Ohio River Valley Environmental Coalition, Inc. *and* Brendan Muckian-Bates and Dustin White and OVEC Union affiliated with the Industrial Workers of the World.[1] Cases 09–CA–274743, 09–CA–277976, 09–CA–277909, 09–CA–279024, and 09–CA–284186

August 31, 2022

DECISION AND ORDER

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

On March 11, 2022, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions;[3] to amend the remedy;[4] and to adopt the recommended Order as modified and set forth in full below.[5]

[1] We have amended the caption to reflect the correct name of the Charging Party Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating and threatening employees with unspecified reprisals on March 4, 2021, and by interrogating and threatening to discharge Brendan Muckian-Bates on March 11, 2021. There are also no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by issuing disciplinary warnings to Alexander Cole on June 2 and July 2, 2021. Finally, there are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by unlawfully soliciting grievances on about May 25, 2021.

We note that *ADB Utility Contractors, Inc*., 353 NLRB 166 (2008), a two-member decision cited by the judge, was subsequently affirmed by a three-member panel at 355 NLRB 1020 (2010).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by terminating Dustin White, Members Wilcox and Prouty note that there are no exceptions to the judge's application of *General Motors LLC*, 369 NLRB No. 127 (2020). Members Wilcox and Prouty also note that they did not participate in *General Motors* and express no view as to whether it was correctly decided.

[3] We shall amend the judge's conclusions of law to conform to his unfair labor practice findings.

[4] The judge states in his decision that the Respondent's board of directors voted to dissolve the organization on or about November 18, 2021, but the record does not indicate whether the Respondent has actually ceased operations. Accordingly, we agree with the judge that the standard reinstatement remedy is appropriate here. But in an abundance of caution, we shall amend the remedy to require the Respondent offer Brendan Muckian-Bates and Dustin White reinstatement in the event the Respondent has closed but subsequently resumes the same or similar business operations. See, e.g., *Republic Windows & Doors, LLC,* 356 NLRB 1449, 1452 (2011).

The Respondent also contends that the General Counsel sought injunctive relief under Sec. 10(j) to prevent it from dissolving, and that the judge's make-whole remedy should be limited based on the terms of an agreement it reached with the Region in the 10(j) proceeding. We find no merit to the Respondent's contention and note that issues concerning the amount of make-whole relief due are best resolved in compliance.

Member Prouty agrees with his colleagues that there is no merit to the Respondent's claim that the judge's make-whole remedy should be limited based on the terms of an agreement it reached with the Region in the 10(j) proceeding. He emphasizes that the purported agreement is not in the record and, as described by the Respondent, related only to the 10(j) proceeding and not the instant unfair labor practice proceeding. Additionally, he notes that the Respondent's invocation of the agreement for the first time in exceptions is untimely. See *U.S. Service Industries, Inc.*, 315 NLRB 285, 285 (1994) (rejecting the respondent's claim, which was untimely as it was not raised before the judge, that discharged employees were not entitled to reinstatement because they engaged in secondary picketing); see also *Wind-Chester Roofing Products, Inc.*, 302 NLRB 878, 878 fn. 1 (1991) (citing *Yorkaire, Inc.*, 297 NLRB 401, 401 fn. 1 (1989), enfd. 922 F.2d 832 (3d Cir. 1990), and, in finding an impasse defense waived, noting that the Board finds a contention untimely raised and waived when a party raises it for the first time in exceptions to the Board); compare *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118, slip op. at 3 fn. 6 (2018) (citing *Yorkaire, Inc.*, supra, and rejecting the respondent's exception to the judge's extension of the successor bar as it was raised for the first time on exceptions).

[5] We shall modify the judge's recommended Order to conform to the violations found, the remedy as amended above, and the Board's standard remedial language, and in accordance with our decision in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall also substitute a new notice to conform to the Order as modified.

Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance*, 369 NLRB No. 68 (2020).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

"3. The Respondent violated Section 8(a)(1) of the Act: on March 4, 2021, and March 11, 2021, by coercively interrogating employees about their union activities and/or protected concerted activities; on March 4, 2021, by threatening employees with unspecified reprisals for their union activities; and on March 11, 2021, by threatening to discharge an employee because of his union activity."

ORDER

The National Labor Relations Board orders that the Respondent, Ohio River Valley Environmental Coalition, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in activities on behalf of OVEC Union affiliated with the Industrial Workers of the World (the Union).

(b) Threatening employees with discharge if they engage in activities on behalf of the Union.

(c) Coercively interrogating employees about their union activities and/or protected concerted activities.

(d) Discharging, suspending, disciplining, or otherwise discriminating against employees for supporting the Union or any other labor organization, or for engaging in protected concerted activities.

(e) 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, offer Brendan Muckian-Bates and Dustin White full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If the Respondent's facility is closed and the Respondent subsequently resumes the same or similar business operations, the Respondent shall offer Muckian-Bates and White full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Brendan Muckian-Bates and Dustin White whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Brendan Muckian-Bates and Dustin White for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Brendan Muckian-Bates, the unlawful discharge of Dustin White, and the unlawful warnings to Alexander Cole, and within 3 days thereafter, notify the employees in writing that this has been done and that the warnings, suspension, and discharges will not be used against them in any way.

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

(g) Post at its Huntington, West Virginia facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, 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 4, 2021.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the

[6] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are 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 facilities reopen 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."

Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. August 31, 2022

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Marvin Kaplan, Member

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Gwynne A. Wilcox, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals for engaging in activities on behalf of OVEC Union affiliated with the Industrial Workers of the World (the Union).

WE WILL NOT threaten you with discharge for engaging in activities on behalf of the Union.

WE WILL NOT coercively question you about your union activities and/or protected concerted activities.

WE WILL NOT discharge, suspend, discipline, or otherwise discriminate against any of you because of your activities in support of the Union or any other labor organization, or for engaging in protected concerted activities.

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, offer Brendan Muckian-Bates and Dustin White reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If our facility is closed and we subsequently resume the same or similar business operations, WE WILL offer Muckian-Bates and White full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Brendan Muckian-Bates and Dustin White whole for any loss of earnings and other benefits resulting from their discharges and suspension, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Brendan Muckian-Bates and Dustin White for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Brendan Muckian-Bates' and Dustin White's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Brendan Muckian-Bates, the unlawful discharge of Dustin White, and the unlawful warnings to Alexander Cole, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings, suspension, and discharges will not be used against them in any way.

OHIO RIVER VALLEY ENVIRONMENTAL COALITION, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-274743 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.

Linda B. Finch, Esq., for the General Counsel.
Sarah A. Walling, Esq. (Jenkins Fenstermaker, PLLC), of Huntington, West Virginia, for the Respondent.
Will Bloom, Esq., of Chicago, Illinois, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case remotely using videoconferencing technology on December 13, 2021. Brendan Muckian-Bates, an individual, filed the charge in case 09–CA–274743 on March 17, 2021, and the charge in case 09–CA–277976 on May 29, 2021. Dustin White, an individual, filed the charge in case 09–CA–277909 on May 28, 2021. The Industrial Workers of the World (Union) filed the charge in case 09–CA–279024 on June 24, 2021, and the charge in case 09–CA–284186 on October 7, 2021. The Director of Region Nine of the National Labor Relations Board (Board or NLRB) issued the initial complaint and notice of hearing on June 28, 2021, the first consolidated complaint on August 10, 2021, the second consolidated complaint on October 7, 2021, and the third consolidated complaint on November 17, 2021. The third consolidated complaint alleges that Ohio River Valley Environmental Coalition, Inc. (the Respondent or OVEC), violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act): on March 4, 2021, by coercively interrogating employees about their union activities and impliedly threatening employees with unspecified reprisals for their union activities; on March 11, 2021, by interrogating an employee about his protected union and concerted activities, and threatening the employee with discharge for his union activities; and on May 25, 2021, by implementing a grievance procedure and promising to remedy employees' grievances. The third consolidated complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the NLRA by taking the following actions because employees engaged in union activities and/or concerted activities: on March 11, 2021, when it suspended Muckian-Bates; on May 20, 2021, when it discharged White; on May 27, 2021, when it discharged Muckian-Bates; and on June 2 and July 2, 2021, when it issued written warnings to Alexander Cole.

The Respondent filed timely answers to the initial complaint, the consolidated complaint and the second consolidated complaint, in which it denied committing any violation of the Act. The third, and final, consolidated complaint was issued on November 17, 2021. Two days later, the Respondent laid off the remaining employees after the Respondent's board of directors voted to dissolve the Respondent. The Respondent's counsel informed the other parties and the Administrative Law Judge that it would not file an answer, or other pre-hearing response, to the third consolidated complaint (the complaint) and it did not, in fact, do so despite being duly served. The Respondent was notified about the December 13, 2021, hearing, but during a pre-hearing conference informed the other parties and the Administrative Law Judge that the Respondent would not participate at the hearing. No representative for the Respondent appeared at the hearing. Counsel for the Respondent did, however, submit a posthearing brief, as did counsel for the General Counsel.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Section 501(c)(3) not-for-profit corporation with an office and place of business in Huntington, West Virginia, where it engages in advocacy and organizing for environmental causes. In conducting these operations the Respondent annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $7500 directly from points outside West Virginia. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent is a non-profit corporation that engages in environmental activism through community organizing and participation in legal proceedings. During the relevant time frame, the Respondent had a staff of nine individuals: Vivian Stockman, executive director; Tonya Adkins, development director (later co-executive director); Matthew Spurlock, administrative director; Brendan Muckian-Bates, director of organizing; Robin Blakeman, project coordinator/community organizer; Alexander Cole, project coordinator/community organizer; Dustin White, project coordinator/community organizer; Sarah Carballo, communications co-director; and Daniella Parent, communications co-director. At some point after March 4, 2021, and prior to June 1, 2021, Matt Cochran replaced Spurlock as administrative director.

The executive director manages the Respondent's day-to-day operations. She reports to the organization's board of directors, which generally has between 7 and 10 members. A group of those members serve on the "personnel committee" of the board of directors. The member of the board of directors who figures most prominently in the facts underlying this case is Mike Forman, who also serves on the personnel committee. Three other members of the board of directors are mentioned

regarding some of the underlying matters – Michael Sullivan (chair of the board of directors), Will Edwards and Gina Hart-Smith.

In late 2020, members of the Respondent's staff began discussing the possibility of obtaining union representation. This effort was motivated in large part by executive director Stockman's statements that she was contemplating retirement. Some staff members had been particularly pleased with Stockman's tenure as executive director and hoped that union representation could help the staff lock-in working conditions that existed under Stockman's leadership. Muckian-Bates was the first staff-member who contacted the Union about representing employees at the Respondent. He also initiated discussions with Cole and other staff members about unionizing, and created the links for videoconference meetings that staff members had with officials of the Union. Union organizing meetings were held on a weekly basis during this period. In early March 2021, some staff members signed cards authorizing the Union to serve as their collective bargaining representative. Muckian-Bates signed a card on March 2, and Cole, Parent, and White signed cards on March 4.

B. Respondent Meets With Employees Regarding Union

On March 2, the Respondent held, by videoconference, what began as a routine staff meeting. Participants included Stockman, Spurlock, Blakeman, Carballo, Cole, Muckian-Bates, Parent, and White. At some point, Spurlock interrupted the meeting and asked executive director Stockman to leave temporarily. After Stockman left, Spurlock told the remaining attendees that he was aware that a unionizing effort was underway and that he intended to inform the Respondent's administration about it. He stated, further, that he considered himself ineligible for membership and did not want to be contacted about the union efforts. The record does not show how Spurlock learned of the unionizing campaign. Neither Muckian-Bates nor White told Spurlock about it, and Spurlock had not attended any union meetings.

Two days later, on March 4, the Respondent's entire staff received an email message from Stockman directing them to attend a mandatory videoconference meeting later that day. The entire administration and staff were in attendance. Mike Forman, a member of the board of directors who was on its personnel committee, conducted the meeting and was the main speaker. Forman told the staff that "management and the board[of directors] were aware of a desire to unionize," and that he was on a "fact-finding mission" and wanted to know "why" employees "believed [they] needed a union." A number of the staff members responded. Carballo and Parent told Forman that they were motivated by a concern about wages, hours, and conditions. White mentioned concern over the possible retirement of Stockman. Parent and White both asked that the Respondent voluntarily recognize the Union.

During the March 4 meeting, Forman urged the employees to reject the unionization effort. He told employees that they "didn't know what [they]were doing" and that "some of the things [staff] liked about [the Respondent] could change, and that [the Respondent] wouldn't necessarily have to concede on some [employee] demands." He stated that, with unionization, employees' "jobs would get a lot harder and everybody's working relationships would get a lot harder." He told them that, for example, with a union present they would "have to clock in and out at specific times," which was different than the current system that was very flexible about schedules. Forman stated that he, himself, had been a long-time union member, but that the staff at the Respondent did not need a union because the employer was a small non-profit that worked as a "family" and already had a grievance procedure.

Forman also made some comments directed at Muckian-Bates. Specifically, Forman stated that Muckian-Bates had been hired as a manager and was "going to have a lot of explaining to do if he was involved in the organizing effort." Others who spoke at the meeting included Spurlock, who stated that he was "not ashamed of telling about the union," and Adkins (development director), who said that it was "a sad day" at the Respondent.

C. Respondent Interrogates, Threatens and Suspends Muckian-Bates

On March 11, Stockman directed Muckian-Bates to attend a teleconference with Forman, Edwards and herself. She did not tell Muckian-Bates what the subject of the meeting would be. The meeting was conducted by Forman. Forman began by informing Muckian-Bates that the purpose of the meeting was to "determine [Muckian-Bates'] role within th[e] organizing drive." He told Muckian-Bates that "failure to respond to any questions would be grounds for immediate dismissal, failure to answer questions truthfully would be grounds for immediate dismissal, and any responses . . . that could later be proven untrue would be grounds for immediate dismissal." Then Forman asked if Muckian-Bates was aware of the union organizing campaign. Muckian-Bates stated that he would decline to answer any questions on the subject until he had an opportunity to obtain the advice of legal counsel. Forman stated that Muckian-Bates had no right to legal counsel for the meeting, and would be immediately terminated unless he answered. Muckian-Bates stated that the interrogation was coercive for purposes of the NLRA, but Forman stated that Muckian-Bates was in a position without NLRA protection. When Muckian-Bates continued to refuse to answer questions about the union campaign, Forman requested that Stockman terminate Muckian-Bates. At that point a 5 to 10 minute break was taken, after which the Respondent informed Muckian-Bates that, instead of terminating him, it was suspending him immediately and would await a decision by the NLRB about the Respondent's contention that he was a supervisor. Forman told Muckian Bates that during the period of his suspension he was to have no contact with the Respondent's staff, with members of the Respondent's board of directors, or any of its funders, and that if he violated any of those prohibitions he would be terminated immediately. The Respondent continued to pay Muckian-Bates during the period of his suspension.

D. Union Activity Continues in April and May

On April 22, 2021, the Respondent's employees engaged in a 1-day strike. The strikers – Carballo, Cole, Parent, and White—asked the Respondent to voluntarily recognize the

Union as their collective bargaining representative and reinstate the still-suspended Muckian-Bates. Neither of those requests was granted by the Respondent. On April 26, 2021, employees filed a petition with the NLRB asking that the Union be recognized as the bargaining representative for a unit of all nonsupervisory employees of the Respondent, including community coordinators/community organizers, communication specialists, and the director of organizing.

White sent a letter on approximately April 30, that was addressed to the Respondent's staff and board of directors. The letter was six pages long and single-spaced and complained about, inter alia, the Respondent's antiunion campaign and suspension of Muckian-Bates. White complained about the actions of multiple persons, but reserved the harshest criticism for Forman, who he claimed had "hit every single square" on the "union busting bingo card," "made bold face lies," and engaged in "domineering and abusive behavior." White stated that while there was no process for a staff member to file a grievance against a member of the board of directors, he was "asking our executive director to demand Mr. Forman resign from the board of directors along with anyone else upholding and being complicit in his toxic behavior."

In an email on May 5, Blakeman, one of the Respondent's three project coordinators, notified the Respondent's staff and board of directors by email that she was resigning. Edwards, a member of the board of directors, responded to Blakeman in a group email that included the entire staff as recipients, as well as at least two members of the board of directors – Forman and Gina Hart-Smith. In his email, Edwards attributed Blakeman's resignation to the "toxic environment by your colleagues and board members." White responded on May 6 that it was the Respondent's union busting tactics that had created the toxic work environment. Hart-Smith made a direct response to White, with copies to everyone else on the email chain. Hart-Smith told White: "Wisdom teaches us to look in the 'mirror' regularly to ensure that we aren't becoming that which we accuse others of being. The thing that triggers us most about others is that which we see in them and it is a mirror of what we are truly unhappy with in ourselves." Hart-Smith's email then went on to state that she did not want to receive any "further responses to this email," because she was "not equipped" for "such toxic communication" and was attending to her terminally ill father. On May 6, White responded by criticizing Hart-Smith for, in White's view, engaging in "gaslighting" and putting her personal "comfort" above addressing the problematic behaviors affecting staff. Hart-Smith responded in an email the same day, apparently to White alone, in which she stated that she was "a teacher of such things," that White was the one "gaslighting" and "to stop including me in this mire." Later that day, White, sent an email in the group email chain, in which he addressed Hart-Smith, stating: "You think you are afforded comfort when we as staff have been demonized, ignored, and berated. We too are tired of it but we can't politely be asked to be removed f[ro]m it. Thanks. So if you want to ignore our complaints of mistreatment towards us and others then we will show up in spaces you are. That is organizing." The next day, in an email that was part of the same chain, White responded to a comment from Forman by stating that raising issues with members of the board of directors was his right under the Respondent's "open door policy."[1]

On May 14, White made a social media post that included a copy of a statement by Mikael Huffman, who had recently resigned from the board of directors and had issued the statement to express support for the union effort. White also criticized members of the board of directors for standing in the way of voluntary recognition of the Union and for tolerating conduct that White said was abusive. White made another social media post on May 19. In this one, White re-posted Forman's exchange with Paula Swearingen, a volunteer and funder, who had made a public statement supporting the union campaign and calling for Forman's resignation from the board of directors. Forman wrote to Swearingen that while the board of directors had asked him not to respond to her, he had decided to reply and stated, "I cannot speak to what your family has sacrificed to the Labor cause over the years, but I lost my wife." General Counsel Exhibit Number (GC Exh.) 16 and GC Exh. 17. White's re-post characterized Forman's response to Swearingen as that of an "unhinged bully" and opined that Forman had used his "wife as a martyr to justify his abuse and ego." (GC Exh. 16.)

E. Respondent Terminates White

White was employed by the Respondent for over 9 years and was working as a project coordinator in 2021. During the time period from March to May 2021, he signed a union authorization card, participated in the 1-day strike, attended union meetings and, as detailed immediately above, made public statements criticizing the Respondent's and Forman's responses to the union campaign.

In a letter, dated May 20, from Stockman to White, the Respondent terminated White's employment effective immediately. (GC Exh. 15.) The letter stated that the termination was warranted by White's violation of handbook provisions prohibiting "gross misconduct," and the transmission of "'defamatory, threatening, obscene, or harassing materials or messages that disclose personal and/or confidential information without authorization,'" and provisions requiring employees to treat people they come "into contact with in the course of [their work] in a courteous and respectful manner." The letter stated that White violated its standards with his statements in the early May email exchange triggered by Blakeman's resignation—and in particular his statement to Hart-Smith that if she refused to hear employee complaints about mistreatment then employees "will show up in spaces you are." The termination letter also

[1] The Respondent's Employee Handbook includes the following:

> Open-Door Policy
>
> OVEC has an open-door policy that encourages employee participation in decisions that will affect them and their daily professional responsibilities. If you have job-related issues or complaints, you are encouraged to talk them over with your direct supervisor or the executive director – whoever you believe can help. OVEC believes that your concerns are best addressed through informal and open communication. If you have an issue or dispute with the executive director that you have not been able to resolve, you may take your grievance to the personnel committee of OVEC's board of directors.

GC Exhs. 5 and 6.

cited White's May 19 social media post regarding the exchange between Forman and Swearingen as a basis for the termination.

The Respondent's employee handbook states that, before terminating an employee, it will "at its option . . . try to address work problems such as problems with attitude, productivity, performance, ethics, conduct, and violation of OVEC rules and problems," using lesser "disciplinary actions [that] may include oral and written warnings, use of a probationary employment, suspension, and dismissal." (GC Exh. 6 at pp. 36 to 37.) There was no evidence in this case that the Respondent had tried to address any problems with White's employment through disciplinary actions short of termination.

On May 24, 2021, White sent an email to Stockman in which he stated that his April 30 letter contained grievances that were not investigated and addressed as required by the employee handbook.

F. Board of Directors Revises Grievance Procedure Effective May 25, 2021

On May 25, 2021, the board of directors revised the October 2020 version of the "grievances" provision in the employee handbook. Compare GC Exh 5 (October 2020 version) and GC Exh. 6 (May 25, 2021, version). The Respondent informed the staff about the changes on about June 8.

The May 25 changes to the grievance procedure in the employment handbook included the following: The revised version created a deadline for employees to request an informal resolution of their grievances from their immediate supervisors. Whereas no deadline was cited for this in the earlier version, the employee now had to make any such request within 10 days from the date of the event at-issue. The prior version gave the supervisor 5 days to investigate and respond to the employee, but the revised version gave the supervisor 10 days to investigate and meet with the employee. The revised version also added language stating that, as part of the grievance process, disciplinary action may be issued and the "use of professional consultants" may be authorized. The prior version stated that if the matter was not resolved with the immediate supervisor, the employee could make a written complaint to the executive director, but did not set any deadline for doing so. The revised version created a deadline—stating that the employee had 15 days from a supervisor's decision to appeal t to the executive director. Furthermore, the prior version stated that an employee who was not satisfied with the decision of the executive director could file a written appeal to the executive committee, which was to rule "in a timely manner." The revised version created a 15-day deadline for the employee to appeal the executive director's decision, and states that the appeal would be made to the "personnel committee." The revised version states that the personnel committee would respond to such an appeal within 15 days.

G. Respondent Terminates Muckian-Bates

Muckian-Bates started with the Respondent as director of organizing in September 2020. His duties in that position included meeting with the project coordinators to get updates on their work and helping them with any research or other assistance they required. He met weekly with Adkins to discuss financial operations and provide updates from the project coordinators. He also met once a week with Stockman to inform her about the project coordinators' updates and work plans. Muckian-Bates gave credible, unrebutted, testimony that he had no authority to hire, fire, demote, or discipline employees, and no authority to effectively recommend any of those actions. Transcript at Page(s) (Tr. 78.) White, a 9-year employee of the Respondent, testified that in his position as a project coordinator his immediate supervisor was not Muckian-Bates, but executive director Stockman. (Tr. 105.) Similarly, Cole, a 3-year employee, testified that in his position as a project coordinator he was not supervised by Muckian-Bates, but by the co-executive directors—Stockman and Adkins. (Tr. 15.) As discussed earlier, Muckian-Bates was the staff member who made the initial contact with the Union about organizing the Respondent's employees, created the videoconference links for union meetings, and engaged in other union activity.

When the Respondent suspended Muckian-Bates on March 11, it stated that before deciding whether to terminate him it would await the NLRB's determination on the question of whether Muckian-Bates was, as the Respondent contended, a statutory supervisor who the Respondent could lawfully terminate for engaging in union activity. The Respondent, however, did not await such a determination, but rather proceeded to terminate Muckian-Bates on May 27, 2021, at a time when its contention that he was a supervisor was still pending before the NLRB. In the letter advising Muckian-Bates of the action, Adkins explicitly stated that the reason the Respondent was terminating him was that he had participated in "unionization activities with staff members." The letter stated that he was terminated because "[a]s a supervisor your continued participation in union-related activities is . . . improper, illegal, and a violation of your duties to OVEC." (GC Exh. 9.)

On June 2, 2021—6 days after the Respondent terminated Muckian-Bates for engaging in union activity—the Director of Region 9 of the NLRB issued a decision and direction of election that thoroughly considered the question of Muckian-Bates' status, and concluded that he was a non-supervisory employee who had a right under the NLRA to engage in union activity. The Respondent asked the Board to review the Regional Director's decision, and on September 28, 2021, the Board ruled against the Respondent. The Board stated that the Respondent had failed to show the existence of any of the supervisory indicium under Section 2(11) of the NLRA.

H. Respondent Meets with Staff and Issues Written Warnings to Cole

Cole was a program coordinator who worked for the Respondent for 3 years. Cole participated in the pro-union effort by, inter alia, helping to organize union meetings, inviting coworkers to attend meetings, and signing a union card.

On June 1, 2021, Cole attended a staff meeting called by the Respondent. Among those who attended, in addition to Cole, were Stockman, Adkins, Cochran, Carballo, and Parent. The main subject discussed at the meeting was how to divide up among the remaining staff the work that had previously been done by Blakeman (who had resigned), White (who had been fired), and Muckian-Bates (who had been fired). During the

meeting, Cole described his work to Adkins and also expressed concern that the Respondent was losing allies in various multi-organization coalitions because those allies disapproved of the Respondent's treatment of staff during the union campaign. Parent gave credible, unrebutted, testimony that while Cole was talking, Adkins rolled her eyes, sighed, and responded sarcastically. Cole gave credible, unrebutted, testimony that Adkins "smirked" at him, and that he reacted: "Well I can sit here and smile too. You know, why are you smiling?" Cole testified that he was frustrated during the meeting, and testified that the reason was that he had previously supplied Adkins with a list that contained all the information she was asking him to recite about his current workload. At one point Adkins threw down a marker she had been using to write on a board, stated that she needed a break, and left the meeting for 5 to 10 minutes. The exchange between Adkins and Cole had been pointed, but Cole remained seated throughout it and Parent and Cole—the only two witnesses to the meeting who testified—both stated that Cole had not yelled.

On June 2, Adkins issued a formal written warning to Cole based on the June 1 meeting. The warning characterized Cole's behavior at that meeting as "disrespectful and disruptive." Adkins wrote that when she requested an update regarding Cole's work with a coalition, he had not provided the information, but rather "shouted at me, accused me of not knowing how a coalition works, and chastised management for not being on coalition calls." She denied that she had, at any point, spoken to Cole "in an unprofessional manner." Adkins warned: "Your toxic and abusive behavior is a violation of OVEC's policies and will not be tolerated. Be advised that any further misconduct will result in additional disciplinary action, up to and including discharge." (GC Exh. 3.)

On June 3, the day after receiving the written warning, Cole submitted what he characterized as a formal grievance regarding his treatment by Adkins. He revised and resubmitted the grievance document on Jun 23, 2021, after a June 8 meeting during which the Respondent informed staff that the board of directors had made changes to the grievance procedure on May 25. Coles' grievance stated that, during the June 1 meeting, Adkins had violated the section of the employee handbook that prohibits the Respondent from subjecting employees to an intimidating, hostile, or offensive work environment. The account of the June 1 meeting in Coles' grievance is consistent with his sworn testimony, although it goes into somewhat greater detail.

Regarding the question of what transpired at the June 1 meeting, I credit the only sworn accounts – that is, the testimonies of Cole and Parent. Their testimonies were consistent, confident, and clear. In some respects even Adkins' version in the June 2 warning letter, was consistent with that sworn testimony. Adkins did not testify, however, and to the extent that portions of the warning letter give an account that is at odds with the sworn testimony, I credit the sworn testimony over the unsworn account in her letter. I note, in particular, that I credit the sworn testimony that Cole did not yell at Adkins and reject the contrary claim in the warning letter. With respect to Cole's grievance letter, I note that it buttresses the testimonies of Cole and Parent to some extent because it was created close in time to the event and is consistent with what Cole and Parent stated on the witness stand. However, to the extent that the grievance letter provides additional details beyond the sworn testimony, I do not rely on those additional details in reaching my decision.

On June 17, after the Respondent cancelled a group staff meeting, it met with staff members individually. The meeting with Cole lasted an hour, and attendees for the Respondent were Adkins, Cochran (administrative director) and, for a portion of the meeting, Maryanne Graham (a member of the board of directors). Cole, the only witness who testified about the meeting, stated that they discussed his work with multi-organization coalitions. Cole testified that Adkins told him that the Respondent would no longer have Cole work with certain coalitions and, according to Cole, those were coalitions associated with particularly pro-union political stances. Cole also testified that he expressed the view that the Respondent was "turning off the youth," and that all the younger more progressive members of the board of directors had resigned due to poor treatment at the hands of the Respondent. During this meeting, Adkins asserted that the Respondent's board of directors was composed of pro-union people. During the meeting, Cole also discussed the fate of Muckian-Bates, and Adkins acknowledged that the NLRB Regional Director had determined that Muckian-Bates was not a supervisor or manager, but Adkins stated that the Respondent did not accept that determination. Cole testified that no one raised their voices during this meeting and that he had remained "calm and collected," but he also said that he found the meeting uncomfortable and "like an interrogation."

On July 2, Adkins issued a second written warning to Cole, this one based on the June 17 meeting. In the warning letter, Adkins stated that Cole's "tone and body language were hostile and threatening," and that he had raised his voice. She stated that Cole had called Stockman and Adkins liars, stated that he would "seize power" and that Adkins would "see what happens." She stated further that he had "stated that the current leadership was too old to be in charge of the organization, and that we were 'running off the youth.'" (GC Exh. 7.) As noted earlier, neither Adkins, Cochran, Graham, nor anyone else other than Cole testified about this meeting. During his testimony, Cole denied that he had stated that Adkins or Stockman were too old for the operation. (Tr. 52.) He also expressly denied that he had either raised his voice or said anything about seizing power, and testified that he had been "calm and collected." Ibid.

Cole's sworn testimony regarding the June 17 meeting was consistent, confident, and facially credible, and I credit it over contrary elements of the unsworn account in Adkins warning letter. To the extent that Adkins' letter contains assertions that, while not contradicted by Cole's testimony, were also not supported by it, I find such assertions self-serving and, given the absence of any supportive sworn testimony on the point, do not credit them.

Analysis and Discussion

I. Muckian-Bates was a statutory employee

Section 7 of the Act provides that "employees" have the

right, inter alia, to "join, or assist labor organizations" and engage in other protected "concerted activities." Section 7, 29 U.S.C. Sec. 157. The definition of "employee" in the Act excludes from coverage "any individual employed as a supervisor," Section 2(3), 29 U.S.C. Sec. 152(3), and thus the Act does not extend the rights described in Section 7 to "supervisors." Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In this case the Respondent argues that Muckian-Bates was a supervisor who did not have Section 7 rights and that the company could, therefore, lawfully threaten, suspend, and terminate Muckian-Bates for engaging in union activity.

As the party asserting supervisory status, the Respondent has the burden of proving it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710-713 (2001). The Respondent has failed to meet that burden. In this regard, I note at the outset that in the prior representation case the Regional Director issued a decision and direction of election finding that Muckian-Bates was not a supervisor for purposes of the NLRA. The Union prevailed in a mail ballot election and on July 19, 2021, was certified as the exclusive collective bargaining representative of the unit. See Case 09–RC–276218. The Respondent appealed and, on September 28, 2021, the Board upheld the Regional Director's determination that Muckian-Bates was not a supervisor. The Board stated that the Respondent failed to prove "the existence of any of the supervisory indicium under Section 2(11)." As the Board has held it appropriate to do, I afford the prior decision regarding Muckian-Bates' supervisory status "persuasive relevance". *Dole Fresh Vegetables*, 339 NLRB 785, 785 (2003); *Brusco Tug & Barge Co.*, 330 NLRB 1188, 1189 (2000), enf. denied on other grounds 247 F.3d 273 (D.C. Cir. 2001), citing *Serv-Stores*, 234 NLRB 1143, 1144 (1978), and *Air Transit, Inc.*, 256 NLRB 278, 279 (1981).

More importantly, I note that the Respondent, which has the burden of proof regarding the issue of supervisory status, *NLRB v. Kentucky* Community, supra, chose not to participate in the trial or otherwise introduce any evidence to meet that burden or which would otherwise make it appropriate for me to reconsider the representation case decision that Muckian-Bates was not a supervisor. At any rate, to the extent that any record evidence bears on the question of whether Muckian-Bates was a supervisor, that evidence was presented by the General Counsel and further supports the prior decision that Muckian-Bates was not a supervisor for purposes of the NLRA. As discussed above, there was credible testimony that Muckian-Bates had no authority to hire, fire, demote, or discipline employees, and no authority to effectively recommend any of those actions. Moreover, the evidence showed that while the project coordinators gave updates and reports to Muckian Bates, it was the executive director and coexecutive director who served as their supervisors. In its posthearing brief the Respondent points to Muckian-Bates' trial testimony that his work included discussing "financial operations" with Adkins and checking that project coordinators and communications staff were completing work in a timely manner. The problem with this argument is that such activities appear nowhere among the list of supervisory responsibilities in Section 2(11). Indeed, the Respondent does not specify which of the Section 2(11) responsibilities it is claiming Muckian-Bates had. Nor does it delineate exactly who it claims he was supervising. A finding that Muckian-Bates was a supervisor would mean that the Respondent's staff was 50 percent supervisors – a ratio that the Board has found to be unlikely and to weigh against accepting an employer's defense that the aggrieved individual was a supervisor unprotected by the NLRA. *Airkaman, Inc.*, 230 NLRB 924, 926 (1977) (ratio of one supervisor to every three employees is unrealistically high); see also *Powerback Rehabilitation*, 365 NLRB No. 119 (2017) (ratio of staff-to-supervisory employees is a secondary indicia of supervisory status); *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (ratio of supervisors to employees bears on the question of supervisory status); *Flexi-Van Service Center*, 228 NLRB 956, 960 (1977) (same).

The Respondent's defense based on Muckian-Bates' supposed supervisory status fails. It did not present evidence sufficient to either warrant reconsideration of the Regional Director's decision, upheld by the Board, *Dole Fresh Vegetables*, supra, *Brusco Tug*, supra, or to rebut the trial evidence that Muckian-Bates was not a supervisor.[2]

I find that the Respondent has failed to meet its burden of proving its defense that Muckian-Bates was a supervisor who it could coerce and discipline for protected union and concerted activities without violating the NLRA.

II. SECTION 8(A)(1) ALLEGATIONS

A. Forman Unlawfully Interrogated Employees at March 4 Meeting

The General Counsel alleges that Forman coercively interrogated employees about their union activities during the mandatory meeting he conducted with employees on March 4. Pursuant to Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their NLRA rights to engage in protected union and concerted activity.[3] Factors the Board has recognized as bearing on the question of whether an interrogation is unlawfully coercive include: whether the interrogated employee was an open or active union supporter; whether proper assurances were given concerning the questioning; the background and timing of the interrogation; the nature of the information

[2] In its brief, the Respondent asserts that Muckian-Bate's gave "contradictory" testimony in a West Virginia Board of Review hearing. However, the Respondent did not even present a transcript or other evidence of any such testimony for my consideration.

[3] Section 7 of the NLRA provides that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

sought; the identity of the questioner; the place and method of the interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

I find that Forman's questioning of employees on March 4 was coercive in violation of the NLRA. The employees were summoned to a videoconference meeting by Stockman, the top day-to-day management official at the Respondent, and done in her presence. The questioning itself was carried out by Forman who was a member of the Respondent's personnel committee, and also a member of the board of directors, which oversaw the Respondent and to which Stockman reported. Forman began by stating that he was aware that there was a desire among some in the workforce to unionize, but the evidence does not show that any of the employees in attendance had voluntarily divulged to Forman or the Respondent a desire to unionize. Forman stated that he was on a fact-finding mission and wanted to know the reasons why employees desired a union. In the accounts given at trial by attendees, there was no evidence that the Respondent prefaced this inquiry by giving the employees any assurances that there would be no adverse employment consequences based on their answers. To the contrary, during the questioning Forman was openly hostile to the union effort, stating that the employees "didn't know what [they]were doing" and that adverse changes would follow unionization. These factors weigh decisively in favor of finding that the interrogation was unlawful, and easily outweigh any contrary indications based, for example, on the fact that some of the employees gave truthful answers to Forman's questioning.

The Respondent, by Forman, violated Section 8(a)(1) of the NLRA on March 4, 2021, by coercively interrogating employees about their union activities.

B. Forman Made Unlawful Threats at March 4 Meeting

The General Counsel alleges that Forman's statements to employees on March 4, 2021, also constituted implied threats of unspecified reprisals for union activity. The General Counsel points, inter alia, to Forman's statements that if the employees unionized their "jobs would get a lot harder" and that they would have to begin to "clock in and out at specific times." In deciding whether an employer has made a threat in violation of this prohibition, the Board applies an objective standard. This means that the Board considers whether the remark would reasonably tend to interfere with the free exercise of employees' NLRA rights, and does not look at the motivation behind the remark, or rely on the success or failure of the remark in suppressing protected activity. *Midwest Terminals of Toledo*, 365 NLRB No. 158, slip. op. at 21 (2017), *Divi Carina Bay Resort,* 356 NLRB 316, 319 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.,* 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury,* 314 NLRB 470, 471 (1994).

In this case I find that Forman's remarks would reasonably tend to interfere with employees' Section 7 rights. Where, as here, an employer tells employees that their NLRA-protected activity will result in less favorable working conditions, and provides no objective facts to support that prediction, "the statement cannot be viewed as anything but a threat" of future reprisals. *Cadillac of Naperville*, 368 NLRB No. 3, slip op. at 3 (2019) enf. in relevant part by 14 F.4th 703 (D.C. Cir. 2021); see also *Colonial Parking*, 363 NLRB No. 90, slip op. at 7 (2016) (supervisor's statement that employees' protected activity would result in a change for the worse in working conditions was a threat of unspecified future reprisals). That is precisely what Forman did here.

I find that the Respondent violated Section 8(a)(1) of the NLRA on March 11, 2021, by threatening employees with unspecified reprisals for their union activities.

C. Forman Unlawfully Interrogated and Threatened Muckian-Bates at March 11 Meeting

The General Counsel also alleges that the Respondent violated Section 8(a)(1) of the NLRA at the March 11 meeting by coercively interrogating and threatening Muckian-Bates. That meeting was attended by Stockman, Forman, and Edwards. The Respondent told Muckian Bates that the purpose of the meeting was to determine his role in the union organizing effort. When Muckian-Bates declined to answer questions about the union campaign, citing his rights under the NLRA and his desire to obtain legal representation, the Respondent expressly threatened to discharge him unless he answered the questions. The Respondent's only defense for these clearly coercive questions and threats is that Muckian-Bates was not an employee who the NLRA protects against this treatment, but rather a statutory supervisor who lacked that protection and could be coercively interrogated and threatened with impunity. As discussed above, this defense fails because Muckian-Bates was not a statutory supervisor, but rather an employee who had federally guaranteed rights under the NLRA to engage in union activity without being subjected to coercive interrogation and threats by the Respondent.

The Respondent violated Section 8(a)(1) of the NLRA on March 11 by coercively interrogating Muckian-Bates about his union activities and protected concerted activities and by threatening to discipline him for such activities.

D. Allegation that Respondent Promised to Remedy Grievances on about May 25, 2021

The Complaint includes an allegation that the Respondent attempted to discourage support for the Union on about May 25, 2021, when it "implemented a grievance procedure and promised to remedy employees' grievances and did so in its employee handbook." As the General Counsel notes in its brief, the Board has held that it is a violation of Section 8(a)(1) of the NLRA for an employer to attempt to discourage union support by soliciting grievances and making an explicit or implicit promise to remedy those grievances. See *Wal-Mart Stores*, 340 NLRB 637, 640 (2003). However, in this case the evidence does not show any instances in which the Respondent solicited, or made any kind of promise to remedy, employee grievances.

As discussed in the findings of fact, on the date referenced in the complaint, the Respondent did make some changes to the grievance procedure in its employee handbook. However, those changes did not encourage employees to file grievances or in any way suggest that the Respondent had become more likely to remedy grievances. Indeed, the likely effect of the May 2021 revisions would be to *discourage* grievances since most of those changes subjected employees to filing deadlines that did not exist previously and extended the deadlines for the employer's responses.

I find that the allegation that the Respondent promised to remedy employees' grievances in violation of Section 8(a)(1) of the NLRA should be dismissed.

III. SECTION 8(A)(3) ALLEGATIONS

A. Suspension and Termination of Muckian-Bates

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the NLRA when it suspended Muckian-Bates on March 11, 2021, and terminated him on May 27, 2021. The uncontradicted evidence, including the trial testimony of Muckian-Bates and the termination letter, establish that the Respondent suspended and ultimately terminated Muckian-Bates because of his union activity and protected concerted activity, including his refusal to cooperate in the unlawful interrogation. *Earle Industries, Inc.*, 315 NLRB 310, 315 (1994), enf. denied 75 F.3d 400 (8th Cir. 1996) (refusal to cooperate in unlawful questioning about protected activity is itself protected activity). Since the fact that the Respondent was motivated by Muckian-Bates' NLRA-protected activity is not in doubt and, indeed, since the Respondent has not advanced a motivation for its actions other than his union activity, it is not appropriate to analyze the evidence regarding the suspension and termination using the *Wright Line*[4] burden shifting analysis. *Cascades Containerboard*, 370 NLRB No. 76, slip op. at 1 fn.1 (2021) ("*Wright Line* applies where motive is in dispute, and it is not disputed here."); *Earle Industries*, 315 NLRB 310, 315 fn. 19 (1994) (the Board's *Wright Line* framework applies to "mixed motive" cases, and is not used if the only reason advanced by the employer for the disciplinary action was the employee's protected activities) , enf. denied 75 F.3d 400 (8th Cir. 1996). The Respondent's only defense is that it could lawfully discriminate against Muckian-Bates for engaging in union and concerted activity because he was a supervisory employee. The Respondent's defense fails because it did not show that Muckian-Bates was a supervisory employee.

The Respondent discriminated on the basis of union activity and protected concerted activity in violation of Section 8(a)(3) and (1) when it suspended Muckian-Bates on March 11, 2021, and when it terminated him on May 27, 2021.

B. Termination of White

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the NLRA by discharging White because he engaged in union and concerted activity in the course of email exchanges with members of the board of directors and management, and in the course of social media posts on May 19. The Respondent counters that White was terminated not for his protected activities but for activities that were unprotected because they were intended only to harm the Respondent's reputation and were part of a "history of similar unprofessional behavior for which he had received numerous warnings."

The appropriate framework for evaluating the evidence regarding White's termination is, as stated by the General Counsel, the *Wright Line* burden shifting analysis. That analytical framework is appropriate where, as here, motive is at issue. Under the *Wright Line* decision, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by employees' NLRA-protected activities. 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) (Section 8(a)(3) and (1)); see also *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 (2020); *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) ("The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation."). The General Counsel can meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity, and there was a causal connection between the discipline and the protected activity. *General Motors LLC*, 369 NLRB No. 127, slip op. at 2 and 10 (2020); *Camaco Lorain Mfg. Plant,* 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors,* 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *General Motors*, supra; *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra; *Senior Citizens*, supra.

The General Counsel easily meets its initial burden. White's protected union and concerted activities were significant and included: attending union meetings, signing a union authorization card, participating in a 1-day strike for union recognition, writing to the board of directors and in social media posts to complain about the Respondent's reaction to the union campaign. In an email chain he stated that the Respondent's "union busting" had created a "toxic" environment that caused the resignation of his co-worker Blakeman. In addition, on social media he re-posted statements of union support that had been issued by a former member of the board of directors (Huffman) and by one of the Respondent's volunteers (Swearingen), and also reposted Forman's reaction to the latter and described him as an "unhinged bully." There is no doubt that the Respondent was aware of many of White's protected activities. Indeed the contents of White's emails and social media posts is what the

[4] 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).

Respondent relies on to justify its decision to terminate him. In addition, the General Counsel has made a strong showing regarding the third and final element of the General Counsel's initial burden—that the Respondent bore animus towards White's Union and other protected activities. As found above, the Respondent coercively interrogated and threatened White and other employees about their union sympathies, and the Respondent discriminatorily suspended and terminated Muckian-Bates for engaging in union activities. During a meeting that the Respondent required employees to attend to campaign against the union campaign, Forman told employees that they "didn't know what [they] were doing," that they were a "family" that did not need a union, and that employees' working conditions would be worse if they chose union representation.

Since the General Counsel has met its initial burden of showing that the Respondent's decision to terminate White was motivated, at least in part, by employees' NLRA-protected activities, the burden shifts to the Respondent, under *Wright Line*, to show that it would have terminated White even absent the NLRA-protected activity. *General Motors,* supra; *Camaco Lorain, supra; ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Board has stated that when an employee engages in abusive conduct in the course of protected activity, that abusive conduct should be differentiated from the protected conduct for purposes of the *Wright Line* analysis—meaning that an employer can escape a finding of violation if it shows that the employee engaged in an abusive outburst that would have led to the same discipline even absent the accompanying protected activity. *General Motors*, slip op. at 8. The types of statements that the Board identifies in *General Motors* as examples of abusive conduct are a "profane ad hominem attack or racial slur." Slip op. at 8; see also *Community Counseling & Mentoring Services*, 371 NLRB No. 39, slip op. at 16 and fn. 24 (2021). In this case, White's statements did not include any such attacks or slurs or otherwise rise to the level of "abusive" conduct such that it should be differentiated from the protected activity and evaluated under *Wright Line* as a lawful reason that the employer might have imposed the same discipline even absent the protected activity. In other words, the statements by White that the Respondent identifies to justify his termination, were themselves NLRA-protected statements and therefore cannot be relied on by the Respondent to meet its burden of proving that it would have discharged White even in the absence of protected activity.

Even if I assume that some of White's statements during his otherwise protected protests crossed into the zone of "abusive" conduct, and that those statements should be differentiated from the protected conduct during which it transpired in the manner described in *General Motors*, I find that the Respondent has failed to meet its burden of showing that it would have terminated White for the allegedly "abusive" statements in the absence of the NLRA-protected activity. I note, at the outset, that the Respondent has not shown that it ever disciplined, much less discharged, any employee who engaged in conduct similar to White's but who did so outside the context of a union campaign or other NLRA-protected activity. See *Tschiggfrie Properties Ltd.*, 368 NLRB No. 120, slip op. at 4 (2019) (Employer fails to meet its responsive burden under *Wright Line* where, inter alia, it did not "present any evidence that it has previously disciplined an employee for . . . engaging in any comparable conduct."). I note, in addition, that White was a 9-year employee who the Respondent has not shown that it ever disciplined for any reason prior to the union campaign. This makes it all the more striking that, after the start of the union campaign, the Respondent imposed the ultimate penalty of discharge on White without first attempting to address any problems with lesser discipline, and despite the fact that its employee handbook specifically contemplates using lesser disciplinary actions to correct problems with an employee's "attitude" prior to resorting to discharge. Rather than attempt to address the lack of evidence of any prior discipline, the Respondent simply asserts in its brief that it had given White "numerous warnings regarding his conduct." Brief of the Respondent at Page 10. However, the Respondent does not point to any record evidence showing that during White's 9 years of employment, he had ever received discipline of any kind prior to the union campaign or that the Respondent had tried to address problems with White's conduct through lesser disciplinary means. The Respondent's imposition of the ultimate penalty of termination was not only draconian, but as far as the record shows, unprecedented. This weighs against finding that the Respondent has met its burden of showing that it would have taken the same action in the absence of its proven animus towards union and concerted activity.

The Respondent's effort to meet its responsive burden is also hindered by the fact that White's statements, even if intemperate, were neither unprovoked nor factually untrue. The Respondent attempts to justify its decision, in part, by pointing to the public social media post in which White characterized Forman's behavior as that of an "unhinged bully." White made this statement regarding Forman's behavior only after Forman had, in fact, repeatedly violated Whites' and other employees' NLRA rights by coercively interrogating and threatening them, and by his involvement in the unlawful suspension of Muckian-Bates. Thus White's critical characterization of Forman's behavior was neither unprovoked nor, it is sad to say, inaccurate. Similarly, although the Respondent takes umbrage at White's reference to Forman's wife, the exchange shows that it was Forman, not White, who chose to insert her into the debate. Specifically, in Forman's email to Swearingen he attempts to bolster his criticism by asserting that he had "lost" his wife to the "labor cause"[5] and questioning whether Swearingen had made comparable sacrifices. All White did in this regard was accurately point out how Forman had referenced his wife in that exchange. The Respondent has not shown that it would have discharged White for his posts regarding Forman if not for its antiunion animus and the fact that White's statement was made about, and in the context of, the union campaign and protected complaints about the Respondent's treatment of staff

[5] I note, moreover, that there is no competent, non-hearsay, evidence in the record showing that Forman's wife had been "lost" because of involvement in a "labor cause." Given that the Respondent chose not to participate at the hearing it is not surprising that, in its brief, it resorts to relying on favorable "facts" for which there is no evidentiary support. See also, fn. 6, infra.

during that campaign.

Nor has the Respondent met its responsive burden based on White's statements to Hart-Smith during a group email exchange. It appears that it was board of directors member Edwards, not White, who created the group email when he sent an email to Hart-Smith and the entire staff in which he laid blame for Blakeman's resignation to "a toxic environment by your colleagues." When White responded by expressing his view that it was the Respondent's own antiunion conduct that created the toxic environment, Hart-Smith chose to enter the fray by responding to White. Hart-Smith's response, which was part of the group email chain and therefore distributed to the entire staff, suggested that White's real problem was not with how the Respondent was treating the staff or opposing the union effort, but rather with White's own unhappiness with himself and that White should address his grievances by "looking in the mirror." In the sentence after Hart-Smith launched this salvo, she stated that she did not wish to be included in any further communications about it.

The Respondent's effort to show that White was terminated for lawful reasons relies heavily on White's response to Hart-Smith's dismissive email in the group email chain.[6] Specifically, the Respondent points to White's statement that employees would continue to make their complaints of mistreatment known by "show[ing] up in the places that you are." According to the Respondent this statement was a threat to Hart-Smith and misconduct of such severity that "[i]t is unfathomable that the General Counsel saw fit to issue a Complaint" regarding the Respondent's termination of him. Contrary to the Respondent's assertion, this evidence not only does not render the General Counsel's action "unfathomable," but comes no where near meeting the Respondent's burden of showing that it would have terminated White even absent its unlawful motivation. The reasonable understanding of White's statement was that employees would continue to raise concerns about their treatment in shared communication "spaces"—such as the group email chain involved here—where Hart-Smith participated in discussions about the treatment of employees. There is no evidence that White had ever showed up to confront Hart-Smith in person, or had even contacted her in a private email or in other ways outside the group discussion email chain. The Respondent has not shown that White's statement about "show[ing] up" in places to complain about working conditions would reasonably be understood as a threat to confront Hart-Smith in person, to intrude onto her privacy, or to challenge Hart-Smith in any forum in which she had not already chosen to join the debate about labor practices.

In its brief, the Respondent does not attempt to use the appropriate analysis—as set forth in, for example, *Wright Line* and *General Motors*—to prove that its decision to terminate White was not the result of its animus towards his NLRA-protected activity. Instead, the Respondent argues that its decision to terminate White was lawful because White's statements disparaged, and were unacceptably disloyal to, the Respondent. Brief of Respondent at pages 6-9, citing *Miklin Enterprises, Inc.*, 861 F.3d 812 (8th Cir. 2017). Although the Board has held that employees can forfeit their NLRA protection by making indefensibly disparaging statements about their employer's product or business reputation, the defense has no application where, as here, the employees' statements are about the employer's labor practices. *Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op at 13 (2020), enfd. in relevant part by 999 F.3d 1 (1st Cir. 2021), *Five Star Transportation*, 349 NLRB 42, 45-46 (2008), (quoting *Vandeer-Root Co.*, 237 NLRB 1175, 1177 (1978), enfd. 522 F.3d 1210 (1st Cir. 2008). The primary authority relied upon by the Respondent in support of this defense is the decision by the Court of Appeals for the Eighth Circuit in *Miklin Enterprises.* That reliance is misguided because the Court of Appeals specifically recognized that complaints about labor practices are *not* disparagement. The Court said, "the critical question" is whether the "communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services." 861 F.3d at 822 (8th Cir. 2017); see also *NLRB v. Maine Coast Regional Health Facilities*, 999 F.3d at 13 (same).

In the instant case White reasonably targeted the Respondent's labor practices, and did not disparage (indefensibly or otherwise) the Respondent's services—i.e., environmental activism. Moreover, his complaints concerned an ongoing labor dispute that was already the subject of the unfair labor practices charge filed by Muckian-Bates and also related to an active petition for union representation. See *Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op at 15 (employee comments were not disloyal so as to forfeit NLRA protection when they were made in the context of and were expressly linked to a labor dispute or the employee's efforts to improve working conditions); *Emarco, Inc.*, 284 NLRB 832, 834 (1987) (employee comments that were "made in the context of and were expressly linked to the labor dispute" did not forfeit NLRA protection), and *Community Hospital of Roanoke*, 220 NLRB 217, 223 (1975) (Comments were not disloyal so as to forfeit protection when the comment "was made in a context of, and was specifically related by [the employee] to, the employee's efforts to improve wages and working conditions" and were not intended to impugn the patient care provided by the employer.). Unlike statements publicly impugning an employer's product or services, White's statements protesting the treatment of employees in the context of a labor dispute did not forfeit the Act's protection. Indeed, such statements are exactly the type of activity that are protected by the NLRA. Under the applicable precedent, and the facts present here, the Respondent's "disparagement" defense is without merit.

The Respondent violated Section 8(a)(3) and (1) of the NLRA on May 20, 2021, when it discharged White because of his union and protected concerted activities.

C. Disciplinary Warnings Issued to Cole

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the NLRA when

[6] In an effort to paint White's email to Hart-Smith as sufficiently abusive to justify immediate termination, the Respondent claims that Hart-Smith was providing care to her dying father at the time. However, Hart-Smith did not testify, and there is no competent, non-hearsay, evidence about Hart-Smith's father or his condition at the time of the email exchange.

it issued written disciplinary warnings to Cole on June 2 and July 2, 2021, because he engaged in union activities and protected concerted activities. The General Counsel's evidence meets the initial *Wright Line* burden. Cole engaged in a wide range of union and concerted activities. These included helping to organize union meetings, inviting employees to attend those meetings, signing a union authorization card, participating in a 1-day strike for recognition, and, on June 1 and 17, raising concerns directly with management about the Respondent's reaction to the union campaign. Some of these activities took place in discussions between Cole and management, so it is clear that the Respondent knew about them. For the reasons discussed with respect to White's termination, the evidence also shows that the Respondent bore animus towards the employees' union and concerted activities. There is, moreover, a connection between those activities and the discipline since the Respondent's disciplinary letters rely on the June 1 and 17 meetings at which Cole criticized the Respondent's response to the union campaign.

Since the General Counsel has met its initial *Wright Line* burden of showing that the discipline was motivated, at least in part, by unlawful animus, the burden shifts to the Respondent to show it would have issued the same discipline to Cole in the absence of the protected activity. *General Motors,* supra; *Camaco Lorain, supra; ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. In its brief the Respondent does not even articulate, much less proffer evidence of, any nondiscriminatory reason that would have led it to issue the warnings to Cole. Instead, it merely points out that Cole is not entitled to any backpay remedy since the discipline against him was limited to disciplinary warnings that did not result in any loss of pay.[7] Since the Respondent has not met, or even attempted to meet, its responsive *Wright Line* burden, I find that the discipline was unlawful.

The Respondent violated Section 8(a)(3) and (1) of the NLRA on June 2, 2021, and July 2, 2021, when it discriminated against Cole by issuing disciplinary warnings to him because of his union and protected concerted activities.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act: on March 4, 2021, and March 11, 2021, by coercively interrogating employees about their union activities and/or protected concerted activities; on March 4, 2021, by threatening employees with unspecified reprisals if they chose to be represented by the Union; and on March 11, 2021, by threatening to discipline an employee because of his union activity.

4. The Respondent discriminated against employees on the basis of their union activities and protected concerted activities in violation of Section 8(a)(3) and (1) of the Act: on March 11, 2021, when it suspended Muckian-Bates; on May 20, 2021, when it terminated White's employment; on May 27, 2021, when it terminated Muckian-Bates' employment; and on June 2, 2021, and July 2, 2021, when it issued disciplinary warnings to Cole.

5. The Respondent was not shown to have solicited and promised to remedy employee grievances in order to discourage union support in violation of Section 8(a)(1) of the Act.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Among the later, the Respondent must make Brendan Muckian-Bates and Dustin White whole for any loss of earnings and other benefits incurred as a result of the unlawful suspension and termination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate the employees for their reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, the Respondent shall compensate Muckian-Bates and White for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 9 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

I note that after the time of the violations found in this decision, the Respondent's board of directors voted to dissolve the organization and on, or about November 18, 2021, all remaining staff were laid off, including Cole. There is no allegation in this complaint that the layoff of Cole and other remaining staff were violations of the Act, and therefore I do not provide any remedy for those layoffs in this decision.

[7] The Respondent also alludes to the fact that Cole's employment was terminated after the Respondent's board of directors dissolved the organization and laid off the staff. There is no allegation before me that Cole's termination, or the dissolution of the organization, were violative of the NLRA, and therefore I express no opinion as to whether those actions entitle Cole to backpay.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[8]

ORDER

The Respondent, Ohio Valley Environmental Coalition, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals because of their union activities.

(b) Threatening employees with termination because of their union activities.

(c) Interrogating employees about their union activities and/or other protected concerted activities.

(d) Discharging or otherwise disciplining employees because of their union activities and/or other protected concerted activities.

(e) 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, offer Brendan Muckian-Bates and Dustin White full reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Brendan Muckian-Bates and Dustin White whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Brendan Muckian-Bates and Dustin White for the adverse tax consequences, if any, of receiving lump-sum backpay awards

(d) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 9 a report allocating the backpay award to the appropriate calendar years for each affected employee.

(e) File with the Regional Director for Region 9 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(f) Expunge from its files all references to the unlawful discipline against Brendan Muckian-Bates, Dustin White, and Alexander Cole.

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

(h) Within 14 days after service by the Region, post at its facility in Huntington, West Virginia, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2021.

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

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

Dated, Washington, D.C. March 11, 2022

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 threaten you with unspecified reprisals, or discipline of any kind, for engaging in activities in support of the Industrial Workers of the World or any other labor organization, or for engaging in protected concerted activities.

WE WILL NOT question you about your union activities.

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

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

WE WILL NOT terminate or otherwise discipline you because of your activities in support of the Industrial Workers of the World or any other labor organization, or for engaging in protected concerted activities.

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

WE WILL offer Brendan Muckian-Bates and Dustin White reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL expunge from our files all references to the unlawful discipline against Brendan Muckian-Bates, Dustin White, and Alexander Cole, and notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL make whole Brendan Muckian-Bates and Dustin White for the loss of earnings and other benefits they suffered as a result of our decision to suspend and terminate them, and WE WILL make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Brendan Muckian-Bates and Dustin White for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 9 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

OHIO RIVER VALLEY ENVIRONMENTAL COALITION, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-274743 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.