to warrant the inference that the employees' union activity was a "motivating factor" in the employer's decision).

[77] The *Tschiggfrie* majority—echoed now by our concurring colleague—likewise overstated appellate courts' questioning of the Board's formulation of the General Counsel's *Wright Line* burden. Indeed, the Seventh Circuit recognized that *Libertyville Toyota* faithfully adhered to the Board's precedent and articulation of the *Wright Line* framework when it enforced the Board's order in that case, notwithstanding the majority's statements responding to then-Member Miscimarra's dissent. *AutoNation*, 801 F.3d at 776 ("[T]he Board referred repeatedly in the text of its opinion to the correct 'motivating factor' requirement of *Wright Line*."). The Tenth Circuit has similarly rejected the *Tschiggfrie* Board's interpretation of *Libertyville Toyota*. *Dish Network, LLC*, 725 Fed. Appx. at 694 (disagreeing with the argument that *Libertyville Toyota* "effectively eliminate[d] causation from the General Counsel's burden") (brackets in original). And while the

We also take this opportunity to clarify that the Board in *Tschiggfrie* did not revise the *Wright Line* framework by adding a requirement that the General Counsel must show particularized motivating animus towards an employee's own protected activity. As noted above, the General Counsel argues on exception that *Tschiggfrie* heightened the General Counsel's burden by precluding the finding of a violation where there is no evidence of "particularized" animus toward an employee's own protected activity, even where the record as a whole supports a reasonable inference that animus toward union or other protected activity was a motivating factor in the employer's decision to take adverse action against the employee. Indeed, the judge articulated a heightened burden in this case, and parties and judges in other cases have likewise interpreted *Tschiggfrie* in this manner. Although the majority in *Tschiggfrie* stated that it was overruling the statement in *Libertyville Toyota* and subsequent cases that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action," the majority explained that it was overruling those cases only "to the extent they suggest that the General Counsel necessarily satisfies his burden of proof under *Wright Line* by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity."[78]

The General Counsel thus misunderstands the majority's holding in *Tschiggfrie*. By overruling *Mesker Door*, *Libertyville Toyota*, and their progeny, the majority did not intend to limit the *Wright Line* analysis to a specific discriminatee's protected activities, as the General Counsel suggests on exceptions.

Section 8(a)(1) proscribes interference with "the exercise of the rights guaranteed in [S]ection 7," while Section 8(a)(3) proscribes discrimination in order "to encourage or discourage membership in any labor organization."[79] An employer violates these provisions by taking adverse actions against employees to encourage or discourage union or other protected activity, and it does not matter whether the activity the employer seeks to encourage or discourage is that of the particular employee against whom the employer has taken action. Although the General Counsel typically proceeds on the theory that an employer took adverse action against a particular employee to punish or discourage *that* employee's protected activity, the General Counsel may also prevail by showing that an employer took adverse action against one or more employees with the intent of discouraging or punishing union activity in its workforce generally. Thus, it is well established that general retaliation by an employer against some or all of its workforce can discourage the exercise of Section 7 rights just as effectively as adverse action taken against only known union supporters and such conduct is unlawful regardless of the individual union sentiments or activities of the affected employees and even though not all union adherents were adversely affected.[80] In such cases, the General Counsel is not required to establish that the employer harbored animus as to a specific employee's union or other protected activity. Rather, the focus "is upon the employer's motive . . . rather than upon the anti-union or pro-union status of particular employees."[81]

Even where the General Counsel is proceeding on the theory that the employer harbored animus toward a specific employee's union or other protected activity and that this animus was a motivating factor in the employer's decision to take adverse action against the employee, the General Counsel is not required to provide direct evidence of particularized motivating animus in order to sustain her burden under *Wright Line*. As the majority in *Tschiggfrie* recognized, "direct evidence of an unlawful

Eighth Circuit questioned the Board's formulation of the initial burden, we respectfully suggest that the court, like our colleagues in *Tschiggfrie*, may have misconstrued the Board's statement that there is no freestanding, fourth "nexus" element as stating that the General Counsel need not prove that animus was a "motivating factor" in an employer's adverse action. No other Circuits have weighed in on this question.

[78] 369 NLRB No. 120, slip op. at 7 (emphasis in original) & fn. 25 (quoting *Libertyville Toyota*, 360 NLRB at 1301 fn. 10 (emphasis in original)).

[79] 29 U.S.C. § 158(a)(1), 29 U.S.C. § 158(a)(3).

[80] "In other words, when the intent is to punish or discourage union activity, it is no defense . . . that the employer wield[ed] an undiscerning axe in choosing the targets to implement its illegal objective." *Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 43 (D.C. Cir. 2020) (citation and internal quotation marks omitted), enforcing 367 NLRB No. 6, slip op. at 1 fn. 2, 14-17 (2018) (collecting cases).

[81] *Hyatt Corp. v. NLRB*, 939 F.2d 361, 375-376 (6th Cir. 1991) ("[T]he Board need not find illegal motivations as to specific individuals" because "[t]he focus . . . is upon the employer's motive . . . rather than upon the anti-union or pro-union status of particular employees.") (citing *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179, 1180 (6th Cir. 1985) ("[T]he General Counsel may . . . prevail by showing that the employer ordered general lay-offs for the purpose of discouraging union activity or in retaliation against its employees because of the union activity of some."). See also *Napleton*, 976 F.3d at 41 (Although an "employer's awareness of a targeted employee's union activity is the most common way of proving actual discriminatory intent . . . such individualized knowledge is not always necessary for a violation to be found.") (citation and internal quotation marks omitted); *NLRB v. Frigid Storage, Inc*., 934 F.2d 506, 510 (4th Cir. 1991) ("The issue is the employer's motivation, and he cannot cleanse an impure heart with ignorance of individual employee sentiments.").

motive, i.e., the proverbial smoking gun, is seldom obtainable."[82] Accordingly, the Board and courts have long held that animus and a causal connection may be "inferred from circumstantial evidence based on the record as a whole."[83] Thus, an examination of the Board's decisions before and after *Tschiggfrie* reveals that the Board has routinely inferred animus and a causal connection from, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; disparate treatment of the employee; and reliance on pretextual reasons for the action.[84] We emphasize that – before and after *Tschiggfrie* – the General Counsel may meet her burden under *Wright Line* by relying on these forms of evidence, and where the evidence on the record as a whole supports a reasonable inference that protected activity was a motivating factor in a challenged employment action the General Counsel need not produce separate or additional evidence of particularized animus toward an employee's own protected activity or of a causal "nexus" between the protected activity and the adverse action to meet her burden.

C. Application to the Present Case

Applying these principles to the present case, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by issuing verbal warnings to Tremper and Pruccoli on March 8. In finding that the General Counsel failed to sustain her burden of establishing that Tremper and Pruccoli's protected activity was a motivating factor in the Respondent's decision to issue the March 8 disciplinary notices, the judge misapplied the *Wright Line* analysis. The judge failed to consider the evidence on the record as a whole and disregarded evidence favorable to the General Counsel. For instance, although finding that Jamison's testimony regarding the discipline was "fishy" and that his decision to issue the discipline was "nit picking" and "arbitrary," the judge failed to consider whether the discipline was pretextual. The judge also disregarded or ignored other circumstantial evidence from which animus and discriminatory motive could be inferred, such as the suspicious timing of the discipline and the Respondent's disparate treatment of Tremper and Pruccoli.

Having reviewed the record, and giving due consideration to all the facts, we reverse and find that the Respondent violated Section 8(a)(3) and (1) by issuing verbal warnings to Tremper and Pruccoli on March 8. It is undisputed that Tremper and Pruccoli engaged in union activity and that the Respondent was aware of their activity.[85] We further find that the record supports the conclusion that the Respondent harbored animus toward their union activity and that this animus was a "motivating factor" in the Respondent's decision to discipline them.

Initially, it is clear from the record—including Jamison's testimony—that the Respondent's explanations as to why it issued the disciplinary notices were pretextual. Specifically, pretext is shown by Jamison's inconsistent testimony that he discovered the uncleanliness of the cutter blades himself but also that he was alerted to the uncleanliness by an unnamed employee. Pretext is also shown by Jamison's testimony that, prior to February 26, he had never looked for smudges or tape on the cutter blades and he did not know when he had last inspected an area for cleanliness, as well as the fact that he went out of his way to photograph Tremper and Pruccoli's alleged infractions. Additionally, Jamison's delay in informing Tremper and Pruccoli of their alleged improper cleaning suggests that he was more focused on catching them in a mistake and creating a record against them than correcting the problem. If the matter were serious enough to potentially warrant third-step discipline (a disciplinary layoff) in the case of Pruccoli and second-step discipline (a written warning) in the case of Tremper, as Jamison recommended, it defies logic that he would have waited 2 weeks to inform them. Although Jamison suggested that he was waiting for the Respondent's human resources department to verify that the level of discipline he recommended was correct, this hardly explains why in the interim Jamison or another supervisor did not simply instruct Pruccoli and Tremper to clean their workstations more thoroughly to avoid whatever problems the lack of adequate cleaning could cause.

The Respondent's disparate treatment of Tremper and Pruccoli is also highly suggestive of pretext and supports

[82] 368 NLRB No. 120, slip op. at 8 (quoting *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001)).

[83] Id. (quotation omitted).

[84] See cases cited at fn. 27, above.

[85] The Respondent clearly had knowledge of Tremper's participation in the February 3 grievance meeting. Moreover, on February 19, Pruccoli filed grievances alleging that the Respondent violated the collective-bargaining agreement and the Act by disciplining Tremper and Abbott for their conduct at the February 3 meeting, and the grievances were signed by the Respondent's representative on February 22. Although there is no direct evidence that Jamison knew about the alleged discriminatees' union activities, it is well established that the Board imputes the knowledge of other supervisors and managers to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation. *G4S Secure Solutions*, 364 NLRB 1327, 1330 (2016), enfd. mem. 707 Fed. Appx. 610 (11th Cir. 2017); *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference at 361 NLRB 1395 (2014).

a finding of animus.[86] As discussed above, Jamison testified, in part, that he was alerted to the dirty cutter blades by an employee on the subsequent shift. Jamison then photographed the blades, prepared a recommendation that Pruccoli receive third-step discipline (a disciplinary layoff), and emailed the photographs and recommended discipline to the Respondent's human resources department the same day. In contrast, when Pruccoli discovered that an employee on an earlier shift had failed to properly clean the cutter blades and pointed the dirty blades out to his supervisor, his complaint was ignored. The Respondent's vastly different responses to these incidents suggest disparate treatment, and thus union animus.[87] The Respondent failed to present any evidence that it has previously disciplined an employee for inadequate cleaning or for engaging in any comparable conduct, or that supervisors or managers have taken photographs in support of such discipline.[88] Moreover, Tremper and Pruccoli (whose positions with the union afforded them firsthand knowledge of how the Respondent administers discipline) testified that they had never been disciplined for inadequate cleaning before even though they had cleaned their workstation the same way for years, nor were they aware of any other employee having been disciplined for inadequate cleaning, either of cutter blades or in general.

Finally, the timing of the discipline also raises a strong inference of animus and unlawful motive. The Board has long held that the timing of an adverse action shortly after an employee engaged in protected activity will support a finding of unlawful motivation.[89] Jamison decided to discipline Tremper and Pruccoli just 4 days after the Respondent received the grievances filed by Pruccoli challenging the Respondent's decision to suspend and warn Tremper and Abbott for their conduct in connection with the February 3 informal grievance meeting, and 1 day after Tremper returned from his suspension.

Based on the foregoing, we find that the General Counsel met her *Wright Line* burden of establishing that Tremper and Pruccoli's union activity was a motivating factor in the Respondent's decision to discipline them. The burden now shifts to the Respondent to establish that it would have disciplined them even in the absence of their protected conduct. As just noted, the Respondent's purported reason for disciplining Tremper and Pruccoli—inadequate cleaning—was pretextual. "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."[90] Accordingly, the Respondent necessarily cannot meet its *Wright Line* rebuttal burden.

Even assuming arguendo that the discipline was motivated in part by a legitimate concern, we would still find that the Respondent failed to meet its burden of proving that it would have taken the same action in the absence of the protected conduct. As discussed above, Tremper and Pruccoli credibly testified that their cleaning on February 26 was typical, yet the Respondent produced no evidence that it had ever previously disciplined any employee for inadequate cleaning.[91] Further, the day after he received the verbal warning, Pruccoli pointed out to his supervisor that the cutter blades at his workstation

[86] *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16, slip op. at 3 (2021) (disparate treatment "is precisely the type of circumstantial evidence found to establish animus under *Tschiggfrie*"), rev. denied 45 F.4th 234 (D.C. Cir. 2022). See also *Wendt Corp*, 369 NLRB No. 135, slip op. at 4 (2020) ("[C]ircumstantial evidence of animus under *Tschiggfrie Properties* is clearly established by the Respondent's disparate treatment."), enfd. in part and remanded on other grounds 26 F.4th 1002 (D.C. Cir. 2022); *Mondelez Global*, 369 NLRB No. 46, slip op. at 2–3 (lack of evidence that employer disciplined others for similar offenses shows animus); *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (unlawful motive inferred from evidence of disparate treatment), cited with approval in *Tschiggfrie*, 368 NLRB 120, slip op. at 8.

[87] *Constellium Rolled Products*, 371 NLRB No. 16, slip op. at 3.

[88] *Mondelez Global*, 369 NLRB No. 46, slip op. at 2-3 (citing *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 223–224 (D.C. Cir. 2016) (lack of evidence that employer discharged others for similar offenses shows pretext)); *Tschiggfrie*, 368 NLRB No. 120, slip op. at 5 (same); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (same), affd. 71 Fed. Appx. 441 (5th Cir. 2003).

The Respondent contends in its answering brief that Jamison testified at the hearing that "he has issued discipline for similar offenses many times in the past." In support, the Respondent cites Jamison's testimony that he "believe[d]" he had written up employees for similar offenses. Given Jamison's ambiguous testimony, which lacks details such as names and dates necessary to substantiate it, and the absence of documentary evidence, the judge found the mutually corroborative testimony of Tremper and Pruccoli that they knew of no such prior discipline to be more reliable. We agree.

[89] See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 6 (2021) (citing *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) ("The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity . . . may raise an inference of animus and unlawful motive."), enfd. mem. per curiam 621 Fed. Appx. 9 (D.C. Cir. 2015)).

[90] *Limestone Apparel*, 255 NLRB at 722. See also *Healthy Minds*, 371 NLRB No. 6, slip op. at 6 ("Because the Respondent's purported reasons for discharging Reese were pretextual, the Respondent necessarily cannot meet its defense burden under *Wright Line*."); *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at 2 (2018), enfd. mem. 790 Fed. Appx. 256 (2d Cir. 2019).

[91] *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 5 (2021) (holding that employer failed to meet its rebuttal burden where it had never disciplined an employee for similar conduct before) (citing *Septix Waste, Inc.,* 346 NLRB 494, 496–497 (2006) (holding that, in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly)), enfd. 41 F.4th 518 (6th Cir. 2022).

were not properly cleaned by the employee on the prior shift, and his supervisor laughed and walked away.

In sum, our consideration of the entire record convinces us that Tremper and Pruccoli were disciplined because of their union activity, and that the Respondent seized upon their alleged improper cleaning in an effort to obscure the true motive for their discipline. Accordingly, we reverse the judge and finding that the Respondent violated Section 8(a)(3) and (1) by disciplining Tremper and Pruccoli.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Intertape Polymer Corp., 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)(3) and (1) of the Act on March 8, 2021, by issuing progressive disciplinary action verbal warnings to Robert Tremper and Mario Pruccoli.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

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)(3) and (1) by discriminating in regard to the conditions of employment of its employees thereby discouraging membership in a labor organization, we shall order the Respondent to rescind the progressive disciplinary action verbal warnings issued to Robert Tremper and Mario Pruccoli on March 8, 2021, to remove any reference to the warnings from its records, and to inform Robert Tremper and Mario Pruccoli in writing that it will not use the warnings against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Intertape Polymer Corp., Marysville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against employees because of their support for and activities on behalf of Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO (the Union) or any other labor organization.

(b) 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 this Order, remove from its files any reference to the unlawful warnings, and within 3 days thereafter, notify Robert Tremper and Mario Pruccoli in writing that this has been done and that the warnings will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its Marysville, Michigan facility copies of the attached notice marked "Appendix."[92] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 8, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

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[92] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

IT IS FURTHER ORDERED THAT complaint paragraphs 7 to 9 relating to the Respondent's suspension and discipline of Robert Tremper and Mike Abbott for their conduct in connection with the February 3, 2021 meeting with management are severed from this case and retained for future disposition.

Further, NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before September 11, 2023 (with affidavit of service on the parties to this proceeding), why the complaint allegations involving the Respondent's suspension and discipline of Robert Tremper and Mike Abbott for their conduct in connection with the February 3, 2021 meeting with management should not be remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Lion Elastomers*, 372 NLRB No. 83 (2023), including reopening the record if necessary. Any briefs or statements in support of the response shall be filed on the same date.

Dated, Washington, D.C. August 25, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in the result.

Introduction

Today, my colleagues and I are in full agreement about all relevant aspects of this case. We agree that the decision in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), "did not add to or change the General Counsel's burden under *Wright Line*."[1] We agree that, in arguing that *Tschiggfrie* imposed a "heightened" initial burden of proof, the General Counsel plainly "misunderstands the majority's holding in *Tschiggfrie*." Furthermore, we agree that, under the standard in *Tschiggfrie*, which is consistent with the *Wright Line* standard, the Respondent violated Section 8(a)(3) and (1) by issuing disciplinary notices to Tremper and union committeeman Mario Pruccoli on March 8, 2021, because of their union activity.[2] Finally, we agree that the issues whether the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and issuing disciplinary notices to union steward Robert Tremper and maintenance employee Mike Abbott for their protected conduct in the course of an informal grievance meeting on February 3, 2021, should be the subject of a notice to show cause why they should not be remanded to the judge for further proceedings consistent with *Lion Elastomers LLC*, 372 NLRB No. 83 (2023).[3]

That should have been the end of the matter. Instead, my colleagues go beyond the scope of the case presented and attempt to explain in *dicta* why the *Tschiggfrie* decision erred by concluding that it was necessary to overrule *Libertyville Toyota* and its progeny "to the extent that they suggest that the General Counsel necessarily satisfies his [or her] burden of proof under *Wright Line* by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity." *Tschiggfrie*, 368 NLRB No. 120, slip op. at 7.[4] My colleagues contend that *Libertyville Toyota* and its progeny did not, in fact, suggest that the General Counsel necessarily satisfies the initial burden of proof under *Wright Line* by simply producing any evidence of the employer's animus or hostility toward union or other protected activity. But if *Tschiggfrie* correctly sets forth the burden under *Wright Line*, and we are applying *Wright Line* in this case, whether or not the formulation set forth in *Libertyville Toyota* was consistent with *Wright Line* is neither necessary nor relevant to the holding in the instant case.[5]

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] I likewise concur with my colleagues that it is unnecessary to pass on the question of whether this conduct and Pruccoli's filing of an unfair labor practice charge naming Tremper as a discriminatee violated Sec. 8(a)(4) given that such violations would not materially affect the remedy.

[3] In *Lion Elastomers*, a Board majority overruled *General Motors LLC*, 369 NLRB No. 127 (2020), and, in place of *Wright Line*, reinstated the Board's setting-specific standards for determining whether an employee has lost the Act's protection by engaging in misconduct in the course of protected activity. As pertinent here, the question whether Tremper and Abbott's workplace conduct toward management lost the protection of the Act will now be analyzed under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Although I relevantly dissented in *Lion Elastomers*, I agree with my colleagues that the Board should issue a notice to show cause why those issues should not be remanded to afford the parties an opportunity to present evidence and argument relevant to the *Atlantic Steel* analysis.

[4] In this connection, the Board also overruled *Mesker Door, Inc.*, 357 NLRB 591 (2011).

[5] Despite this self-evident fact, my colleagues attempt to justify their decision by asserting that the need for "clarification" of *Tschig-*

Because the Board unanimously finds that *Tschiggfrie* is consistent with *Wright Line*, and that the Respondent violated the Act by issuing disciplinary notices to Tremper and Prucolli under the standard set forth in *Tschiggfrie*, any discussions by my colleagues regarding *Libertyville Toyota* and its progeny are *dicta*.[6] Nevertheless, because my colleagues insist on that further discussion, I have no choice but to respond, in *dicta*.

Discussion

1. *Tschiggfrie* is Fully Consistent with *Wright Line*

Initially, as both *Tschiggfrie* and my colleagues recognize, *Wright Line* is fundamentally a causation test. To establish such causation, the General Counsel must establish three elements—(1) union or other protected activity by the employee, (2) knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. My colleagues and I agree that there is no need or place for a fourth element requiring a demonstrated "causal nexus" between the employee's protected activity and the employer's adverse employment action taken against the employee. Indeed, the *Tschiggfrie* Board made clear that "identification of a causal nexus as a separate element that the General Counsel must establish to sustain his [or her] burden of proof is superfluous because '[t]he ultimate inquiry' is whether there is a nexus between the employee's protected activity and the challenged adverse employment action." *Tschiggfrie*, supra, slip op. at 7 (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012)); *Wright Line*, 251 NLRB at 1089 (announcing a "causation test" by which the General Counsel must make a "showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision") (internal quotation marks omitted). Again, my colleagues agree with this aspect of *Tschiggfrie*.

The view that the General Counsel must establish causation as part of the *Wright Line* burden is not only clear from the language of *Wright Line* itself, but it is inarguably consistent with the Supreme Court's holdings on the matter. As my colleagues acknowledge, *Wright Line* held that the General Counsel must establish, as part of the prima facie showing, evidence sufficient to support the inference "that protected conduct was 'a motivating factor' in the employer's decision" to take an adverse action. *Wright Line*, 251 NLRB at 1089. In *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), the Court upheld the *Wright Line* standard and cited, with approval, the fact that:

> [T]he Board's decisions . . . have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus – or as the Board now puts it, that the employee's protected conduct *was a substantial or motivating factor in the adverse action.* The General Counsel has the burden of proving these elements under § 10(c).[7]

462 U.S. at 401 (emphasis added); see also *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (indicating that *Transp. Mgmt.* held that, to establish a violation under the Board's burden-shifting paradigm, the burden is to establish that "antiunion animus *contributed to* the employer's firing decision") (emphasis added).

The Court has clearly recognized that the General Counsel's burden under *Wright Line* included a causal link between the adverse action taken and the protected conduct alleged to have been a contributing factor in the adverse action. My colleagues concede that, in requiring such causation, *Tschiggfrie* is consistent with *Wright Line.*

My colleagues also acknowledge that, contrary to the General Counsel's position, the *Tschiggfrie* decision expressly stated that it did *not* hold that the General Counsel must produce *direct* evidence of animus and that, instead, the decision makes clear that the Board "adhere[s] to the Board's longstanding principle that

gfrie "is plainly evident from the General Counsel's brief in this and other recent cases urging the Board to overrule *Tschiggfrie* and misconstruing it as modifying or heightening the General Counsel's burden under Wright Line, and the judge's application of a heightened standard in this case." This rationale, however, is not plainly evident to me.

Here, the General Counsel affirmatively sought to *overrule Tschiggfrie*. In seeking that result, she asserted that *Tschiggfrie* represented a "significant and unjustified departure from well-established precedent." She did not contend that parties were confused by *Tschiggfrie*, nor did she provide any examples of parties being confused by *Tschiggfrie*. The fact that the General Counsel, as a litigant advocating for overturning *Tschiggfrie*, did not take the position that *Tschiggfrie* was in fact consistent with long-standing precedent hardly constitutes evidence that widespread confusion exists concerning the application of *Tschiggfrie*. Moreover, if my colleagues were interested in clearing up the General Counsel's alleged confusion, all they had to do is apply *Tschiggfrie* here, demonstrating that it is consistent with *Wright Line*. There is no need whatsoever to reach *Libertyville Toyota* in deciding this case.

Making matters even worse, it is not clear that the judge even relied on the analysis set forth in *Tschiggfrie*—the analysis that my colleagues vigorously assert must be clarified--in his decision. None of that analysis is discussed in the judge's decision. Rather, the judge consistently cited *Wright Line* as the correct standard to apply under the "dual motive causation test."

[6] See generally *Jiminez v. Walker*, 458 F.3d 130, 143 (2d Cir. 2006) ("Holdings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not.").

[7] Note that I am citing this passage solely to demonstrate the Court's recognition that the protected conduct is a "substantial or motivating factor in the adverse action," not for the proposition that animus must necessarily be demonstrated against the employee's own protected conduct.

'[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.'" *Tschiggfrie*, 368 NLRB No. 120, slip op. at 8 (quoting *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)). My colleagues further acknowledge that *Tschiggfrie* did not impose a "heightened burden" on the General Counsel to demonstrate "particularized animus toward an employee's own protected activity" in all cases.

In sum, my colleagues and I agree that *Tschiggfrie* is consistent with *Wright Line*, and that the judge did not err in citing it as consistent with *Wright Line* in his decision.

2. There is no need to "clarify" the holding in *Tschiggfrie*

Despite this agreement, my colleagues assert that it is necessary to engage in an extended discussion of the *Tschiggfrie* case because it has "caused significant confusion for parties before the Board." My colleagues fail to cite a single case, let alone the numerous cases one would expect to signify "significant confusion," in support of this assertion.

Nevertheless, my colleagues claim the need to "clarify that the Board in *Tschiggfrie* did not revise the *Wright Line* framework by adding a requirement that the General Counsel must show particularized motivating animus towards an employee's own protected activity."[8] Specifically, they appear to assert that *Tschiggfrie* engendered confusion by rejecting "the statement in *Libertyville Toyota*, which has been cited in many subsequent cases, that 'proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action.'" *Tschiggfrie*, 368 NLRB No. 120, slip op. at 7-8 fn. 25 (quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10, enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015)).

In rejecting this interpretation of that language, however, the *Tschiggfrie* Board observed that "[t]his statement can easily be interpreted . . . as contrary to *Wright Line*'s requirement that the General Counsel prove that an employee's protected conduct was a 'motivating factor' in the employer's decision to take an adverse action because it strongly suggests that the General Counsel necessarily satisfies his [or her] initial burden through evidence of general animus or hostility toward union or other protected activity alone." Id., slip op. at 7-8 fn. 25.[9] In other words, the *Tschiggfrie* Board addressed the concern that the *Libertyville Toyota* language could be interpreted too liberally, holding that animus evidence cannot be so general that the General Counsel effectively cannot demonstrate the requisite causal relationship between the employee's protected activity and the employer's adverse action.[10] My colleagues, however, fail to expressly acknowledge any analytical outer limit to the generality of animus evidence. See *AutoNation*, 801 F.3d at 775 ("The rule that union activities must motivate a particular adverse employment action in order to make out a Section 8(a)(3) violation is well established; an abstract dislike of unions is insufficient."). Instead, my colleagues acknowledge this necessary outer limit only implicitly: "To be clear . . . the Board in *Libertyville Toyota* did not suggest that the General Counsel neces-

[8] To bolster their view that *Tschiggfrie* requires clarification, my colleagues claim that "the judge articulated a heightened burden in this case, and parties and judges in other cases have likewise interpreted *Tschiggfrie* in this manner." But consistent with *Wright Line*, the judge correctly articulated the General Counsel's "initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action." This language did not express or imply any requirement of particularized animus toward a specific employee's protected activity. At most, it reflected the fact that this case involves alleged animus against the protected activity of identified employees. Indeed, my colleagues specifically acknowledge that "the General Counsel typically proceeds on the theory that an employer took adverse action against a particular employee to punish or discourage *that* employee's protected activity . . . ." The judge here merely articulated the core of the *Wright Line* "causation test," which examines whether there is a causal relationship between employee protected activity and employer adverse action. Meanwhile, as noted, my colleagues do not identify the "parties and judges in other cases" who they claim have misunderstood *Tschiggfrie*.

[9] The Board further explained that the *Libertyville Toyota* formulation "is in tension, if not in actual conflict, with the Supreme Court's clarification that the *Wright Line* initial burden is not simply a prima facie burden of production." Id. Rather, it is a burden of persuasion "'that antiunion sentiment *contributed to* the employer's decision.'" Id. (quoting *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (emphasis added)).

[10] The concern was based, in part, on the fact that in cases following *Libertyville Toyota,* the Board simply recited the *Libertyville Toyota* formulation without explaining how that formulation was consistent with *Wright Line* principles. See, e.g., *Dish Network*, 363 NLRB No. 141, slip op. at 1 fn. 1, 4 fn. 9 (citing the *Libertyville Toyota* formulation in response to then-Member Miscimarra's concurrence that "generalized animus towards union activity is insufficient to satisfy" the General Counsel's *Wright Line* burden and that "[t]he Board's task in all cases that turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect their employment" (internal quotations omitted)); *Nichols Aluminum*, 361 NLRB 216, 218 fn. 7, 222 (2014) (citing the *Libertyville Toyota* formulation in response to then-Member Johnson's dissenting argument that "*Wright Line* is inherently a causation test"), enf. denied 797 F.3d 548 (8th Cir. 2015).

sarily satisfies her burden under *Wright Line* by producing *any* evidence of the employer's animus or hostility toward union or other protected activity"; instead, that case supports the view that "there will be cases in which the particular facts demonstrate that the General Counsel's evidence falls short." My colleagues therefore deem the *Tschiggfrie* Board's express rejection of the *Libertyville Toyota* formulation "unnecessary,"[11] but then seemingly reach the same conclusion—that there is necessarily an outer limit to the generality of animus evidence—by narrowly reinterpreting that formulation.[12] As a result, I am concerned that my colleagues, despite their good intentions, could—like the *Libertyville Toyota* Board— engender rather than ameliorate confusion regarding the *Wright Line* framework.

3. *Tschiggfrie* Necessarily Clarified *Wright Line*

As mentioned above, my colleagues' assert that *Tschiggfrie* has caused "significant confusion" without providing a single example. The *Tschiggfrie* Board's decision to clarify the *Wright Line* standard, by contrast, arose directly from the Eighth Circuit's confusion in applying the *Libertyville Toyota* formulation. Specifically, the Eighth Circuit interpreted *Libertyville Toyota* to erroneously allow the General Counsel to satisfy her initial *Wright Line* burden by simply producing evidence of an employer's general hostility or animus toward the union, and the court would not enforce a violation under *Wright Line* if the Board applied the *Libertyville Toyota* formulation. See *Tschiggfrie Properties*, 896 F.3d at 880; *Nichols Aluminum*, 797 F.3d at 548. The Eighth Circuit's rejection of the *Libertyville Toyota* formulation, standing alone, amply demonstrates that the *Tschiggfrie* Board's overruling of that formulation and clarification of *Wright Line* was not "unnecessary," as my colleagues claim. Additionally, although my colleagues are correct that the Seventh Circuit did not deny enforcement of the Board's *Wright Line* analyses simply because the Board applied the *Libertyville Toyota* formulation, the court was critical of that formulation and expressly declined to endorse it. See *AutoNation*, 801 F.3d at 769, 776. The *Tschiggfrie* Board quite reasonably concluded that it did not need to "wait for other Federal circuit courts to reject the *Libertyville Toyota* formulation before acting to remedy its ill effects." *Tschiggfrie*, supra, slip op. at 8-9 fn. 26.

In sum, the *Tschiggfrie* Board correctly concluded that "the *Libertyville Toyota* formulation has caused more than enough confusion, disagreement, and, perhaps most importantly, difficulty in securing enforcement of Board orders to warrant . . . clarification of the General Counsel's initial burden under *Wright Line*." Id. And I believe that the need for clarity in applying the General Counsel's initial burden under *Wright Line* is better served by the *Tschiggfrie* Board's decision to overrule the ambiguous language that had caused confusion and enforcement difficulties in the courts, than by my colleagues' implicit and indirect path to addressing the *Libertyville Toyota* formulation.

4. Application of *Wright Line* Test to the Present Case

Despite our difference of opinion regarding the need for the *Tschiggfrie* clarification of *Wright Line*, I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) by issuing disciplinary notices to Tremper and Pruccoli because of their union activity, and that the judge's contrary findings must be reversed. Initially, there is no question that Tremper and Pruccoli were relevantly engaged in protected union activity of which the Respondent was aware. Contrary to the judge, there is also ample evidence of the Respondent's animus here such as to demonstrate that Tremper and Pruccoli's union activity was a "motivating factor" in their disciplines. It is well settled that animus may be inferred from circumstantial evidence, including timing and disparate treatment. *Tubular Corp. of America*, 337 NLRB 99 (2001). As noted, the *Tschiggfrie* Board reaffirmed this bedrock legal principle. *Tschiggfrie*, supra, slip op. at 8. I agree with my colleagues that the timing of Tremper and Pruccoli's disciplines shortly after their protected union activity, coupled with the disparate treatment in how their alleged workplace infractions were handled relative to the comparable conduct of their coworkers, sufficiently support an inference of the Respondent's animus. Moreover, I agree with my colleagues that the Respondent failed to carry its burden of persuasion to demonstrate that it would have taken the same adverse actions in the absence of Tremper and Pruccoli's protected union activ-

[11] My colleagues also consider the *Tschiggfrie* Board's overruling of the *Libertyville Toyota* formulation to be "unnecessary" because, in their view, that formulation merely "corrected the judge's . . . description of the General Counsel's *Wright Line* burden as including a separate 'nexus' element."

[12] My colleagues suggest that the "case-specific nature of the inquiry" somehow reveals a "flaw" in the concept of any "analytical outer limit of the generality of animus evidence." Not so. Inherent in *Wright Line*'s causal requirement that an employee's protected conduct be a "motivating factor" in the employer's decision to take an adverse action is the logical implication that supporting animus evidence cannot be so general as to defeat causation. The *Tschiggfrie* decision did not suggest that the Board should identify any *particular* outer limit for the generality of animus evidence applicable to *all* cases, nor do I do so here. Rather, the decision recognized the analytical truth that, under *Wright Line*, the animus evidence offered in a given case may be so general that, in that particular case, the General Counsel cannot meet her burden to establish that animus was a "motivating factor" in the allegedly unlawful action.

ity. Indeed, its proffered reasons for issuing the disputed disciplines are clearly pretextual. Accordingly, as to these disciplines, the Respondent violated Section 8(a)(3) and (1) of the Act as alleged.

Conclusion

Although I see no need to revisit *Wright Line* again in today's decision, my colleagues evidently think otherwise. But having decided to do so, I think my colleagues miss an opportunity here to clearly state that, consistent with the causation principles intrinsic to *Wright Line*, there must be some analytical outer limit to the generality of animus evidence. Indeed, general hostility toward a union is insufficient to demonstrate that employee protected activity was a "motivating factor" in a specific adverse action taken by an employer. Notwithstanding this difference of opinion, I am encouraged that my colleagues recognize that *Tschiggfrie* plainly did not create some additional heightened burden for the General Counsel.

Dated, Washington, D.C. August 25, 2023

Marvin E. Kaplan, Member

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 discipline or otherwise discriminate against any of you for supporting Local 1149 International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL–CIO (the Union) or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to Robert Tremper and Mario Pruccoli, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

INTERTAPE POLYMER CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-273203 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Steven E. Carlson, Esq., for the General Counsel.
Jeffrey A. Schwartz, Esq., for Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. A virtual zoom hearing in this case took place on September 28, 2021. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Robert Tremper and Mike Abbott because they engaged in union and protected activity. The complaint also alleges that Respondent violated Section 8(a)(4), (3), and (1) of the Act by issuing warnings to employees Tremper and Mario Pruccoli because of their union activities and because of their involvement in filing an unfair labor practice charge with the Board on the above suspensions. Respondent filed an answer denying the essential allegations in the complaint.[1] Tr. 5-6. After the conclusion of the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.[2] Based on the briefs and the

[1] The complaint includes a compliance specification addressed to backpay assertedly due to Tremper because of his lost wages for the 5-day suspension levied on him. Assuming the suspension is found to be unlawful, Respondent has no objection to the backpay figure set forth in the compliance specification. Tr. 19.

[2] At the outset of the hearing the General Counsel was permitted to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) of the Act by refusing to discuss contractual grievances

entire record,[3] including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Marysville, Michigan, is engaged in the manufacture, nonretail sale and distribution of adhesive tapes. In conducting its operations during a representative 1-year period, Respondent purchased and received, at its Marysville facility, goods valued in excess of $50,000 directly from points outside of Michigan. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find, as Respondent also admits, that the Charging Party (hereafter, the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent's Marysville facility operates on three shifts. The three employees whose disciplines are at issue in this case worked on the third shift, which begins at midnight and ends at 8 am. Respondent's roughly 140 employees have been represented by the Union for many years and the relationship of the parties has included successive collective bargaining agreements, the last of which was negotiated shortly before the hearing in this case to replace the one that ran from May 3, 2018, to May 2, 2021. Tr. 27.

At the time of the events in this case, Tremper and Pruccoli were slitter operators working on separate parts of a large tape splitter machine, which takes jumbo rolls of product, breaks them down to a 16-inch roll, then slits that roll to smaller sizes and finally packages the material and puts it onto pallets for the product to be distributed. Tr. 24. Abbott was an electrician who tended to the machines at the facility. Pruccoli was a committeeman for the Union and Tremper was a steward for the Union. Joe Picarello is the supervisor on the midnight shift and John Zuzga is the overall maintenance manager for the Respondent. Tr. 25, 146-147.[4]

The Events of February 3, 2021 and the Following Disciplines

At about 2 am on February 3, 2021, there was a fire in the facility at or near the Banbury machine, which processes and mixes additives to a rubber base that goes into the ultimate adhesive product. Tr. 84. Mike Abbott, an electrician in the maintenance department, was alerted to the fire. He and another electrician shut off the Banbury disconnect and tried to locate the source of the fire. Tr. 85. Once it was located and contained—by 3:30 or 4 am in the morning, Abbott "locked it out," which meant that he put his personal padlock on the disconnect that controlled the Banbury. This was a safety precaution that prevented anyone from accidentally turning on the machine while maintenance was working on it. Abbott cleaned out burnt insulation on the wires at the source of the fire to prevent the fire from flaring up again; he then left the scene to perform other duties. He left further inquiry into the fire, repairs, and resumption of operations to the day shift. Tr. 86-87.

Maintenance Manager Zuzga, whose normal hours are 8 am to 5 pm on the first shift (Tr. 146), received notice of the fire in the early morning hours while he was at home. He left for the plant earlier than his normal starting time and arrived at about 6:15 am. Tr. 148. After arriving at the facility, he briefly inspected the area of the fire, which had been extinguished by then, but he had questions about the fire and its effects. He thereafter met and spoke with Mike Abbott about what had happened so he could pass the information on to contractors and others who had to deal with the aftermath of the fire. There was no intention or prospect of disciplinary action in that meeting, which took place on the work floor. Tr. 148-150.

At some point, Zuzga and Abbott started walking over to the source of the fire at the Banbury machine so Abbott could explain what he did to neutralize the area after the fire. Abbott then said that Zuzga should get his lock, presumably to put on the machine affected by the fire. Zuzga said he did not need a lock because he was not going to touch any of the equipment that would require him to lock anything. Abbott replied by repeating that Zuzga needed a lock, to which Zuzga again said he did not. At that point, Abbott asked for his union representative and Zuzga agreed. Shortly thereafter Union Steward Robert Tremper, joined Zuzga and Abbott. The three then engaged in a discussion as to whether Zuzga had to put his lock on the affected machine. Tremper and Abbott took the position that, in the past, a supervisor put his lock on a machine taken out of service. Zuzga, who had taken over his management duties some 4 or 5 months before, insisted that he did not need to put his lock on the machine for what he needed to do. He simply wanted to go to the affected machine and have Abbott show him the area of the fire and what had been done to remedy the situation. The interchange became argumentative and tense so Zuzga led the others to his office where they could speak in private without the interference of work floor noise. Tr. 150-153. At that point, all three, Zuzga, Abbott and Tremper, were wearing earplugs. Tr. 67, 153.

When the three reached Zuzga's office, they were joined by Shift Supervisor Dennis Hillman, whom Zuzga asked to join the meeting. Tr. 153. When Zuzga asked the others to sit down, Tremper responded, "I'm not here for some sit-down party." Zuzga was surprised at the comment but responded "okay" and Tremper remained standing throughout the meeting. Tr. 153. Then Zuzga turned to Abbot and asked him why he thought that Zuzga needed to get his lock before he went to the machine with Abbot to ask questions about the fire and how it was handled. Abbot responded that the previous maintenance manager had that practice. Zuzga asked what the reason was

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regarding the suspensions of Tremper and Abbott. Evidence was taken on that matter, but, in his brief, counsel for General Counsel moved to withdraw that allegation. See G.C. Br. p. 1, fn. 3. The motion is granted.

[3] The General Counsel filed an unopposed motion to correct transcript, which is hereby granted except for the alleged error at Tr. 214 line 9, which I could not verify.

[4] Zuzga became the maintenance manager in September of 2020. He had not worked for Respondent before his appointment to that position.

for that past practice but did not get an adequate reply. He stated his view that it was unnecessary to put his lock on the machine because of his assessment of company policy and what he had to do at that time. Tr. 153-154. Zuzga indicated that he was sticking with his view and asked that the meeting end because he needed "to get out there with Mike" in order for him to find out "what's going on with the machine." Tr. 155

At that point, Tremper started to argue with Zuzga about the company policy, which was apparently based on an OSHA regulation with which Zuzga was very familiar. Zuzga asked if Tremper was familiar with the policy and Tremper replied "no, that's not my job. That's your job." Zuzga agreed and said that "neither one of you can show me how I'm making anybody unsafe. You need to get back to work." Tr. 155-156. Zuzga said that he needed to go out to the work floor with Abbott to discuss with him what was done there after the fire. Tremper continued to argue and insisted that Abbott was not going to go out to the work floor without Tremper. Zuzga held to his view that the meeting was ending and Tremper and Abbott should go back to work, noting that there might be repercussions if they did not. Tr. 156, 171-173. Tremper replied that this meant that Abbott would be disciplined so he had to be present. Zuzga denied Tremper's statement, saying that no one had even mentioned discipline. Tr. 156. Zuzga again tried to end the meeting. He also told Abbott he was "temporarily suspended until we can resolve this because I can't work with you right now apparently so you're going to have to go home." Tr. 156-157.

Abbott then left the meeting but Tremper kept arguing with Zuzga and he remained standing near the door blocking Zuzga and Hillman from leaving the office. Zuzga then said the meeting was over and asked Tremper to leave. Tremper refused. Zuzga again asked Tremper to leave the office and this time Tremper asked if that was a "direct order." Finally, after more such exchanges, Tremper left the office. At one point when Tremper was in the doorway arguing with Zuzga, Tremper said this: "Are we men here? . . .We can't talk? . . .Are you a man?" Tr. 159. Zuzga simply asked Tremper again to leave. Zuzga testified that he told Tremper to leave his office "at least four times." Tr. 157-159.

Zuzga testified that he felt that Tremper was challenging him in an aggressive way, especially when he stood in the doorway and refused to leave the office as directed. Zuzga viewed Tremper's behavior as threatening and an attempt to bully management. Tr. 159, 185-191.

The above is based mostly on Zuzga's clear and detailed testimony about the events of February 3. I was very impressed with his calm and forthright demeanor. His testimony also survived vigorous cross-examination. His contemporary notes, about which he was questioned by counsel for General Counsel, essentially confirmed his direct testimony, although he candidly conceded some differences, none of them serious enough to contradict the thrust of his direct testimony or otherwise to cause me to question his reliability as a witness. In contrast, Tremper was not as detailed in his testimony and his demeanor on the witness stand confirmed Zuzga's description of his contentious and confrontational persona in the February 3 incident. Actually, Tremper's account of what happened in the meeting in Zuzga's office did not differ much from that of Zuzga, except perhaps in attributing most of the heat to Zuzga rather than himself. I have no doubt that the exchange in Zuzga's office became heated, as Tremper testified (Tr.71), but I believe Tremper was much more aggressive in his stance and tone than Zuzga. I also believe that Tremper viewed his interactions with Zuzga as a means of asserting some kind of psychological advantage over a newly installed management official: That likely explained Tremper's admitted refusal to sit when Zuzga invited the participants to sit at the beginning of the meeting in his office. Tremper confirmed (Tr. 33) that, at that point, he said "I am not here to sit down," although I believe he said something much more emphatic as Zuzga testified. That view probably also explained his disparaging remarks, while refusing to leave the office, that included asking Zuzga whether he was a "man," the essential facts of which Tremper did not deny. Nor did Tremper deny refusing to leave the office unless he received a direct order, although he attempted to minimize the matter. In fact, Tremper himself admitted he was told to leave 3 or 4 times. Tr. 74. Indeed, Tremper seemed unduly sensitive to the issue of status. All of this colored his testimony. Accordingly, as between Tremper and Zuzga, I found Zuzga to be the more reliable witness.

Although I viewed Abbott as a fairly honest witness and his account of how he handled the fire is uncontradicted, his testimony on the rest of the happenings on February 3 did not seriously deviate from Zuzga's, but it was not as complete or detailed. Neither Abbott nor Tremper disputed Zuzga's essential testimony that the two sides disagreed on the need for Zuzga to put his own lock on the out of order machine. The essence of Abbott's and Tremper's testimony seemed to be that Zuzga was insistent that he was right and they somehow took offense at that. Abbott also testified that he was preoccupied and did not listen to much of the interaction between Tremper and Zuzga in the office meeting because he was talking to his supervisor, Dennis Hillman, who was trying to "reinforce" what Zuzga "was saying." Tr. 101. And, of course, Abbott had left the office before the last part of the meeting where Tremper disparaged Zuzga and stood in the doorway refusing to leave the office despite being directed to do so. See Tr. 101-102.

Zuzga brought the February 3 incident to the attention of the HR department and recommended that Tremper be disciplined, which resulted in the 5-day suspension that is the subject of this case. Zuzga was not the sole decider as to the eventual decision on the 5-day suspension. Tr. 160-161. That was determined after discussions between Senior Human Resources Manager Amy Walton, John Zuzga, Operations Manager Brian Newman and perhaps Production Manager Steve Mathews. Tr. 242-244. Aside from considering the statements of Zuzga and Hillman, there was no attempt by management officials to get the views of Abbott and Tremper about the incident on February 3. Tr. 256-258, 260-261. According to Respondent, Tremper's conduct violated Rule 36 of Respondent's rules, which prohibits threatening, intimidating or interfering with supervisors. The document, titled "Final Warning Disciplinary Action", was issued on February 16, 2021, by Production Manager Bruce Mathews. G.C. Exh, 3. Respondent's justification for the suspension was that Tremper intimidated Zuzga, particularly in refusing to leave Zuzga's office and by interfering with Zuzga's

attempt to get information from Abbott about the status of a critical piece of equipment after the fire. Tr. 261-262. The written discipline was presented to Tremper in a meeting at 7:45 am on February 16 in Zuzga's office. Also present in addition to Zuzga and Tremper, were Mario Pruccoli, the third shift union committeeman, and Bruce Mathews.

In a separate meeting, either on February 16 or a day or two later, Abbott was presented with a written document reflecting a verbal warning, essentially for Abbott's refusal to give Zuzga the information he needed and questioning Zuzga's determination that he did not need to place his lock on the affected machine. G.C. Exh. 5. The verbal warning indicates that it was issued by Zuzga but it was presented by Supervisor Hillman. Union Committeeman Pruccoli or another union official was also present when the document was presented to Abbott. Tr., 103-106. In this warning, Zuzga cited a violation of Rule 21 of the Respondent's rules, indirect insubordination by challenging the directions of a supervisor. But Abbott was paid for the brief time he missed for being sent home for the rest of his shift of February 3. Tr. 161-162. G.C. Abbott is no longer employed by Respondent, having left at some point before the hearing in this case. Tr. 47.

At the meeting in Zuzga's office on February 16, referred to above, Pruccoli stated that he would file an unfair labor practice charge over the matter. Tr. 43-45, 113-114. He did so on February 19, 2021. The charge was filed with Region 7 of the Board, alleging a violation of the Act in the disciplines issued to Tremper and Abbott with respect to the incident on February 3. On February 24, 2021, the Regional Director for Region 7 sent a letter to Respondent's Production Manager, Steve Mathews, notifying him of the filing of the charge. G.C. Exh. 1(a). Senior Human Resources Manager Amy Walton testified that she was notified of the filing of the charge in an email from Mathews on March 1, 2021. Tr. 235.[5]

Also, on February 19, the Union filed grievances over the disciplines of Abbott and Tremper with Respondent under the applicable collective bargaining agreement. G.C. Exhs. 6 and 7. There was a discussion of those grievances, as well as others, at the regularly scheduled monthly grievance meeting between management and union representatives on March 18, 2021. Tr. 135-139.

The Disciplines of Pruccoli and Tremper for What Happened on February 26.

Employees Pruccoli and Tremper received warnings for not properly cleaning their parts of the multi-head slitter machine at the end of their shift on Friday, February 26.[6] That machine spans 3 levels and workstations—the front, the middle and back. It runs on all three shifts and requires 3 operators to run. Tr. 120-121. On February 26, the regular third-shift supervisor was not working and covering for him for the last four hours of the shift was the first shift supervisor, Aaron Jamison. Tr. 121-122. Pruccoli testified that, at the end of the shift on February 26, he was working in the middle section of the machine and did his usual clean-up, including wiping off the excess glue or tape, if any, on the 5 blades used on that section of the machine. Tr. 122. As he was performing his cleaning duties at the end of the shift, Pruccoli saw Jamison motion to Tremper, who was working on the back section of the machine to pick up rolls of tape on the floor of his workstation. He also saw Tremper pick up those rolls. Tr. 123. Pruccoli then finished cleaning the cutter and left. Tr. 123.

Tremper testified that he was working in the back section of the machine on February 26. At about 7:30 am, Jamison approached Tremper and told him to clean ups his area and he did so. Tr. 49.

Neither Tremper nor Pruccoli was notified that there was any problem with their work on February 26 until about two weeks later when they were both issued verbal warnings in written documents, as discussed below.

Jamison, who has been lead production supervisor in the converting department for 8 years (Tr. 195, 221), supported some of the above testimony from Pruccoli and Tremper. The main difference was that Jamison testified that, after the end of the night shift, he checked the slitter machine and found that the sections that Pruccoli and Tremper worked on were not cleaned properly. Jamison made it clear that he was not saying that the workstations were not cleaned, but rather that the cleaning job was not "satisfactory." Tr. 213, 222. After viewing the unsatisfactory cleanliness at the end of the shift, Jamison went to his office to pick up his i-pad, which he used to take photographs of the unsatisfactory cleaning on the sections of the machine that Tremper and Pruccoli had worked on. Tr. 216-217, 227, R. Exhs. 1A-1C. He sent those pictures to the HR department along with a direction that a verbal warning be issued on the matter to the two employees. This was done that same day, February 26. Tr. 197-201, 205-207, 218. See also Tr. 231-235.

Jamison testified, contrary to Tremper and Pruccoli, that Tremper did not pick up the tape on the floor at his workstation after he asked Tremper to do so near the end of the shift. Tr. 219-220. He conceded that he did not talk to Pruccoli at this time. Nor did he specifically instruct Pruccoli to clean his area. Tr.219-220. According to Jamison, he checked the blades that Pruccoli was supposed to clean at the end of his shift when another employee on the first shift told him that the blades had not been cleaned, although he could not recall the name of that employee. Tr. 221, 225-226. He also testified that, although he

[5] Tremper testified that the day after he received his 5-day suspension, which would have been on February 17, he was motioned into Picarello's office where Supervisor Aaron Jamison was also present. Tr. 45-47. According to Tremper, Picarello asked about the suspension and he handed both men the document he received about the suspension and both read it. Tremper responded that he was not worried about the suspension because "[w]e're just going to let the Labor Board deal with it." Tr. 47. Even though this testimony was uncontradicted, I do not credit it. The testimony does not have the ring of truth. Rather it seemed a strained attempt by Tremper to show Jamison's knowledge of the filing of the charge in support of the contention that a subsequent warning issued to him by Jamison, which is discussed later in this decision, was motivated in part by the filing of an unfair labor practice charge over the suspension. Jamison was, of course, not involved in the incident that led to the suspension and he worked on the first shift, not the midnight shift, as did Picarello and Tremper.

[6] Tremper returned to work on February 25 after his suspension ended. Tr.47.

walks through the department every day and checks every machine, he had never found "tapes that were not cleaned up or blades that were not cleaned up," at least on the slitter machine. Tr. 221. Jamison further testified that the third section of the machine was properly cleaned at the end of the third shift on February 26. Tr. 219. Jamison testified that, in his 8 years as a supervisor, he had issued disciplines for improper cleaning (Tr. 221-222), but none were introduced in evidence by Respondent. He also testified that he took photographs of other improprieties in support of his disciplines (Tr. 223), but, again, no such photographs were offered in evidence. Nor was there any other corroboration of Jamison's testimony with respect to previous similar disciplines or photographs.

Jamison further testified that, when he made the determination to discipline Tremper and Pruccoli, he was unaware that an unfair labor practice charge had been filed over the incident involving Tremper and Abbott on February 3. According to Jamison, he first learned of that charge the week before the hearing. Tr. 201-202. As indicated above, that charge was filed on February 19, 2021, and was communicated to Human Resources Manager Walton on March 1. Those objective facts support Jamison's testimony that he did not know of the filing of charges when he decided to discipline Tremper and Abbott.

In a meeting in Supervisor Picarello's office on March 8, 2021, Pruccoli and Tremper were presented with written documents reflecting verbal warnings issued by Jamison for failing to properly clean their work areas on February 26. The documents were presented to Tremper and Pruccoli by Picarello, but Jamison was not present. Tr. 124-127, 47-52. The verbal warnings cited violations of Rule 6 of Respondent's work rules, "failure to work efficiently and/or competently on work assigned." G.C. Exhs. 4 and 8. With the documents setting forth the verbal warnings were Jamison's photographs purporting to show the state of the slitter machine sections left by Pruccoli and Tremper at the end of their shift. R. Exh.1A-1C, Tr. 124-127, 47-52.

In the March 8 meeting, Pruccoli protested that the photograph about the blade he was accused of failing to clean simply had a piece of tape on it. Pruccoli testified that it is not unusual for a piece of tape to be stuck on the blade. According to Pruccoli, there is no reason to remove the tape unless it affects the cutting ability of the blade, in which case the tape is removed. Tr. 125-126. Pruccoli testified that he would normally remove any tape on a blade during the cleaning process at the end of his shift, but he candidly admitted that he could not recall if he did so on February 26. Tr. 128. Tremper also protested his warning during the March 8 meeting and he wrote his handwritten protest on the warning. See G.C. Exh. 4.

After he received his verbal warning on March 8, Pruccoli spoke separately with Jamison, questioning the basis of the warning, in the presence also of Tremper. Tr. 128-129. Jamison said that Pruccoli did not clean the cutter and Pruccoli insisted that he did, reminding Jameson that he saw Pruccoli cleaning it. According to Pruccoli, Jamison replied that the blades were "filthy and a mess," to which Pruccoli responded that he had seen the pictures and they showed only a piece of tape on a blade and some smudges on it. Pruccoli also told Jamison that hardly anyone cleans the smudges off the blades since a so-called "wick solution" was introduced about a year before, which acted as a lubricant between blade and the tape. Tr. 129-130. Pruccoli also testified that, as a union committeeman, he never previously saw any kind of discipline issued for not cleaning a cutter blade. Tr. 130.

Tremper corroborated Pruccoli's account of their meeting with Jameson after the receipt of their verbal warnings. Tr. 53. According to Tremper, when he and Pruccoli said their cleaning on February 26 was no different than it was on any other day, Jamison replied that then it was a consistency issue, implying that not all supervisors were enforcing the matter in the same way. Tr 54. Tremper testified that, in his experience as a union steward, he was not aware of any prior disciplines for inadequate cleaning. Tr. 55-56.

The testimony of Pruccoli and Tremper about their meeting with Jamison after they were issued their verbal warnings on March 8 was not only mutually corroborative in essence but uncontradicted because Jameson did not deny the meeting or refer to it at all in his testimony. I therefore credit their testimony about the meeting.

The day after he received his verbal warning, at the start of his shift, Pruccoli noticed smudges on all 5 blades in his section of the slitter machine. He pointed them out to his supervisor, Joe Picarello, who, upon noticing the smudges, laughed, and said he was not going "to get in the middle of this" and he walked away. Tr. 130-131. This is based on Pruccoli's uncontradicted testimony because Picarello did not testify in this proceeding.

Neither Tremper nor Pruccoli had any prior disciplines on their records prior to the March 8 verbal warnings for violating Rule 6 of the Respondent's rules, or, if they had such disciplines, they had been removed from their records, presumably based on Respondent's policy to remove disciplines after a certain period has elapsed after the date of the discipline. Tr. 253.

B. Discussion and Analysis

The Alleged Discriminatory Suspensions and Warnings

The touchstone of the analysis for the disciplinary suspensions of Tremper and Abbot for their actions and conduct on February 3 and the disciplinary verbal warnings of Tremper and Pruccoli for their failure to properly clean their workstations on February 26 is Respondent's motivation for those disciplines. The alleged improper motivation for the first set of disciplines is discrimination based on union or other protected concerted activity (Section 8(a)(3) and (1) of the Act). The alleged improper motivation for the second set of disciplines is the same, along with discrimination in connection with the filing of unfair labor practices (Section 8(a)(4)).

Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. 7 (2019). Under *Wright Line,* the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's ad-

verse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. See *Hard Hat Services, LLC,* 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

As shown below, in applying these principles, I dismiss the discrimination allegations in this case.

The Disciplines for What Happened on February 3

The General Counsel asserts that the protected Section 7 right engaged in by Abbott and Tremper, his union representative, was the one set forth in the collective bargaining agreement (G.C. Exh. 2). G.C. Br. pp. 2-3, 20 and 21. More precisely, according to the General Counsel, Tremper and Abbott were enforcing the safety provision of the contract, which provides that Respondent "equip hazardous machinery with effective safety devices." Section 18.1 of G.C Exh. 2. The General Counsel also asserts that Abbott and Tremper were bringing those safety concerns to the attention of Zuzga under Step 1 of the contractual grievance procedure. Section 4.1 of G.C. Exh. 2. See *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822 (1984).[7]

The General Counsel disavows any reliance on the protected Section 7 right defined by the Supreme Court's ruling in *NLRB v. J. Weingarten, 420 U.S. 251 (1971).* See G.C. Br. at p. 23, fn. 16. However, I find that decision (and its progeny) instructive, in at least an analogous sense, in analyzing the issues in this case. In *Weingarten*, the Court stated that an employer violates Section 8(a)(1) of the Act when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes might result in disciplinary action. The test for the latter determination is measured by an objective standard under all the circumstances in the case, rather than by the employee's subjective belief. See *Southwestern Bell Telephone Co.,* 338 NLRB 552 (2002), finding that the standard was not met. It is also clear that, even in a *Weingarten* situation, where a union representative is representing an employee in a meeting that may result in discipline, a union representative who engages in conduct that interferes with the proper interrogation of the employee or upends the employer's control of the meeting exceeds his or her role as a union representative. Indeed, an employer may, in those circumstances, lawfully eject the union representative from the interview. See *New Jersey Telephone Company,* 308 NLRB 278, 279-280 (1992); and *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 3–4 (2019).

As an initial matter, I find that, in the exchange on the work floor and in the meeting in Zuzga's office, Abbott did not have an objectively based belief that he was in danger of being disciplined. In their first encounter on the work floor, Zuzga made it clear that he simply wanted Abbott to go with him to the source of the fire to point out what the problem was and what he had done to rectify it. Zuzga had to have that information to determine what kind of remediation had to be done. Abbott then asked whether Zuzga was going to put his lock on the affected machine, as a previous supervisor had done in similar circumstances. When Zuzga said he did not need to put his lock on the machine for what he needed to do, Abbott asked for his union representative. Even though, at this point, there was no objective evidence that discipline was even a possibility, Zuzga nevertheless permitted Tremper to assist Abbott and join the discussion.

Assuming, in accordance with the General Counsel's theory of the case that Abbott and Tremper were attempting to enforce a contractual right and bringing a Step 1 contractual grievance to the attention of Zuzga, there is no evidence that Zuzga' ejection of Tremper from the meeting or the ultimate 5-day suspension of Tremper were motivated by Tremper's protected or union activity. To the contrary, Zuzga readily agreed to Abbott's request to involve a union representative in the discussion about whether he, Zuzga, should put his own lock on the affected machine. Moreover, Zuzga patiently listened to counter arguments from Tremper and Abbot. Indeed, when Zuzga cited company policy in support of his position, Tremper admitted that he had not read the policy and that was Zuzga's job. When Zuzga finally made it clear he was not convinced by Tremper's and Abbott's arguments and decided, in effect, to reject their position and end the meeting, that also ended Step 1 of the grievance procedure. That the meeting ended in the rejection of the position advanced by Tremper and Abbott surely does not mean Zuzga's decision to suspend Tremper was based on unlawful considerations.

Despite the legitimate end of the meeting and the rejection of any asserted grievance, Tremper nevertheless remained belligerent. He continued to argue and refused to go back to work as he was ordered. He became even more confrontational than he was at the beginning of the meeting when he refused to sit and remained standing as an act of defiance. He disparaged Zuzga by asking him whether he was a man and stood in the doorway refusing to leave even after 3 or 4 requests to leave, including asking if these were direct orders. Zuzga rightly felt challenged and threatened by such behavior. These were the real reasons for the proper ejection of Tremper and for Tremper's 5-day suspension.

Thus, I find that the General Counsel has not met the initial burden of showing that Respondent's 5-day suspension of Tremper was motivated by his union activity, including any activity on Abbott's behalf on February 3. As indicated, there is no evidence of union or protected activity animus either from Zuzga or any other official of Respondent who was involved in approving the suspension. There were no independent Section 8(a)(1) violations, normal indicia of animus, either alleged or

[7] The record does not support a finding that Tremper and Abbott explicitly asked for a Step 1 grievance meeting or explicitly even raised a contract grievance either in the meeting on the work floor or the meeting in Zuzga's office. The dispute was over whether Zuzga should put his own lock on the affected machine for what he wanted to do—have Abbott explain at the site of the fire what he had done with respect to the fire. I am not sure that that amounts to a contractual grievance. Nor is there evidence that the alleged grievance over safety matters proceeded beyond Step 1. Nevertheless, I have no doubt that Tremper and Abbott were engaged in protected activity of some kind when they met with Zuzga on February 3. Accordingly, I will accept, for the purpose of my analysis, the General Counsel's explanation of the protected union activity involved in this case. That of course does not answer the question whether the discipline was motivated by that protected activity.

found. And Respondent itself has had a long history of a successful bargaining relationship with the Union, including, as shown in this record, a policy of holding monthly grievance meetings with union representatives. Finally, as I also have indicated above, there is no causal connection between alleged unlawful animus and the reason for the discipline. In any event, even assuming that the General Counsel's initial burden was met, based on my findings with respect to Tremper's interference with Zuzga's attempt to get important information from Abbott and his other efforts to disrupt the meeting, Respondent would have disciplined Tremper for these other nondiscriminatory reasons notwithstanding his alleged protected activity. This is reinforced by the fact that Zuzga's recommendation for discipline was carefully considered by a group of management officials before it was approved and implemented. I therefore dismiss the complaint allegation that Tremper's suspension was violative of the Act.[8]

Turning to Abbott's suspension, which was basically for the rest of the shift on February 3, I also dismiss that allegation. For some of the same reasons mentioned above in the discussion of the Tremper suspension, I do not see any unlawful animus or related causation in Zuzga's ejection of Abbott from his office and the latter's brief suspension, which amounted to probably less than 2 hours. The decision to eject Abbott was based on Zuzga's decision to end the meeting, which, in the circumstances, was perfectly justified. The meeting had disintegrated to meaningless and repeated sharp exchanges once Tremper and Abbott persisted in insisting that Zuzga place his lock on the machine, even after Zuzga had considered their position and rejected it. Zuzga rightly ended the meeting at that point. The suspension of Abbott for the rest of the day was probably unnecessary, given that the shift was almost over, but it was not unlawfully motivated. In any event, Abbott was later paid for any lost time he suffered due to the suspension. And he is no longer employed by Respondent. Thus, even if the treatment of Abbott were viewed as technically unlawful, there is no reason, in these circumstances, to find a violation or certainly to remedy it. The matter has been "substantially remedied" or rendered moot by "subsequent conduct." See *Dish Network Service Corp*., 339 NLRB 1126, 1128 fn. 11 (2003).

The Verbal Warnings Issued to Tremper and Pruccoli

Much of Jamison's story about the verbal warnings issued to Tremper and Pruccoli for improperly cleaning their parts of the slitter machine on February 26 sounds fishy. It seems unusual for Jamison to have gone out of his way to take photographs of the alleged poor cleaning attributed to Tremper and Pruccoli. Despite Jamison's testimony that he took pictures of other derelictions of this type, we have only his word on this. If indeed he had done so on other occasions there certainly would be evidence of such use of photographs, but here, of course, there was no such evidence submitted. Nor was there any evidence submitted to corroborate Jamison's testimony that he had issued other disciplines in the past for improper cleanliness. The mutually corroborative testimony of Tremper and Pruccoli that they knew of no such prior disciplinary actions is more reliable, especially because of their obvious knowledge of such disciplinary history, given their positions with the Union. Then there is the anomalous testimony of Jamison that he was alerted to the uncleanliness of the blades by a first shift employee, which seems to conflict with his testimony that he himself discovered that impropriety. Also unusual was that Jamison did not find that the third person who was working on the machine on that shift on that day failed to properly clean the machine or took a picture of that apparently clean workstation at least to provide a contrast to the alleged messiness of the rest of the machine. I also find it unusual that neither Tremper nor Pruccoli was told of the failure to properly clean their parts of the machine until two weeks later. One would think that, if the unsatisfactory cleaning was so important, the offending employees would be told immediately of their failings—and shown the pictures as well—so that the employees could be told in a timely manner how to improve and protect the machine from whatever problems the improper cleaning caused. Instead, Tremper and Pruccoli continued to work on the machine for the next 2 weeks risking further cleaning problems to an important machine until they were told of their improprieties in formal warning notices. Finally, according to Human Resources Manager Walton, neither Tremper nor Pruccoli had any prior disciplines for "failure to work efficiently and/or competently on work assigned," as set forth in Rule 6, which they allegedly violated in this case. In all the circumstances, I believe that the warnings issued to Tremper and Pruccoli were, at best, nit picking, and, at worse, arbitrary.

But here is the problem on this part of the case: As a matter of law, the General Counsel must prove, at least initially, that the motive for the verbal warnings issued to Tremper and Pruccoli was either union activity or filing of the unfair labor practice charge by Pruccoli on behalf of Tremper. That has not been accomplished on this record. Jamison may have been petty in his disciplines, but there is no evidence that he had a

[8] In his brief (G.C. Br. at p. 17, fn, 12) counsel for the General Counsel asserts that the proper question to ask in analyzing this case is whether Tremper lost the protection of the Act by his improper conduct during protected activity. It is acknowledged, however, that, under the present state of the law, *Wright Line* is the appropriate standard for such cases. See *General Motors, LLC*, 369 NLRB No. 127 (2020), which overturned the four-factor balancing test set forth in *Atlantic Steel Co.,* 245 NLRB 814, 816 (1979) and substituted the *Wright Line* test for those cases. Counsel for General Counsel also points out that the General Counsel is seeking to have the Board overturn *General Motors* and return to the *Atlantic Steel* standard for such cases. Should that happen, it is not clear to me that this case is one where, as in the past, *Atlantic Steel* would have applied. The theory in that type of violation is that the alleged misconduct and the alleged protected activity are inseparable so that a balancing of competing rights is required. That is not the case here. Assuming, however, that Tremper and Abbott were engaging in protected activity in bringing a safety-related grievance to the attention of management during the meeting with Zuzga in the latter's office, that meeting ended when the grievance was denied. Tremper's misconduct continued thereafter so he was not involved in protected activity when he engaged in the conduct for which he was disciplined. In any event, even if I were to consider this case under the *Atlantic Steel* standard, I would find, for the reasons stated in my analysis set forth above, that Tremper's misconduct was sufficient to forfeit any Section 7 right he was allegedly asserting. The result would therefore be the same—no violation. See *Piper Realty Co.*, 313 NLRB 1289 (1994), a remarkably similar case out of this same region.

discriminatory motive in doing so—either because of union activity or the filing of an unfair labor practice charge. He specifically denied even knowing about the filing of the charge when he made his decision to discipline the two employees on February 26. And there is no evidence to contest or doubt that testimony. Moreover, in this case at least, it appears that no other supervisory or management officials were involved in the decision to issue the disciplinary warnings. And Jamison himself did not exhibit anything like anti-union animus. Accordingly, the General Counsel has failed to meet the initial burden of proving a violation and I must dismiss this aspect of the complaint.

Even though I have found no violations on this part of the case, based on my assessment of the situation as set forth above, including Jamison's apparent admission that there may have been inconsistent enforcement by different supervisors of machine cleaning protocols, I recommend that the Respondent expunge the verbal warnings issued to Tremper and Pruccoli. It appears that Respondent does have a policy of expunging warnings after the passage of a certain amount of time. See Tr. 253. This situation seems an appropriate application of that policy.

CONCLUSION OF LAW

Respondent has not violated the Act by suspending employees Tremper and Abbott, or by issuing verbal warnings to employees Tremper and Pruccoli.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[9]

ORDER

The complaint herein is dismissed in its entirety.

Dated at Washington, D.C., November 2, 2021.

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[9] 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 waived for all purposes.