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United Parcel Service, Inc. and Robert C. Atkinson, Jr.
Case 06–CA–143062

December 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

This case presents an opportunity for the Board to reconsider the standard announced in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017), for deferring to arbitral decisions in unfair labor practice cases alleging discharge or discipline in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.¹ *Babcock* represented a drastic contraction of deferral practices that had existed for decades and that we reestablish today. Under the *Babcock* postarbitral deferral standard, even if the arbitration procedures appear to have been fair and regular and the parties have agreed to be bound by the results of arbitration, the Board will not defer to an arbitral decision unless (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. *Id.* at 1131. The burden of proof under *Babcock* rests with the party urging deferral. *Id.*

While focused primarily on the revised standard for postarbitral deferral, *Babcock* also substantially altered the prearbitral standard for deferral to grievance arbitration proceedings and to prearbitral grievance settlements in unfair labor practice cases alleging discharge or discipline in violation of Section 8(a)(1) and (3). *Babcock* held that the Board would no longer defer to grievance arbitration proceedings in the former cases unless the parties in a collective-bargaining relationship have explicitly authorized an arbitrator to decide the unfair labor practice issue, and that it would not defer to grievance settlement agreements that did not comport with the new requirements for postarbitral deferral. *Id.* at 1138–1139.

The Board has considered the judge’s decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions only to

¹ On November 25, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs. The General Counsel and Charging Party also filed limited exceptions and supporting briefs, the Respondent filed answering briefs, and the General Counsel and Charging Party filed reply briefs.

² The Respondent and the Charging Party have 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.*

the extent consistent with this Decision and Order. After careful consideration, we find, for the reasons set forth below, that the 3-member majority holding in *Babcock*³ upset the proper balance of interests struck by the longstanding precedent it overruled. It drastically restricted the prior longstanding deferral policy established in *Olin Corp.*, 268 NLRB 573 (1984), and the even more venerable substantive review standard for postarbitral deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), as well as complementary policies for prearbitral deferral established in *United Technologies Corp.*, 268 NLRB 557 (1984), and for deferral to prearbitral settlement agreements in *Alpha Beta Co.*, 273 NLRB 1546 (1985). By doing so, *Babcock* greatly diminished the prospect of Board deferral to collectively bargained grievance arbitration procedures for the resolution of disputes over discharge and discipline. This radical contraction of deferral policy was not persuasively shown to be necessary to protect either employees’ Section 7 rights or the Board’s jurisdiction to resolve unfair labor practice allegations. Further, by disfavoring the peaceful resolution of employment disputes about discharge and discipline issues through collectively bargained grievance arbitration proceedings, *Babcock* disrupted the labor relations stability that the Board is charged by Congress to encourage.

Accordingly, we have decided to overrule *Babcock* and to reinstate both the *Spielberg/Olin* postarbitral deferral standard and related prearbitral deferral standards that existed prior to *Babcock*. In accord with the Board’s usual practice, we shall apply these standards retroactively “to all pending cases in whatever stage.”⁴ Applying the *Spielberg/Olin* standard to the facts of this case, we reverse the judge and dismiss the complaint, deferring to the unanimous decision of a joint grievance panel upholding the October 28, 2014 discharge of Charging Party Robert C. Atkinson, Jr.

I. BACKGROUND

The International Brotherhood of Teamsters (Union or IBT) represents the Respondent’s package car drivers nationwide, with 32 locals representing smaller geographical regions. Represented employees are covered by both the national master agreement and their local contract supplement. In May 2013, the Respondent and Union negotiated a successor national master agreement and successor local supplement agreements. The master agreement required member ratification on a national basis, and each supplement required member ratification on a local basis.

Atkinson had been a package car driver for the Respondent since 1995 and a shop steward for Teamsters Local 538 at the New Kensington Center in Apollo, Pennsylvania, since 1996. In 2013 and 2014, Atkinson actively opposed ratification of the national master agreement and the Western Pennsylvania (WPA) local supplement, and he participated in a national Vote No campaign aimed at persuading the Union to renegotiate a

188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Members Miscimarra and Johnson separately dissented to the overruling of precedent.

⁴ *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

more favorable contract. The Respondent and the Union were both aware of Atkinson's involvement in the Vote No campaign.

The Vote No campaign ended in late April 2014, when the Union amended its constitution so that it could accept remaining unratified local supplements, which allowed the national master agreement and all the local supplements to take effect. Dissatisfied with the terms of the new agreement and the process used to push through the unratified local supplements, Atkinson unsuccessfully ran for local union office in an effort to displace the longtime Teamsters 538 business agent, Betty Rose Fischer.

On October 28, 2014, the Respondent discharged Atkinson for violating its package delivery procedures.⁵ Atkinson filed two grievances over this discharge. Both of them referenced claims that the discharge violated Section 8(a)(3) of the Act. A joint grievance panel, consisting of two representatives from the Union and two from the Respondent, considered these grievances at a January 14, 2015 hearing. Business agent Fischer represented Atkinson at the hearing, and Atkinson testified in his own behalf. After the hearing, the panel unanimously upheld the October 28 discharge, finding that “[b]ased on the facts presented and the grievant’s own testimony the committee finds no violations of any contract articles therefore the grievances (#22310 and #22311) are denied.” Because the joint panel denied Atkinson’s grievance, he was officially discharged.

Atkinson had also timely filed charges with the Board alleging that his discharge violated the Act. After a hearing, the administrative law judge applied *Babcock* in rejecting the Respondent’s argument that the Board should defer to the joint panel’s decision upholding the discharge. Based on the record in the unfair labor practice proceeding, the judge found that Atkinson’s October 28 discharge and his prior June 20 discharge were unlawful.

On March 15, 2019, the Board issued a Notice and Invitation to File Briefs in this matter, inviting the parties to file briefs addressing the following questions:

1. Should the Board adhere to, modify, or abandon its existing standard for postarbitral deferral under *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014)?
2. If the Board decides to abandon the *Babcock* standard, should the Board return to the holdings of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), or would some other modification of the Board’s standard for postarbitral deferral be more appropriate?
3. If the Board decides to abandon the *Babcock* standard in favor of either the *Spielberg/Olin* standard or some other standard for postarbitral deferral, should it apply the newly

⁵ The Respondent had previously discharged Atkinson for a similar violation on June 20. He grieved the discharge and continued to work pursuant to a contractual provision that required UPS to continue to employ him until the grievance was resolved. There is no evidence that this grievance was ever resolved, but the resolution of his October 28 discharge was apparently conclusive as to the end of his employment with the Respondent.

adopted standard retroactively in this case and other pending cases or prospectively only?

Thereafter, the General Counsel, the Respondent, and the Charging Party each filed a brief and a reply. The United States Chamber of Commerce (Chamber) and the Association for Union Democracy (AUD) filed amicus briefs. Both the General Counsel and the Respondent argue that the Board should return to the *Spielberg/Olin* standard because it achieved a better balance between the national policy favoring arbitration and employees’ rights under the Act. The General Counsel further argues that the Board should take this opportunity to clarify when an arbitral award will be found clearly repugnant to the Act under the *Olin* standard. The Charging Party argues that the Board should retain the *Babcock* standard in order to ensure the protection of employees’ statutory rights. The Chamber argues that the Board should adopt a waiver-based deferral standard. The AUD, emphasizing a concern for protection of the individual statutory rights of union dissidents, also argues for retention of the *Babcock* standard and further contends that the Board should not defer to joint arbitral panels that lack a neutral member.

II. ANALYSIS

A. Legal Background Prior to *Babcock*

Debate over Board deferral to collectively bargained grievance-arbitration procedures has always involved how to balance two statutory mandates: first, the Board’s exclusive administrative authority and mandate under Section 10(a) of the Act to prevent unfair labor practices; second, the declaration in Section 1 of the Act that its purpose is to reduce industrial strife by “encouraging practices fundamental to the friendly adjustment of industrial disputes” and “encouraging the practice and procedure of collective bargaining,” a purpose that Section 203(d) further defines by stating that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” In light of these mandates, it is generally understood that a Board policy of deferring to grievance arbitration is discretionary—that is, the Board does not cede its jurisdiction when deferring—but deferral is strongly favored as a primary mechanism for encouraging labor relations stability in collective-bargaining relationships. It is preferable, when feasible, to let the parties resolve employment disputes through negotiated mechanisms of their own choosing without resort to the Board’s processes.

A substantial body of Federal jurisprudence, with the *Steelworkers Trilogy* as a foundation stone, supports the proposition that the establishment by parties to a collective-bargaining relationship of an autonomous system of industrial self-government through grievance arbitration is the culmination of the statutory scheme that Congress empowered the Board to uphold. See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960) (stating that the “policy” set forth in Section 203(d) “can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play”); *Steelworkers v. Warrior & Gulf Navi-*

gation Co., 363 U.S. 574, 581 (1960) (“[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.”); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (noting “[t]he federal policy of settling labor disputes by arbitration”). See also *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (“Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the ‘common law’ of the plant.”), and *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377 (1974) (“The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command.”).

Therefore, while the Board retains its exclusive statutory jurisdiction to resolve unfair labor practice issues, it realizes its statutory duty, rather than abdicates it, when exercising the discretion to allow disputes to be resolved through the mechanisms to which the parties themselves agreed. See *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (“[T]he Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.”); *International Harvester Co.*, 138 NLRB 923, 927 (1962) (observing that the Board “has not permitted parties to bypass their specially devised grievance-arbitration machinery for resolving their disputes”), *affd. sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied* 377 U.S. 1003 (1964); *Denver-Chicago Trucking Co., Inc.*, 132 NLRB 1416, 1421 (1961) (finding it appropriate to defer to arbitration if “the parties have found that the machinery which they have created for the amicable resolution of their disputes has adequately served its purpose”).

In 1955, the Board in *Spielberg*, *supra*, first articulated the guiding principles for when it would exercise its discretion to defer to an arbitration decision resolving an unfair labor practice issue. It found deferral appropriate when the arbitral proceedings “appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.” *Id.* at 1082. The Board did not elaborate on the repugnancy prong, other than to say that the decision to defer “does not mean that the Board would necessarily decide the [unfair labor practice] issue as the arbitration panel did.” *Id.* Subsequently, in *International Harvester Co.*, the Board stated that it would decline to defer to an arbitral award only if the award “was at variance with settled law and therefore clearly repugnant to the purposes of the Act.” 138 NLRB at 928. The Board deferred to the arbitrator’s award in that case “since it plainly appears to us that the award is not palpably wrong. To require more of the Board would mean substituting the Board’s judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, ‘as part and parcel of the collective bargaining process.’” *Id.* at 929 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578).

In *Raytheon Co.*, 140 NLRB 883, 886 (1963), *enf. denied* on other grounds 326 F.2d 471 (1st Cir. 1964), the Board held that it would not defer to an arbitrator’s decision if the arbitrator failed to consider and rule on the unfair labor practice issue.⁶ From 1972 to 1984, Board vacillation in the application of the *Raytheon* “consideration” and *Spielberg* “repugnancy” standards resulted in periodic shifts between limited and expansive deferral to arbitration awards under *Spielberg*, culminating in the re-adoption of a restrictive standard in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).⁷ Then, in its 1984 decision in *Olin*, the Board rejected the prior restrictive approach to deferral set forth in *Suburban Motor Freight* and held that it would defer to an arbitral award “if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.” *Olin*, 268 NLRB at 574. *Olin* also clarified the *Spielberg* “repugnancy” standard, finding deferral appropriate “[u]nless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act.” *Id.* (internal footnote omitted).⁸ Finally, *Olin* placed the burden of proof under the above standard on “the party seeking to have the Board reject deferral and consider the merits of a given case.” *Id.*

The *Olin* majority defended these changes as consistent with a “national policy [that] strongly favors the voluntary arbitration of disputes” and as “necessary to restrict the ‘overzealous dissection of [arbitrators’] opinions by the NLRB’ decreed by the Ninth Circuit in *Douglas Aircraft*, [609 F.2d at 355].” *Id.* In the *Olin* majority’s opinion, “[t]hat misdirected zeal has resulted in such infrequent deferral by the Board that its occasional exercise has had little substantive relationship to a mechanism which daily settles uncounted labor disputes.” *Id.*

⁶ The Board did not specifically state whether this procedural requirement would be a separate part of the *Spielberg* test or would be reviewed as an element of the third “repugnancy” part of the test. Both *Olin* and *Babcock* appear to treat the “adequate consideration” requirement as a separate part of the test, antecedent to the substantive “repugnancy” analysis, and we believe this is the preferable approach.

⁷ See *Airco Industrial Gases*, 195 NLRB 676, 677 (1972) (deferral improper because the “award gave no indication that the arbitrator ruled on the unfair labor practice issue”); *Yourga Trucking*, 197 NLRB 928, 928 (1972) (burden of proof rests with party seeking deferral); *Electronic Reproduction Service Corp.*, 213 NLRB 758, 761 (1974) (overruling *Airco* and *Yourga* and holding that Board will defer to arbitral awards unless the party opposing deferral could show that special circumstances prevented that party from having a full and fair opportunity to present evidence relevant to the statutory issue); *Suburban Motor Freight, Inc.*, 247 NLRB 146, 146–147 (1980) (overruling *Electronic Reproduction* and returning to *Airco/Yourga* standard).

⁸ Although not specifically cited on this point, it seems likely that this clarification had its source in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582–583 (“An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”). See also *Douglas Aircraft*, 609 F.2d 352, 354 (9th Cir. 1979) (“If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was ‘clearly repugnant’ to the Act.”), quoted with approval in *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 374 (3d Cir. 1980).

The *Olin* Board provided further insight into its clarification of the *Spielberg* repugnancy standard through its application to the arbitrator's award at issue in *Olin*, which found the parties' contractual no-strike language was sufficient to justify the discharge of employee Spatorico for his role as a union official in a sick-out protest for which other participants were only given written reprimands. The Board noted that under the recent holding of the Supreme Court in *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983), a union could waive the protection afforded union officials against imposition of more severe sanctions for participating in an unlawful work stoppage if the waiver is clear and unmistakable. The Supreme Court found that the general no strike/no lockout language at issue in that case was insufficient to establish a waiver. Noting that the arbitrator had interpreted additional, more specific language in the parties' contract at issue in *Olin*, the Board stated:

Certainly, were we reviewing the merits, Board Members might differ as to the standards of specificity required for contractual language waiving statutory rights and as to whether the above language meets those standards at least as applied to employee Spatorico. The question of waiver, however, is also a question of contract interpretation. An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes.

268 NLRB at 576. The Board concluded that "the arbitrator's contractual interpretation is not clearly repugnant to either the letter or the spirit of the Supreme Court's opinion in *Metropolitan Edison*." *Id.* In essence, it was susceptible to an interpretation that the union had waived its official's protection from discriminatory discipline for participating in an unprotected work stoppage.

The *Olin* standard remained in place and was applied by the Board in numerous cases from 1984 to 2014. In doing so, the Board deferred to arbitral decisions at a higher rate than prior to 1984, but it still found deferral was not warranted in some instances.⁹ Further, during that period, all but one of 10 United

⁹ According to a detailed 1987 review by one commentator of postarbitral Board decisions since *Olin*,

[t]he Board's post-settlement deferral rate under *Spielberg* has shown a dramatic upswing since *Olin*, from thirty-four percent of the deferral cases considered by the Board during the three decades after *Spielberg* to sixty-seven percent of the cases considered after *Olin*. Forty-eight post-settlement deferral issues have been presented in the forty-seven cases decided since *Olin*. The Board deferred to the grievance settlement or arbitration award in thirty instances. Of the eighteen issues not deferred, the largest number were reversed as repugnant to the Act. The Board also declined deferral in cases involving representation questions, procedural bars, insufficient contractual scope, no deferral request, a nongrievance settlement, insufficient evidence, nonparallel contractual and statutory issues, and alleged employer retaliation.

Calvin W. Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 Ohio St. L.J. 595, 635 (1987). See also a 10-year summary of 43 postarbitral deferral cases in speech by then-Chairman

States Courts of Appeals "routinely approved or applied without adverse comment the *Spielberg/Olin* standards" as a general deferral policy.¹⁰

B. *The Board's decision in Babcock*

In 2014, the Board majority in *Babcock* made sweeping changes in the longstanding *Olin* standard, imposing conditions on deferral in discharge and discipline cases that are even more restrictive than under the short-lived *Suburban Motor Freight* regime that *Olin* overruled. Based on a perception that "[t]he current [*Olin*] standard creates excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory issue, or when it is impossible to tell whether he or she has done so," 361 NLRB at 1128 (footnote omitted), the *Babcock* majority announced a new standard for postarbitral deferral in cases alleging discharge and discipline violations of Section 8(a)(3) and (1) of the Act. The new standard changed the Board's procedural and substantive deferral criteria and shifted the burden of proof to the proponent of deferral. Specifically, deferral in 8(a)(3) and (1) cases under *Babcock* would only be appropriate "if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." 361 NLRB at 1131.¹¹ In addition, *Babcock* returned to the rule announced in *Yourga Trucking* and reaffirmed in *Suburban Motor Freight* that "that the party urging deferral has the burden to prove that the substantive requirements for deferral have been met." *Id.* at 1136.

Under *Babcock's* new deferral standard (1) above, deferral would be appropriate only when the party urging deferral "demonstrate[es] that the specific statutory right at issue was incorporated in the collective-bargaining agreement. If the right was not incorporated in the contract, the proponent must show that the parties explicitly authorized the arbitrator to decide the statutory issue [presented in a particular case]." *Id.* at 1131.

Under *Babcock's* new deferral standard (2), deferral would be appropriate "only where the party urging deferral demonstrates that the arbitrator has actually considered the unfair

John C. Truesdale, *NLRB Deferral To Arbitration: Still Alive and Kicking*, 2000 WL 3359494 (2000).

Postarbitral cases decided by the Board likely represent only a small part of the agency's overall postarbitral deferral decisions, which include decisions made at the regional office level. However, the General Counsel does not keep statistics on the number of postarbitral deferral decisions.

¹⁰ *Babcock*, 361 NLRB at 1156 (Member Johnson, dissenting in part) (listing cases). The Eleventh Circuit in *Taylor v. NLRB*, 786 F.2d 1516 (1986), was the only reviewing court to disapprove the *Olin* deferral standard. As discussed below, we believe the court's opinion was based on a mistaken interpretation of *Olin* and on precedent critical of the earlier and broader deferral standard in *Electronic Reproduction*, *supra*.

¹¹ *Babcock* did not disturb existing deferral standards for unfair labor practice cases involving alleged violations of Sec. 8(a)(5). It also left intact the *Spielberg* requirements that an arbitral proceeding appear to have been fair and regular and that all parties had agreed to be bound by the result.

labor practice issue, or that although the statutory issue is incorporated in the collective-bargaining agreement, the party opposing deferral has acted affirmatively to prevent the proponent of deferral from placing the statutory issue before the arbitrator.” *Id.* at 1132. Further, the Board would find that the arbitrator has actually considered the statutory issue only when it has been shown that “the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation.” *Id.* at 1133.

Finally, under *Babcock*’s new deferral standard (3), “the arbitrator’s decision must constitute a reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case. The arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach.” In reviewing the evidence submitted in arbitration, the Board stated that it would not be bound by the arbitrator’s factual findings, including credibility findings, based on this evidence. *Id.* at 1138.

In addition to these sharp departures from the *Olin* postarbitral standard as well as the *Spielberg* “repugnancy” standard, *Babcock* made correlative restrictive changes in prearbitral deferral standards, holding that it would no longer be appropriate to defer litigation of Section 8(a)(3) and (1) unfair labor practice charges to contractual grievance arbitration procedures “unless the arbitrator was explicitly authorized to decide the unfair labor practice issue.” *Id.* at 1138–1139 (overruling *United Technologies*, 268 NLRB 557 (1984)). It also held that it would apply to prearbitral grievance settlements the same new standard applicable to postarbitral awards, thus requiring that “it must be shown that the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement.” *Id.* at 1139 (overruling *Alpha Beta Co.*, 273 NLRB 1546 (1985)). In determining whether the last part of this test is met, the *Babcock* Board would assess such agreements in light of the factors set forth in *Independent Stave*, 287 NLRB 740, 743 (1987).¹² *Id.* at 1139.

The *Babcock* majority acknowledged that the Board’s usual practice of applying a new standard retroactively to all pending cases, including the case where the standard is announced, would in this instance frustrate the Act’s purpose of encourag-

¹² Under *Independent Stave* as applied to agreements to settle unfair labor practice allegations, the Board considers all the circumstances surrounding a settlement agreement, including (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of unlawful conduct or has breached previous settlement agreements resolving unfair labor practice disputes. 287 NLRB at 743.

Inasmuch as the *Independent Stave* factors apply to the settlement of pending unfair labor practice cases, it is not at all clear how the *Babcock* majority intended them to apply to prearbitral grievance settlements where no unfair labor practice charge had yet been filed.

ing collective bargaining because of its disruptive effects on parties whose bargaining agreements, executed in reliance on *Olin*’s longstanding standard, did not expressly authorize an arbitrator to decide unfair labor practice issues. Accordingly, the new *Babcock* standards would only apply prospectively. The discharge issue in *Babcock* itself was decided under the *Spielberg/Olin* standard, and the complaint was dismissed based on deferral to a grievance subcommittee’s decision that the Board unanimously found to be susceptible to an interpretation consistent with the Act.¹³ On review, a panel of the Ninth Circuit rejected a challenge to the Board’s failure to apply the new deferral standard retroactively and did not address the merits of the new standard. *Beneli v. NLRB*, 873 F.3d at 1094. The court opined that one factor weighing heavily against retroactive application was that

[t]he new standard shifts the burden of proof for challenging the arbitration award to the party advocating deferral to the arbitral award and is less deferential to the arbitrator’s decision. The more deferential *Spielberg/Olin* standard controlled for almost 60 years, and employers and unions relied upon it during that time period. Courts of appeals throughout the country, including this one, repeatedly upheld that standard. Thus, the new standard represents an abrupt departure from well-established practice.

Id. at 1099–1100.

C. *Babcock* is overruled

The *Babcock* decision represents a policy choice based on the then-majority’s differing view of the relative weight to be assigned the protection of employees’ individual statutory rights and the encouragement of grievance arbitration in a collective-bargaining relationship. The *Babcock* majority did not rely on any empirical evidence in support of its new deferral standards, and it disclaimed the suggestion that the prior *Spielberg/Olin* deferral standard constituted an impermissible construction of the Act. 361 NLRB at 1128 fns. 5 and 6. In our view, the *Spielberg/Olin* postarbitral standard, as well as the related prearbitral standards in *United Technologies* and *Alpha Beta*, are not just permissible constructions of the Act. They represent a cohesive policy choice that is far more commensurate with the role contemplated by Congress for arbitration of statutory claims and for Board deference to the grievance arbitration process and its results. To fully effectuate the policies and purposes of the Act, *Babcock* must be overruled and the prior deferral standards must be reinstated.

Babcock is premised on two fundamental and mistaken concepts.

The first is the factual presumption that there is an “excessive risk” that arbitrators will not adequately consider statutory issues implicated in discharge and discipline cases unless they are expressly authorized to do so and required to make specific findings as to those issues. This presumption of “excessive risk” is belied by the inability of the *Babcock* majority to do more to support it than to refer to the facts of *Babcock* and the

¹³ Members Miscimarra and Johnson concurred in relevant part.

outcome in two other cases¹⁴ during the entire 30-year history of *Spielberg/Olin* jurisprudence.¹⁵ To fill the obvious gap, and giving no counterweight to cases in which the Board declined to defer under *Spielberg/Olin*, the majority resorted to speculation that an unknown number of additional cases might (or implicitly must) exist but were “never brought to the Board because the General Counsel or the party who would challenge deferral correctly assume[d] that, under our current [*Spielberg/Olin*] standard, the Board would defer.” *Id.* at 1132.

This speculative stretch reflects a general distrust of arbitration as adequate to protect individual statutory rights under the Act in discharge and discipline cases. *Babcock* made no overt claim that arbitrators lack competence to decide these cases consistent with statutory principles,¹⁶ nor would any such claim be tenable. Arbitrators “are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements. When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.” *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596–597. And as a general matter, “arbitral tribunals are readily capable of handling . . . factual and legal complexities,” and “there is no reason to assume at the outset that arbitrators will not follow the law.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (citations omitted). Indeed, “[w]here the statutory issue [in labor arbitration] is primarily factual or contractual, an arbitrator is in as good, if not better, position than the Board to resolve the issue.” *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1441 (9th Cir. 1984); accord: *Bloom v. NLRB*, 603 F.2d 1015, 1020 (D.C. Cir. 1979).

¹⁴ *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985), and *Airborne Freight Corp.*, 343 NLRB 580 (2004).

¹⁵ As previously noted, there is a similar paucity of adverse judicial precedent during this period with respect to the validity of the *Spielberg/Olin* standard, although several courts of appeals disagreed with the Board’s decision to defer or not to defer under that standard based on the facts in a particular case. The Eleventh Circuit was the only court of appeals that rejected the standard itself, stating in *Taylor v. NLRB*, 786 F.2d at 1521–1522, that “[b]y presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board’s responsibility under the NLRA.” *Taylor* relied in part on a trio of Supreme Court cases that are distinguishable on the basis of the statutory rights involved (see fn. 21) and in part on what appears to be a misconception that the *Olin* standard is equivalent to the earlier deferral standard in *Electronic Reproduction*, *supra*. In addition, as noted by dissenting Member Johnson in his *Babcock* dissent, the court “seem[ed] also to have been much influenced by its view that the Board had simply failed to follow its own *Spielberg/Olin* standard in the circumstances of that case” with respect to whether the joint committee arbitration proceedings in that case were “fair and regular.” 361 NLRB at 1156 (citing *Taylor*, 786 F.2d at 1522).

¹⁶ However, *Babcock* did arguably damn with faint praise the ability of arbitrators to resolve statutory issues: “We recognize that many arbitrators, as well as many union and employer representatives who appear in arbitral proceedings, are not attorneys trained in labor law matters.” 361 NLRB at 1133.

More importantly, *Babcock*’s implicit distrust of arbitration is untenable in the face of the principles expressed in Section 1 and Section 203(d) of the Act, in the Federal Arbitration Act,¹⁷ and in the overwhelming body of judicial precedent voicing confidence in, and strong preference for, resolution of discharge and discipline cases through collectively bargained grievance arbitration procedures. As the Supreme Court stated: “[T]he hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”¹⁸

The second mistaken concept underlying *Babcock* is the legal premise that individual statutory rights remain unaffected by grievance arbitration provisions in collective-bargaining agreements and are independent of contractual rights, and that the Board retains in full its primary adjudicatory role (as opposed to authority) to protect those rights. On the contrary, “[i]n the NLRA, Congress clearly did not seek to segregate private dispute resolution as a remedy separate from and independent of statutory remedies. Indeed, § 203(d)’s express preference for private remedies reflects Congress’ considered view that, with regard to NLRA rights, private and public dispute resolution were *not* independent, but interdependent.”¹⁹ In fact, in many discharge and discipline cases addressed in grievance arbitration, factual congruency and contractual just cause or nondiscrimination provisions effectively mean there are no real statutory issues to litigate apart from contractual issues. Resolution of one issue necessarily resolves the other. Moreover, many individual statutory rights that may exist prior to collective bargaining may change or be eliminated as a result of the bargaining process. It is well established that a union can and frequently does waive many individual employee rights under the Act in collective-bargaining agreements, including, e.g., the right to strike and the right to refuse to cross a lawful picket line.²⁰

In light of the foregoing, it would seem obvious that the parties’ grievance arbitration machinery, rather than the Board, becomes the primary mechanism for resolving everyday employment disputes, even when those disputes may arguably present issues of statutory protection. The Supreme Court’s expansive view of the role of grievance arbitration in collective bargaining under the Act certainly gives no indication that a “carve out” should exist for putatively independent statutory issues relating to discharge and discipline. In fact, it is difficult

¹⁷ “The FAA was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

¹⁸ *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578. Of course, numerous subsequent Supreme Court decisions have made clear that the FAA’s provisions were also intended to reverse the hostility towards arbitration under commercial agreements noted in *Steelworkers v. Warrior & Gulf Navigation*.

¹⁹ *Hammontree v. NLRB*, 925 F.2d 1486, 1497–1498 (D.C. Cir. 1991) (internal quotation marks omitted).

²⁰ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

to understand how a restrictive Board policy of deference to arbitration on those issues can possibly be reconciled with *Steelworkers Trilogy* principles. In *Warrior & Gulf Navigation*, the Court stated that “[a]rbitration is the means of solving the unforeseeable by molding a system of private law for *all the problems* which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.” 363 U.S. at 580 (emphasis added). And in *American Mfg. Co.*, the Court stated that Section 203(d)’s “policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play,” and “[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all disputes* that arise under the agreement.” 363 U.S. at 566, 567 (emphasis added).²¹

In sum, contrary to *Babcock*’s premise that individual statutory rights and the Board’s primary adjudicatory role in protecting them remain unchanged after parties have collectively bargained a contract including provisions for a private grievance arbitration system,

[t]he national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case. The parties are not injured by deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process. To the extent that the parties surrender their right to a subsequent full hearing before the Board or a court, it is a voluntary waiver, consistent with the national policy.²²

In this context, the Board best serves the national policy embedded in the Act by limiting review of the arbitral process and result. It is only “when the arbitration award cannot be arguably reconciled with the policies of the Act, [that] the Board will vindicate the federal interest by declining to defer.”²³

Apart from the two overarching policy reasons just discussed for rejecting the *Babcock* standard, we find there are other serious problems with the standard that further warrant reinstating the precedent and deferral practices overruled in *Babcock*.

1. *Babcock* risks impermissible interference with parties’ freedom of contract. *Babcock* held that the Board would not defer to an arbitration award in the absence of an express authorization that the arbitrator can decide statutory issues in discharge and discipline cases. Even as applied prospectively, this holding effectively required parties in a collective-bargaining relationship to rewrite facially lawful grievance arbitration contractual provisions in future contracts, or to mod-

²¹ We not regard the Supreme Court’s decisions in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), as supportive of a contrary view of the Board’s role in protecting individual statutory rights. Each of those cases involved nonwaivable individual rights under other statutes (Title VII, the FLSA, and 42 U.S.C. § 1983, respectively) that Congress intended to be judicially enforceable even if previously subject to arbitration.

²² NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d at 374.

²³ *Id.* at 375.

ify them by providing the requisite authorization on a case-by-case basis. As Member Miscimarra stated in his dissenting opinion in *Babcock*, 361 NLRB at 1147, there is a legitimate concern that this aspect of the majority’s decision contravenes the express terms of Section 8(d) of the Act, as affirmed in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), providing that the Board has no authority to compel the parties to agree to substantive terms of a contract. It is true that, strictly speaking, the parties do not *have* to provide this authorization, but failing to do so would result in forfeiture of their ability to utilize grievance arbitration to resolve disputes over discipline and discharge—historically among the most frequent subjects of that process.

2. *Babcock* encourages multiple litigation of a single contested discharge or discipline. *Babcock* summarily rejected arguments that the new standard would encourage unions to withhold evidence concerning unfair labor practice issues in arbitration proceedings in order to preserve the ability to relitigate those issues before the Board. The majority reasoned that an employer could raise the statutory issue even if the union did not, parties would normally be motivated to raise the issue in order to avoid the expense and time of unnecessary litigation, and if a party opposing deferral withheld evidence “the Board will assess whether Board law reasonably permits the arbitrator’s award in light of the evidence that has been presented.” *Id.* at 1133. This reasoning does not withstand scrutiny.

First, assuming that parties would, post-*Babcock*, include express authorization in their collective-bargaining agreements for arbitrators to address and resolve unfair labor practice issues,²⁴ it is not at all obvious why an employer defending a discharge or discipline would raise and then rebut the possibility of a statutory violation if the grievant did not raise the issue. Indeed, there is no reason to believe that an employer would even know that there was a possible statutory claim if an unfair labor practice charge had not been filed prior to the arbitration. In that case, not only would the employer be unable to raise the issue, but an arbitrator would clearly be unable to address it (assuming, as the *Babcock* majority would, that a separate statutory issue always exists).

As for *Babcock*’s claim that parties still would be motivated to resolve all issues in arbitration to avoid the expense and time of additional litigation, we question why any grievant would not want to preserve the possibility of a second chance to regain a job or reverse a disciplinary action in the event of an initial adverse arbitral ruling. This would seem particularly obvious and desirable when it is the General Counsel, not the grievant or the union that represents him or her, who will bear the administrative burden and costs in the second go-round. An employer, however, will have no such support in litigation against a government agency; unlike the grievant or union, it must foot its own bill. Consequently, even the threat that a grievant will seek a second bite of the apple would likely persuade many employers to negotiate settlements on terms less favorable than they may secure or have already secured in arbitration. *Bab-*

²⁴ This assumption is far from certain, as discussed at length by dissenting Member Miscimarra in *Babcock*. 361 NLRB at 1147–1148.

cock thus puts the Board's heavy thumb on the scales of the private collective-bargaining justice system.

Finally, *Babcock's* purported assurance that the Board would defer if shown that the party opposing deferral acted affirmatively to prevent the proponent of deferral from placing the statutory issue before the arbitrator is largely illusory. Deferral on this basis would apparently be justified only if the grievant or union representative affirmatively prevented an employer from raising the statutory issue. If the employer makes no attempt to raise the issue, the failure of parties opposing deferral to do so would not constitute the required affirmative act (and we have explained why it is unlikely that an employer would raise the statutory issue if the grievant does not). For that matter, even if the Board finds that a party opposing deferral has withheld evidence, under *Babcock* its assessment of the reasonableness of the arbitrator's award will be based on de novo review of the evidence presented in arbitration, giving no deference to the findings, including credibility findings, made by the arbitrator. Moreover, this review will take place after presentation of evidence in an unfair labor practice hearing. Under these circumstances, it is difficult to believe that review of the arbitrator's decision by an administrative law judge, and by the Board on exceptions, will not be colored by evidence presented in that subsequent proceeding.

3. *Babcock erred in shifting the burden of proof.* The *Babcock* majority reasoned that it was appropriate to place the burden of proof on the party urging deferral in accord with general precedent that the burden rests with a party urging an affirmative defense. It also criticized *Olin* for imposing what it deemed to be a "conclusive presumption that the arbitrator 'adequately considered' the statutory issue if the arbitrator was merely presented with facts relevant to both an alleged contract violation and an alleged unfair labor practice." 361 NLRB at 1130. Finally, reprising an argument from Member Zimmerman's dissent in *Olin*, *Babcock* also claimed that "there is 'no sound procedural basis at all for imposing on the General Counsel—the one party in unfair labor practice litigation who is not in privity through a collective-bargaining agreement—the responsibility of producing evidence about arbitral proceedings under that agreement.'" *Id.* at 1136 (quoting *Olin*, 268 NLRB at 580).

We adhere to precedent holding that postarbitral deferral is an affirmative defense that must be timely raised. However, we find merit in dissenting Member Johnson's view in *Babcock*, *id.* at 1154 fn.13, that a party meets the resulting burden by proving the existence of an arbitration award. Once that has been done, we find it more appropriate to impose the burden of proof with respect to deferral on the party seeking a *de novo* unfair labor practice hearing on the discharge or discipline that was the subject of the arbitration award. Doing so is consistent with the view of the Supreme Court in *Warrior & Gulf*, the second of the *Steelworkers* trilogy, that doubts regarding the propriety of deferral "should be resolved in favor of [contractual] coverage." 363 U.S. at 583.²⁵ See also *John Wiley & Sons, Inc. v.*

Livingston, 376 U.S. 543, 550 fn. 4 (1964) ("[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that an interpretation that covers the asserted dispute...be favored" (emphasis deleted; internal quotation marks omitted)).

We disagree that the burden imposed is impossible to meet. That argument may have had some traction in reference to the broad deferral standard and presumption set forth in *Electronic Reproduction*, where the Board would defer to an arbitral award "except in special circumstances," but it lacks merit when leveled against the *Olin* standard. As one commentator cogently stated,

the party arguing against deferral under *Olin* can succeed by showing that the unfair labor practice issue was not factually equivalent to the contractual grievance, or that the arbitrator was not presented generally with the facts necessary to decide the unfair labor practice. By contrast, under *Electronic Reproduction* an argument based on the failure to present relevant facts to the arbitrator would be grounds for granting deferral. In addition, a party urging against deferral under *Olin* can show that the arbitral award was not susceptible to an interpretation consistent with the NLRA. Finally, the party urging against deferral could rely on the remaining elements of the *Spielberg* test, available under any formulation of the standards. That is, the party could argue that proceedings were not fair and regular, or that the parties had not agreed to be bound by the arbitral decision.²⁶

Finally, we find no merit in the argument that it is unfair to impose the burden of proof on the General Counsel because he is not in contractual privity with the arbitration process. The General Counsel lacks independent authority to investigate unfair labor practices. Under Section 10 of the Act, an unfair labor practice charge must be filed to initiate any investigation,

a healthy regard for the federal policy favoring arbitration. . . . The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983); see also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (FAA "mandates enforcement of agreements to arbitrate statutory claims"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("[N]o warrant in [FAA] for implying . . . presumption against arbitration of statutory claims."); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (FAA "requires that [the Court] rigorously enforce agreements to arbitrate"). In the end, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp.*, 473 U.S. at 626 (emphasis added); see also *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) ("[T]here is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" (quoting *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. at 582-583).

²⁶ Thomas L. Kemp, *Further Convolutions In a Convoluted Policy: Olin, Taylor, and NLRB Deferral to Arbitration Decisions*, 82 Nw. U. L. Rev. 443, 468–469 (1988).

²⁵ Even apart from the provisions of Sec. 203(d) expressly favoring deferral to collectively bargained grievance arbitration, the Supreme Court has stated that "questions of arbitrability must be addressed with

and that investigation begins with the supporting evidence provided by the charging party. In discharge and discipline cases presenting deferral issues, the charging party will almost invariably be the grievant or the union representing that grievant in arbitration. Accordingly, there is no apparent reason why the General Counsel would not have full access through the charging party to evidence concerning the conduct and result of an arbitral proceeding that could meet the burden of showing deferral is inappropriate under the *Spielberg/Olin* standard.

4. *Babcock eviscerated the Spielberg “repugnancy” standard.* The *Babcock* majority replaced a standard for substantive review of an arbitral decision that had existed for nearly 60 years—i.e., that assuming all other deferral criteria are met, the Board will defer to an arbitral decision that is not clearly repugnant to the purposes and policies of the Act. Under the new standard adopted in *Babcock*, however,

deferral normally will be appropriate if the party urging deferral shows that Board law reasonably permits the arbitral award. By this, we mean that the arbitrator’s decision must constitute a reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case. The arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach. In deciding whether to defer, the Board will not engage in the equivalent of de novo review of the arbitrator’s decision.

361 NLRB at 1133 (footnote omitted).

As previously noted, the Board’s review under the “reasonableness” standard would not be based on the arbitrator’s own findings, including credibility resolutions, of evidence presented in arbitration. Even if Board review would be restricted to that evidence and would not, as we have suggested, likely be colored by evidence presented in a subsequent unfair labor practice hearing and by an administrative law judge’s findings based on that evidence, the new “reasonableness” standard gives less deference to an arbitrator’s factual findings than the Board gives to an administrative law judge’s findings.²⁷ Beyond that, *Babcock* provides no real insight into how Board review of an arbitrator’s mandated legal analysis of the statutory issue would differ, if at all, from its traditional de novo review of the merits of an administrative law judge’s legal analysis. *Babcock* provides only a single, far-from-illuminating example of how it would apply the reasonableness standard.²⁸ Further, *Babcock* casts a shadow of doubt by stating that deferral will “normally” be appropriate under that standard, leaving open the prospect that an even less deferential standard (if that is even possible) might apply in certain undefined circumstances.

²⁷ The Board will not overrule a judge’s demeanor-based credibility findings unless the clear preponderance of all the relevant evidence convinces us that the findings are incorrect. All other factual findings, as well as a judge’s legal conclusion based thereon, are subject to de novo review. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545.

²⁸ The *Babcock* majority indicated that the Board “might” defer to an arbitrator’s award that differed to some extent from the remedy that the Board would order for a violation found. 361 NLRB at 1133 fn. 16.

es. It is clear enough, however, that both the arbitrator’s analysis and the results of that analysis would be subject to an unprecedented degree of scrutiny under the new “reasonableness” standard, representing a marked departure from the Board’s traditional limited substantive review under *Spielberg*. In sum, notwithstanding *Babcock’s* disclaimer of de novo review, we agree with dissenting Member Johnson that this standard

is tantamount to requiring de novo review of the award by an administrative law judge in the unfair labor practice case and, upon exceptions, by the Board itself. There may be instances in which an award will survive this review even if the judge or Board might interpret the facts differently, but it seems far more likely that the current Board majority will defer only in circumstances where it would reach the same result under the facts as they would find them and under the law as they presently construe it.

This is not true deferral in any meaningful sense.

Id. at 1153.

Based on the foregoing, we conclude that *Babcock* should be overruled and that the requirements set forth in *Olin* for postarbitral deferral in unfair labor practice cases alleging discharge and discipline in violation of Section 8(a)(3) and (1) should be reinstated. Specifically, the Board will defer to an arbitration award in such cases if (1) the arbitration proceedings were fair and regular,²⁹ (2) the parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the Act.³⁰ As in *Olin*, the burden will be on the party

²⁹ We find no basis in amicus AUD’s arguments for departing from the Board’s long-established policy of deferral to joint arbitration panel decisions on the ground that those proceedings are inherently unfair to grievants who are union dissidents. The Board has repeatedly upheld application of the *Spielberg/Olin* standard to final and binding decisions of such joint panels, including those that lack a neutral member. E.g., *Airborne Freight Corp.*, 343 NLRB 580, 580 (2004). See also *General Drivers, Warehousemen, and Helpers, Local Union No. 89 v. Riss and Company, Inc.*, 372 U.S. 517 (1963) (holding that award of a Teamsters joint committee is judicially enforceable under Sec. 301 if parties intended in their collective-bargaining agreement that the award be final and binding). That does not mean, of course, that a party cannot prove in a particular case that the process engaged in by a joint panel has not been fair and regular. Under the *Spielberg* doctrine, the Board has declined to defer to decisions of bipartite grievance arbitration panels when, unlike in the present case, there has been evidence of bias, hostility or lack of impartiality by members of the panel. See *Roadway Express, Inc.*, 145 NLRB 513, 515 (1963).

³⁰ We find no need in this proceeding to address the arguments by the General Counsel and amicus Chamber that we should modify or replace the *Spielberg* repugnancy standard for substantive review of an arbitral decision inasmuch as either of the changes suggested would have no impact on the disposition of the deferral issue in this case, as discussed below.

arguing against deferral to demonstrate defects in the arbitral process or award.³¹

D. Retroactive application of the new standard

We must now decide whether to apply the *Spielberg/Olin* deferral standard retroactively, i.e., in all pending cases including this one, or prospectively only. “The Board’s usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage,” unless retroactive application would work a “manifest injustice.” *SNE Enterprises*, 344 NLRB at 673 (internal quotations omitted). “[T]he propriety of retroactive application is determined by balancing any ill effects of retroactivity against ‘the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’” *Id.* (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In determining whether retroactive application would result in “manifest injustice,” the Board considers “the reliance of the parties on pre-existing law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.” *Id.* Having considered these principles, we conclude that applying the pre-existing standard retroactively and dismissing the complaint would not work a manifest injustice.

In returning to the *Spielberg/Olin* deferral standard, we find retroactive application to all pending cases to be particularly appropriate. *Spielberg/Olin* was long-established Board precedent; the Board had applied it in numerous cases; and parties were familiar with and long relied on it. By contrast, *Babcock* has only been Board policy since December 2014, and it was to be applied prospectively only. In fact, the present case appears to be the only postarbitral deferral case to have come before us for review. Under these circumstances, “retroactive” application of the *Spielberg/Olin* deferral standard is little more than a continuation of what the Board has long done. Thus, retroactive application in this context cannot be said to work a manifest injustice.

E. Application of the restored Spielberg/Olin standard in this case

We find deferral to the January 14, 2015 joint panel decision to be appropriate. As discussed above, under *Spielberg/Olin*, the Board defers when (1) all parties have agreed to be bound by the arbitrator’s decision, (2) the proceedings appear to have been fair and regular, (3) the contractual issue is factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue, and (5) the arbitral decision is not clearly repugnant to the Act—i.e., the decision is susceptible to an interpretation that is consistent with the Act. In addition, under *Spielberg/Olin*, the burden rests on the party opposing deferral—here, the Charging Party—to show that the above standards were not met.

³¹ We will also reinstate the corollary standards for prearbitral deferral to grievance arbitration in *United Technologies*, 268 NLRB 557 (1984), and for deferral to prearbitral grievance arbitration agreements in *Alpha Beta*, 273 NLRB 1546 (1985).

First, it is undisputed that all parties agreed to be bound by the decision of the joint grievance panel. Second, even under *Babcock*, the judge did not find that the Respondent failed to show the joint panel proceedings were not fair and regular, and only the Charging Party relevantly excepted. Under the *Spielberg/Olin* standard, the General Counsel bears the burden of making that showing. Moreover, it is well established that the General Counsel, not the Charging Party, is in control of the complaint. In any event, we reject as unfounded speculation arguments suggesting that panel members were biased against Atkinson because of their involvement in negotiating the bargaining agreements that he actively opposed, or that Business Agent Fischer was biased against him because he ran against her in the local union election. It is clear from the record that the contractual issue as to Atkinson’s discharge was factually parallel to the unfair labor practice issue and that the joint grievance panel was presented generally with the facts relevant to deciding the statutory issue. Both of the grievances filed by Atkinson alleged violations of Section 8(a)(3) of the Act. The applicable Teamsters master agreement contains separate articles prohibiting discrimination based on union activity (art. 21), retaliation for enforcement of contract rights (art. 37), and discharge without just cause (art. 52). The written casefile presentations by both parties at the hearing referenced the allegations of statutory violations. Atkinson had the opportunity to testify and to answer questions by panel members. He acknowledged in his testimony at the unfair labor practice hearing that he did discuss his union activity before the joint panel.

The remaining question presented under *Spielberg/Olin* is whether the panel’s unanimous decision was repugnant to the Act as not susceptible to any interpretation consistent with the Act. The panel based its decision on “the facts presented and the grievants [sic] own testimony,” finding “no violation of any contract articles.” The interpretation of that decision can be no different than in *Babcock*, where all Board members agreed, with subsequent approval by the Ninth Circuit, that “the decision is arguably consistent with a finding that the [panel] considered and rejected the contention that the discharge was motivated by union...activities.” *Babcock*, 361 NLRB at 1140. The finding that Atkinson was discharged for failing to follow company procedures is therefore susceptible to an interpretation consistent with the Act. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 23, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Julie Stern, Esq., for the General Counsel.
Jennifer Asbrock, Esq., for the Respondent.
Catherine Highet, Esq., for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel alleges that United Parcel Service, Inc. (Respondent or UPS) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Robert C. Atkinson, Jr. (Atkinson or Charging Party) on June 20 and October 28, 2014 (it was possible to discharge Atkinson twice because Atkinson continued working while his grievance for the June 20 discharge was pending). Although Respondent maintains that it lawfully discharged Atkinson on both dates for not following UPS's methods and procedures, as explained in more detail below, I have found that Respondent's decisions to discharge Atkinson violated the Act because they were tainted by a plan among Atkinson's supervisors to use UPS's methods and procedures to get rid of Atkinson because of his union and protected concerted activities. However, based on evidence of misconduct by Atkinson that Respondent acquired after Atkinson's discharge, I have also found that Atkinson is not entitled to reinstatement, and is not entitled to backpay beyond June 21, 2016.

STATEMENT OF THE CASE

This case was tried in Pittsburgh, Pennsylvania on June 20–24 and August 22–25, 2016. Atkinson filed the charge in Case 6–CA–143062 on December 18, 2014.¹

The General Counsel issued the complaint in Case 6–CA–143062 on March 29, 2016. In the complaint, the General Counsel alleged that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Atkinson on or about June 20, 2014, and by discharging Atkinson on or about October 28, 2014, because Atkinson refrained from supporting and assisting Teamsters Local Union 538 (Teamsters Local 538) and engaged in protected concerted activities. Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I

¹ All dates are in 2014, unless otherwise indicated.

² The transcripts and exhibits in this case are generally accurate. However, both the General Counsel and Respondent filed motions to correct the trial transcript in this matter. In addition, during my review of the record, I also identified transcript corrections that are warranted.

Given the absence of any objections and (for the most part) the lack of any conflicts between the parties' requested corrections, I hereby grant in part and deny in part the General Counsel's and Respondent's motions to correct the trial transcript as indicated in Appendix B, which is a list of transcript corrections that is attached to this decision. Where the transcript corrections relate to the spellings of the names of non-supervisory employees who did not testify in the trial, I have granted the corrections as indicated in Appendix B, but to provide a measure of privacy I did not include the employee names in Appendix B.

make the following

FINDINGS OF FACT³

I. JURISDICTION

Respondent, a corporation with an office and place of business in North Apollo, Pennsylvania, engages in the business of receiving, sorting and delivering packages. In conducting its operations during the 12-month period ending on November 30, 2014, Respondent performed services valued in excess of \$50,000 in States other than the Commonwealth of Pennsylvania. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that Teamsters Local 538 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. UPS Background

1. General overview

UPS primarily is in the business of picking up and delivering small packages in the United States and internationally. To provide those services, UPS uses several facilities, including larger facilities (hubs) where packages are sorted and routed, and smaller delivery centers where drivers take packages to their final destinations and pick up packages to be shipped elsewhere. The International Brotherhood of Teamsters represents approximately 230,000 hourly employees who work for UPS in its package delivery operations. (Tr. 660–661, 726–727, 712–716, 1154.)

2. Collective-bargaining history

UPS drivers are covered by two collective-bargaining agreements: a national master agreement that covers all UPS drivers; and a local supplement agreement (of which there are approximately 36) that covers UPS drivers in the relevant geographical area. Historically, the national master agreement and the local supplement agreements have been linked for purposes of ratification, such that union members must ratify both the national master agreement (in a vote by all union members) and all local supplements (in separate votes by union members covered by each respective local supplement) before the agreements can take effect. (Tr. 87–88, 495–496, 663, 672–673.)

3. UPS package car driver procedures

UPS package car drivers are on the front lines of delivering and picking up packages to/from UPS customers. Because of that fact, UPS has implemented an extensive set of procedures that are aimed at ensuring that drivers complete their delivery routes in a professional, safe and efficient manner. UPS ex-

³ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case. I also note that in the interest of preserving a measure of privacy, I have used employee initials when discussing comparators to Atkinson, unless the comparator in question testified as a witness during the trial (in which case I use the comparator's full name).

pects its drivers to do the following (among other things) before leaving the UPS facility: meet appearance standards (e.g., by having trimmed hair and a clean and neat uniform); attend pre work communication meetings (PCMs) at the start of their shift to hear announcements and receive instructions; inspect their trucks for leaks, damage and mechanical problems; and use their Delivery Information Acquisition Device (DIAD or “board”)⁴ to download and review the stops on their assigned route (a procedure called “get EDD” (Enhanced DIAD Download)). (Jt. Exhs. 3, 4; R. Exh. 44; Tr. 47–48, 493–494, 567–568, 803, 957–960, 1215–1216; see also Jt. Exh. 5 (defining DIAD, EDD and PCM).)

When UPS drivers are on the road and running their routes, UPS expects them to determine the best path to make the deliveries on their route in a timely manner and generally in the package delivery order specified by EDD, and comply with all applicable traffic and safety laws. To facilitate driver efficiency and safety, UPS expects its drivers to follow various methods, procedures and instructions (known as the “340 methods”),⁵ including but not limited to: planning ahead (e.g., knowing the next few stops and thinking about the most effective way to complete them); having a smooth routine in the car (i.e., a routine that has no wasted motion); and making deliveries quickly and professionally (e.g., by minimizing time with the customer and having all necessary materials at hand to complete the delivery in one trip). Drivers must also ensure that they deliver Next Day Air packages by the designated time (usually by 10:30 am for the highest level of Next Day Air), since next day air delivery is a premium service that UPS provides. (Jt. Exhs. 3, 4; GC Exh. 3; Tr. 49, 55–56, 113, 246–247, 409–410, 435, 898–907, 1304.)

In part because its package car drivers are unsupervised when they are out making deliveries, UPS uses a “Telematics” system to collect and monitor information about how the drivers are using its trucks. For example, the Telematics system collects data on: the speed and location of the truck; whether the driver is wearing a seatbelt; how many times the driver backed the truck up each day; and whether and when the bulkhead door (the door between the cabin and package storage areas of the truck) is open. UPS generally may not take disciplinary action against employees based on information from Telematics alone, but where employee dishonesty is at issue, UPS may use Telematics to corroborate other evidence. (Tr. 56–57, 257, 351–352, 478–479, 549–550, 587, 615–616, 803–804, 1101–1102, 1258–1259, 1297.)

Finally, when drivers return to the UPS facility, they must remove any Next Day Air packages from the truck and drop them off with a Next Day Air clerk (to avoid having those time-

⁴ A DIAD is a handheld device that UPS drivers use to, inter alia, scan packages, download and review the stops on their assigned route, complete assigned training modules, and communicate with UPS supervisors. (Jt. Exh. 5.)

⁵ Although UPS drivers are familiar with the term “340 methods,” and UPS periodically communicates with and trains drivers about methods, procedures and instructions, UPS does not distribute a particular document to drivers about the 340 methods. (Tr. 55–56, 246, 357, 409–410, 523–525, 581, 610, 730–731, 767–768, 779–780, 804; R. Exh. 2.)

sensitive packages getting lost in the shuffle of other packages that do not have such a short delivery commitment). (Tr. 51.)

2. Disciplinary, grievance, and arbitration procedures

In general, UPS follows a progressive discipline policy (though UPS reserves the right to forego progressive discipline for certain “cardinal” infractions involving, inter alia, dishonesty, substance abuse or recklessness causing a serious accident while on duty, and also has the discretion to handle some issues informally with a “documented talk-with” or coaching).⁶ Under the progressive discipline policy, UPS will first issue a written warning notice to an employee who commits an infraction, with the warning remaining in effect for a period of up to nine months. If the employee commits another infraction of any kind while the warning is still in effect, then UPS may suspend the employee (typically for 3 days). Further infractions that occur while prior discipline remains in effect may result in UPS issuing a longer suspension (typically for 10 days), and ultimately, in UPS discharging the employee. (Jt. Exh. 2 (Article 52); Tr. 86–87, 249–250, 351, 373, 431, 549, 616–617, 775–777, 802–803, 840–841, 875, 1439; see also Tr. 780–781 (noting that if an employee committed multiple procedural, or “methods,” infractions on one day, the business manager would have the discretion to use one disciplinary action to address those infractions (instead of separate discipline for each infraction).)

Employees may file grievances to contest disciplinary action, including disciplinary action that the employee maintains is discriminatory and thus in violation of federal and/or state law. At step one of the grievance process, generally a manager from the facility meets with the union steward to discuss the discipline at issue and attempt to reach an agreed resolution (such as a “settlement” where the employee and UPS agree to a shorter suspension or a lower form of discipline). The process is similar at step two, but often the local union business agent will participate in the meeting in support of the employee, and a representative from UPS’s labor department will participate in support of management. If the dispute persists, then the grievance will proceed to step 3, where a panel composed of two UPS representatives and two union representatives will consider evidence and arguments from each side and then decide whether to uphold, modify or rescind the discipline. Finally, at step 4, an aggrieved party can submit the dispute for arbitration. Notably, an employee who has been suspended or discharged may continue working for UPS while his or her grievance of that disciplinary action is pending, unless the suspension or discharge was based on a “cardinal” infraction (i.e., an infraction that is sufficiently serious to warrant the suspension or discharge taking effect immediately). (Jt. Exh. 1 (Articles 7, 36); Jt. Exh. 2 (Articles 49, 52); Tr. 46–47, 86–87, 494–495, 801–802, 872–875, 1049–1051.)

B. The New Kensington Center

1. New Kensington center management overview

The New Kensington center (a.k.a. “New Ken” center) is one of UPS’s package delivery centers, and is located in North

⁶ The question of whether a documented talk-with or coaching qualifies as a form of discipline under the Act is not before me in this case.

Apollo, Pennsylvania. Generally speaking, a business manager (a.k.a. center manager) leads the New Kensington Center, and receives managerial support from an on road supervisor who supervises the drivers at the center, and from a dispatch supervisor who supervises the pre load employees at the center (i.e., the employees who load the package delivery trucks in the morning before drivers leave for their routes) and sets the routes for drivers each day. During most of the relevant time period in 2013, and 2014, Jeremy Bartlett served as the business manager at the New Kensington center (though he simultaneously served as business manager at the Zelionople package delivery center, and spent the majority of his time at that location),⁷ while Matt DeCecco served as the on road supervisor and Ray Alakson served as the dispatch supervisor. Keith Washington served as the division manager over the geographic region that includes the New Kensington center, and thus was Bartlett's supervisor. (Tr. 44–45, 1046–1047, 1091, 1254, 1257, 1345–1348, 1422, 1569–1571, 1625–1626, 1629–1631; see also Jt. Exh. 6.)

2. UPS's labor department and the New Kensington center

Among its various departments, UPS has a labor department that: handles contract negotiations; provides advice to UPS managers about labor-related issues; and represents UPS during disciplinary grievance proceedings (assuming the grievance is not resolved at step one of the grievance process). During most, if not all, of the relevant time period, Rob Eans served as UPS's district labor manager and Tom McCready served as UPS's labor manager for geographic area that includes the New Kensington center. In those capacities, both Eans and McCready consulted with New Kensington management about labor issues, and also served as UPS's spokesperson in the grievance process if a dispute about employee discipline proceeded past the first step of the grievance process. Eans and McCready also represented UPS in contract negotiations with local unions, including negotiations for the Western Pennsylvania supplement to the national master collective-bargaining agreement between UPS and the International Brotherhood of Teamsters. (Tr. 92–93, 662–665, 787–790, 841, 869–875, 1047–1051; Jt. Exh. 6.)

3. Robert Atkinson, Jr.—background

Robert Atkinson, Jr. began working for UPS at the New Kensington center in April 1988, and became a package car delivery driver in 1995. The most recent time Atkinson was disciplined at UPS before 2014, was in 2011, when Atkinson was disciplined in connection with an automobile accident. (Tr. 44–45, 93–94, 807–809, 876, 1350; R. Exh. 2 (p. 1).)

During his tenure with UPS, Atkinson was a member of Teamsters Local 538, and served as the shop steward for approximately 17 years until his employment with UPS ended in January 2015. As shop steward, Atkinson acted as a liaison between the managers at the New Kensington center and employees, and represented employees at disciplinary meetings. (Tr. 45–47, 86, 278–279, 807–808, 875–876.)

⁷ Bartlett was the business manager for the New Kensington and Zelionople centers from June 1 to August 1, 2013, and from April 1 to August 1, 2014. (Jt. Exh. 6; see also Tr. 1422.)

C. Fall 2012 to April 2013—Collective-Bargaining Agreement Negotiations

In the fall of 2012, UPS began negotiating with the International Brotherhood of Teamsters for a successor national master collective-bargaining agreement. In the same time period, UPS also began negotiating with local Teamsters negotiating committees for successor agreements to the local supplement collective-bargaining agreements. (In practice, UPS alternated every few weeks between bargaining sessions for the national master agreement and bargaining sessions for the local supplements.) (Tr. 663–665, 718–719, 871.)

By April 2013, UPS reached handshake agreements with the International Brotherhood of Teamsters on the terms of the national master agreement and with the local Teamsters negotiating committees on the terms of each local supplement agreement. Under the proposed new national master agreement (among other changes), any employees who were covered by the UPS health care plan would be switched to the Central States Health and Welfare plan (a.k.a. “Teamcare”).⁸ Through this change to employee healthcare, UPS expected to reduce its healthcare costs without imposing new out-of-pocket healthcare costs on employees. (Tr. 663–664, 668–671, 674, 722–723, 748, 792; Jt. Exh. 1 (Article 34, Section 2).)

D. May 2013—Contract Ratification Efforts and the “Vote No” Campaign

With contract negotiations complete, in or about May 2013, UPS and the International Brotherhood of Teamsters planned to present the national master agreement and the local supplements to union members for ratification votes. In connection with that plan, the International Teamsters Union recommended that bargaining unit members vote “yes” to approve the national master agreement and the local supplements, and circulated letters and flyers to outline some of the highlights in the national master agreement. UPS, meanwhile, circulated memoranda to UPS managers to explain the changes in the national master agreement, and to advise managers about the “Do’s and Don’ts for management during the contract education and voting process.” (Tr. 697–699, 748–750, 1205–1206, 1655–1656; GC Exh. 38 (pp. 7, 12); R. Exh. 52 (UPS memoranda about the national master collective-bargaining agreement and the contract ratification process).)

Several employees from around the country, however, opposed ratifying the national master agreement, with many citing the proposed change in employee healthcare plans as a major point of concern. In addition, several employees opposed ratifying their local supplement agreement, in part as a strategy to force UPS and the International Brotherhood of Teamsters to renegotiate the employee healthcare changes in the national master agreement, and in part as a strategy to demand concessions in the local supplement (including concessions that might offset some of the changes in the national master agreement). Collectively, employees who advocated against ratifying the

⁸ Employees who already were covered by a non-UPS healthcare plan were not affected by this change to employee healthcare, since they could simply continue with their non-UPS healthcare plan. (Tr. 668–669, 722–723.)

proposed collective-bargaining agreements titled their efforts as the “Vote No” campaign. Supporters of the Vote No campaign, including a group organized under the name Teamsters for a Democratic Union (TDU), used a variety of methods to advocate against ratifying the national master agreement and the local supplements, including: social media postings; petitions; flyers; and verbal communication between bargaining unit members. (Tr. 296, 302–303, 688–689, 792–795, 799, 1204–1205; GC Exh. 38 (p. 3); R. Exh. 51 (pp. 1–15); CP Exh. 6 (pp. 48–54, 61–73, 77–88, 92–93, 97–100, 113).)

A number of bargaining unit members covered by the Western Pennsylvania supplement joined and supported the Vote No campaign, including Atkinson, who started the Vote No campaign in the New Kensington center. Like Vote No campaign supporters in other locations, Atkinson and other bargaining unit members in Western Pennsylvania used social media postings, petitions, flyers and verbal communication to advocate that bargaining unit members reject the national master agreement and the Western Pennsylvania supplement. UPS was aware of and made an effort to monitor the Vote No campaign to gain a sense of what issues or concerns union members had about the national master agreement and Western Pennsylvania supplement. (Tr. 90–91, 297, 388–389, 444–445, 485, 495–496, 568–569, 689, 792–795, 833–835, 872; R. Exhs. 1 (Bates 01839), 22 (Bates 01839–01840, 02101); GC Exh. 38 (p. 4); CP Exh. 6 (p. 8–9).)

E. June 2013 – Bargaining Unit Ratifies National Master Agreement but Rejects Local Supplements in Western Pennsylvania and Several Other Locations

In late June 2013, bargaining unit members voted to ratify the national master collective-bargaining agreement negotiated by UPS and the International Teamsters Union. The national master agreement could not take effect, however, because bargaining unit members in 18 geographic areas (including Western Pennsylvania) did not ratify their applicable supplemental collective-bargaining agreements.⁹ (Tr. 88–89, 206–207, 296–297, 303, 673–676; CP Exh. 7; R. Exh. 41; GC Exh. 38 (p. 9).)

In light of those results, on or about June 28, 2013, UPS and the Teamsters UPS national negotiating committee agreed to extend the existing national master collective-bargaining agreement and all supplements “for an indefinite period of time subject to thirty (30) days written notice by either party.” UPS agreed that any increases in hourly wage rates, contributions and economic benefits that the parties negotiated would be retroactive to August 1, 2013. (Tr. 676–677, 755; Jt. Exh. 7.)

F. Summer 2013—UPS and the International Brotherhood of Teamsters Begin Efforts to Persuade Bargaining Unit Members to Ratify the Remaining Supplemental Collective-Bargaining Agreements

After learning that bargaining unit members did not ratify 18 supplemental agreements, UPS and the International Brotherhood of Teamsters began an effort to persuade those bargaining unit members to ratify the supplements in a second vote. In

⁹ Bargaining unit members covered by the Western Pennsylvania supplement had rejected supplements in the past, including in 1993, 1997, 2002 and 2007. (Tr. 303–304, 689–690, 790–791.)

connection with that effort, UPS communicated with local Teamsters officials and monitored Vote No campaign activities to gain a better sense of what issues or concerns led bargaining unit members to vote against ratifying the supplements, and to assess whether the parties could address those issues and concerns through further communication and negotiation. UPS also renewed negotiations with the applicable local union negotiating committees (including the negotiating committee for the Western Pennsylvania supplement). (Tr. 678–682, 690–692, 745–746, 798–799, 822–823, 833–834, 852–854; See also, e.g., CP Exh. 6 (pp. 74–75).)

The Teamsters UPS national negotiating committee, meanwhile, sent a letter dated July 29, 2013, to bargaining unit members covered by supplemental agreements that were not ratified. The letter stated, in pertinent part, as follows:

Dear UPS Members:

I am writing to bring you up to date on the status of the 2013 UPS contract and your Area Supplement or Rider.

As you know, the National UPS Agreement covering more than 220,000 Teamster members throughout the country has been approved by a majority of UPS Teamsters who voted. This contract will take effect after all Area Supplements and Riders, including yours, are also passed. . . .

It is important to clarify that while you or your fellow members covered by your Area Supplement may have voted against the National Agreement, a majority of Teamsters around the country voted to pass it. It is, therefore, a binding agreement between UPS and the Teamsters Union, and cannot be reopened.

A majority of Teamsters voting in your area voted against your Area Supplement. Many voted against the Area Supplement because they were unhappy with the change to a new health care plan that was negotiated in the National Agreement. Because health care is contacted in the National Agreement, another vote against the Supplement will not impact health care. The Supplement deals strictly with local area issues, not the broader economic and language issues that are covered by the National Agreement that has already been approved.

At the same time, there were local issues that people voting against the Area Supplement were concerned with. Your supplemental negotiating committee is now bargaining with the company to address these issues. Once a modified agreement is concluded we will bring that to you for a new vote. . . .

(R. Exh. 47; Tr. 678–679; see also 684 (noting that UPS agreed with the Teamsters UPS national negotiating committee that the national master agreement that bargaining unit members ratified was a binding agreement).)

G. Summer/Fall 2013 – the Vote No Campaign in Western Pennsylvania Continues

In the same time period, supporters of the Vote No campaign continued to advocate against ratifying the Western Pennsylva-

nia supplement.¹⁰ In various Western Pennsylvania locations, Vote No supporters distributed flyers, displayed Vote No signs and/or clothing in vehicles parked at UPS facilities, and verbally advocated for bargaining unit members to reject the Western Pennsylvania supplement again when it came up for another ratification vote. (CP Exh. 6 (pp. 1–6, 16, 18–28, 36–39, 109–112); GC Exh. 38 (pp. 1, 13).)

Atkinson became more involved in the Vote No campaign by, among other activities, distributing flyers, establishing a Vote No web page where area union members could learn about and discuss the Western Pennsylvania supplement, and later establishing a web page about Teamsters Local 538. (Tr. 90–91, 297–300, 392, 448, 485, 591, 1379–1380, 1382–1383.)

Managers at the New Kensington center were aware of Atkinson's ongoing activities in support of the Vote No campaign. In late 2013, dispatch supervisor Ray Alakson warned Atkinson and Mark Kerr (another UPS driver in the New Kensington center) that they should be careful about what they posted on the Vote No webpage because the UPS labor department was monitoring the posts.¹¹ (Tr. 91–93, 300–302, 390–392, 445–448, 485, 488–489, 1379–1380, 1382–1383.)

H. January 22, 2014—Atkinson Disciplined for Mishandling a Next Day Air Package

On January 22, 2014, on road supervisor Matt DeCecco¹² called Atkinson to a meeting (Alakson attended as an additional UPS representative, and UPS driver Dan Morris attended as assistant shop steward). At the meeting, DeCecco issued Atkinson a written warning notice for failing to follow proper procedures, methods and instructions because at the end of Atkinson's previous shift, Atkinson left a Next Day Air package on his truck instead of taking the package to the Next Day Air drop off area in the UPS facility.¹³ In addition to being a

¹⁰ The Vote No campaign also continued in various other locations in the United States where bargaining unit members had not yet ratified the applicable local supplement. (See, e.g., CP Exh. 6 (pp. 55–60, 94–95).)

¹¹ Alakson denied making these remarks (see Tr. 1390), but I do not credit that testimony. As a general matter, UPS drivers in the New Kensington center viewed Alakson as one of the more relaxed managers. (Tr. 473, 592; see also Tr. 1350 (Alakson agreed that he had a good working relationship with Atkinson).) Consistent with that reputation of being relaxed (and therefore approachable), Alakson admitted that Atkinson and Kerr spoke with him about the Vote No campaign and what they were fighting for. Given Alakson's relationship with Atkinson and Kerr, and Alakson's knowledge that managers were aware of the Facebook page where Atkinson posted remarks in support of the Vote No campaign (see Tr. 1379–1380, 1382–1383), Atkinson's and Kerr's testimony that Alakson warned them about posting on Facebook about the Vote No campaign rings true.

¹² DeCecco became the on road supervisor at the New Kensington center on or about January 15, 2014. DeCecco placed a higher level of emphasis on UPS rules and methods infractions than other previous supervisors. (Tr. 432–433, 435, 451, 472–473, 593, 1087, 1253; Jt. Exh. 6.)

¹³ The witnesses presented conflicting testimony about whether, in the same January 22 meeting, DeCecco rescinded a warning that Atkinson testified he received from on road supervisor Robert (Bob) Clark in December 2013, for not wearing a seatbelt while operating his truck. (Compare Tr. 94–96, 207–208, 340–341, 609–610, 614–615 with Tr.

Next Day Air package, the package required premium service because it was being shipped internationally and weighed more than 70 pounds. Due to Atkinson's oversight, UPS failed to deliver the package by the promised deadline, and thus had to deliver the package to the customer late and free of charge. Atkinson told DeCecco that he did not remember leaving a Next Day Air package on his truck, but apologized if that indeed happened. (Tr. 96–97, 247, 321–322, 1096, 1257–1258; GC Exh. 5; see also Tr. 502–503, 811, 876–877.)

Atkinson did not file a grievance to contest the January 22, 2014 written warning notice. (Tr. 248, 877.) In 2014 and 2015, UPS disciplined eight employees (including one supervisor) for mishandling Next Day Air packages, with five of those employees receiving written warning notices, two employees receiving suspensions, and one employee being discharged. Two additional employees received a documented talk-with for mishandling a Next Day Air package. (R. Exhs. 7, 65; Tr. 248, 877–878, 880–882, 1098–1100, 1659–1661.) Before 2014, UPS often used a verbal coaching or documented talk-with to correct New Kensington center employees when they mishandled Next Day Air packages, though employees who committed that infraction on multiple occasions could receive a written warning notice. (Tr. 97–98, 208–209, 415, 430–431, 483–484, 488, 503–504, 532–533, 586; see also Tr. 1395.)

I. Late January 2014—Bargaining Unit Again Rejects Western Pennsylvania Supplement

In late January 2014, bargaining unit members again voted against ratifying the Western Pennsylvania supplement, notwithstanding the recommendation of Teamsters Local 538 and other locals that members should ratify the supplement. Only a few (approximately 4–5) other supplements across the country remained unratified at that time. (CP Exh. 6 (pp. 107–108); R. Exh. 48; CP Exhs. 5 (pp. 66, 68), 7; GC Exh. 38 (p. 11); Tr. 89, 206–207, 682–683, 726–727.)

The Vote No campaign was active both before and after the second ratification vote, as supporters continued to use social media, flyers and verbal communication to advocate against ratifying the Western Pennsylvania supplement. UPS was aware that Atkinson and employee Mark Kerr were active in the Vote No campaign in the New Kensington center. (R. Exh. 1 (Bates 01871 – front and back of page); CP Exhs. 1, 5 (pp. 66–69), 6 (p. 104); Tr. 187–191.)

J. March 2014 – Disputes about Vote No Literature and Signs

For much of the Vote No campaign in the New Kensington center, Vote No supporters used a UPS employee safety bulletin board in the men's locker room to post Vote No flyers and literature. Employees also used the bulletin board to post non union-related materials such as jokes, raffle tickets and announcements about charity fundraisers. UPS managers rarely entered the men's locker room because they could only reach it by exiting the main building and walking outside to the locker

1101; see also Jt. Exh. 6; Tr. 239.) I note that there is no documentation in the evidentiary record that UPS issued or rescinded such a warning. In any event, I need not resolve this factual dispute because the seatbelt warning issue is not material to my analysis of the allegations in the complaint.

room, and because there was another bathroom (a women's bathroom that was rarely used) adjacent to their office. (Tr. 151–153, 158, 341, 367–368, 394–395, 440, 449–450, 453–455, 499–500, 555–556, 569–570, 593–594, 1210, 1213–1215, 1385–1386, 1555–1556, 1657–1659; GC Exhs. 19(a), 38; see also 561–564.)

In March 2014, DeCecco saw Atkinson and asked to speak with him. The following conversation ensued:

DeCecco: That bulletin board out in the locker room, who's been posting stuff on it?

Atkinson: Well, a lot of people post things on there.

DeCecco: Well, who is it?

Atkinson: I'm not going to tell you names of who posts on that board.

DeCecco: Well, that bulletin board is not for union material. I took a lot of stuff down off of there today, and from now on, anything that is posted on that board is posted through me, so show it to me and I'll tell you whether you can put it on that board or not.

(Tr. 153–154; see also Tr. 316–317, 1210, 1286.) DeCecco added that Atkinson could post literature on the union bulletin board (a bulletin board in a different location at the facility), but only if the literature was printed on union letterhead. (Tr. 1210–1212; see also Tr. 396, 398, 449–450, 1217–1218 (DeCecco gave similar instructions to Kerr regarding the locker room bulletin board and the union bulletin board).)¹⁴ Later in the week, DeCecco told UPS drivers at the morning PCM that the locker room bulletin board was intended for UPS health and safety information, and that employees should not place any literature on the locker room bulletin board without UPS approval.¹⁵ (Tr. 155, 396, 398–399, 500–501, 570–571, 1215–

¹⁴ According to Atkinson, DeCecco stated that he would consider allowing employees to post union literature on the locker room bulletin board if the literature was printed on union letterhead. (Tr. 154–155.) I did not credit that aspect of Atkinson's testimony because it was not consistent with the credible testimony that Kerr and DeCecco provided regarding what DeCecco expressed about bulletin board postings. (See, e.g., Tr. 396, 398, 450, 1210–1212, 1217–1218.)

On a related point concerning union literature and union letterhead, I note that the evidentiary record shows that Teamsters Local 538 supported ratifying the Western Pennsylvania supplement. Thus, although Atkinson had access to the union bulletin board as the shop steward, it is questionable as to whether Teamsters Local 538 would have permitted Atkinson to print Vote No campaign literature on union letterhead or to post such materials on the union bulletin board. (Tr. 317, 481, 486, 571, 1212, 1217; see also Tr. 1658.)

¹⁵ I do not credit Kerr's and Larimer's testimony that DeCecco also prohibited employees from passing out literature that was not on union letterhead. (See Tr. 393–394, 450–451, 570–571.) Instead, I credit DeCecco's testimony that, after consulting UPS's labor department, he told employees that they could distribute literature, but only at the entrance to the building or during nonwork time in nonwork areas. I also credit DeCecco's explanation that the union letterhead requirement was only for materials that employees wanted to post on the union bulletin board. (Tr. 1210–1212.) Although Atkinson could not remember DeCecco's instructions about passing out literature, Atkinson

1217.)

Given the limitations that DeCecco outlined for Vote No literature and the bulletin boards in the facility, Atkinson and Kerr made Vote No signs on posterboard and provided them to employees to post in their automobile windshields while their cars were parked in the UPS facility parking lot. Approximately 15–25 employees joined Atkinson and Kerr in placing Vote No signs in their automobile windshields. (Tr. 155–157, 193–194, 300, 315–316, 366, 399–400, 452, 497, 501, 529–530, 600, 1218–1219, 1385, 1553, 1654; GC Exhs. 19(a)–(b); CP Exh. 3.)

The Vote No signs prompted some reactions from UPS management. For example, when Atkinson and UPS labor manager Tom McCready encountered each other in the UPS office, the following exchange occurred:

McCready: I see you are putting signs in your cars out there.

Atkinson: Yes, I guess we are.

McCready: I guess you can do whatever you want.

Atkinson: Yeah. That's what we're left with. We can't put stuff in the bulletin board anymore.

(Tr. 209.)¹⁶ In addition, both Alakson and DeCecco took photographs of the Vote No signs and sent them to the UPS labor department for guidance. When Atkinson called DeCecco to ask why he was seen taking photographs (another driver had tipped Atkinson off about that), DeCecco replied "This is my parking lot. I can take pictures of whatever I want. Labor [is] interested in what's going on right here and it's my right to send them these pictures." DeCecco added that he was taking photographs because he needed to find out whether the Vote No signs in employee vehicles were permitted.¹⁷ (Tr. 160, 1218–1221.)

In late March 2014, UPS assigned Jeremy Bartlett to be the business manager for the New Kensington and Zelionople cen-

agreed that he did distribute literature in nonwork areas and nonwork time without being stopped by UPS. (Tr. 318.)

¹⁶ McCready testified that he did not threaten Atkinson about putting Vote No signs in his automobile. (Tr. 1027.) That limited denial does not undermine or rebut Atkinson's testimony about what McCready said – instead, McCready's testimony at most only sets forth McCready's subjective opinion that his remarks to Atkinson were not threatening.

¹⁷ Witness Bill Lange testified that when DeCecco was taking photographs of employee cars with Vote No signs, he (Lange) overheard DeCecco remark "labor isn't going to like this." (Tr. 502.) Similarly, Atkinson testified that he spoke with Alakson about the Vote No signs, and Alakson stated "those signs that you have in the vehicles out there are a problem. Labor knows about them and I just want you to know that that's a topic of conversation in labor right now." (Tr. 159.) Both DeCecco and Alakson denied making those remarks (although DeCecco's denials were somewhat off the mark since he denied speaking to Lange directly, and he denied making a slightly different statement than the one Lange said he overheard). (Tr. 1222, 1295, 1389.) I have not given weight to the testimony about DeCecco's and Alakson's remarks as described in this footnote because I find that the evidence is cumulative (i.e., the reaction of New Kensington and UPS labor department managers is clear enough from other testimony in the record that I have described in this section).

ters.¹⁸ When Bartlett visited the New Kensington center, he saw the Vote No signs posted in employee automobiles and took photographs to send to the UPS labor department for guidance. Bartlett also met with New Kensington supervisors to get up to speed on what was happening at the facility. In that conversation, the supervisors explained why there were Vote No signs posted on employee automobile windshields and identified Atkinson and Kerr as the employees who were involved in the Vote No campaign. (Tr. 1547–1549, 1551–1552; CP Exh. 3; see also Jt. Exh. 6; Tr. 1348.)

Ultimately, in various communications, the UPS labor department advised managers at the New Kensington center that they should keep an eye on the issue but avoid doing anything improper regarding employees posting Vote No signs in their cars. Accordingly, DeCecco notified Atkinson that the Vote No signs in employee vehicles were permitted. (Tr. 829, 1022–1023, 1221, 1386–1387, 1549; CP Exh. 5 (p. 19).) There is no evidence that UPS ever required any employees to remove Vote No signs from their cars. (See, e.g., Tr. 606, 1223, 1387–1388.)

K. April 1, 2014—Atkinson Receives Documented Talk with for Scanning the Same Delivery Notice Twice

On or about March 30, 2014, Atkinson attempted to deliver a package on his route, but was not able to complete the delivery because the resident at the address was not home to sign for the package. Consistent with UPS practice, Atkinson posted a delivery notice on the front door of the residence and scanned the notice with his DIAD. (Tr. 98–99, 400, 504, 571–572, 1291; see also CP Exh. 15 (example delivery notice).)

The next day, Atkinson made another attempt to deliver the same package, but again found that the resident was not at home to sign for the package. Consistent with his practice and the practice of other drivers, Atkinson filled out a second delivery notice and posted it next to the first notice on the front door of the residence. However, when Atkinson attempted to scan the second delivery notice, he accidentally scanned the first delivery notice instead. By making this mistake, the second delivery notice was not logged into UPS's electronic records, thereby creating the possibility that the resident at the address might receive inaccurate information about UPS's delivery efforts if the resident called UPS customer service to inquire about the package. (Tr. 99–101, 248–249, 400, 504–505, 572, 595, 1102–1106, 1288–1292.)

On April 1, DeCecco met with Atkinson to give him a documented talk with about erroneously scanning the first delivery notice when Atkinson was making a second delivery attempt.¹⁹ Dan Morris attended the meeting as Atkinson's union representative. In the meeting, DeCecco asserted that Atkinson should have removed the first delivery notice and left the sec-

ond delivery notice in its place. DeCecco did not seek to suspend Atkinson (the next step under UPS's progressive discipline policy) based on the delivery notice incident, and Atkinson did not file a grievance to contest the documented talk with. At the PCM the next day, DeCecco announced that drivers should remove the previous day's delivery notice whenever they were going to post a new delivery notice. (Tr. 98–100, 249–250, 505, 572–573, 596–597, 879, 1102–1103, 1106–1107, 1287–1288; GC Exh. 6.)

A few days later, Atkinson encountered DeCecco when Atkinson returned to the UPS facility at the end of his day. During the conversation, DeCecco asked Atkinson a procedural question about whether Atkinson would drive to a delivery location if Atkinson knew that the recipient was not available. When Atkinson said that he would still drive to the delivery location, DeCecco remarked that he “could have every driver on a working discharge” based on infractions for failing to follow UPS methods, procedures and instructions.²⁰ Atkinson responded by saying that it was a shame that DeCecco would make that remark because a lot of good people worked at the New Kensington center. (Tr. 102; see also GC Exh. 13 (indicating that Atkinson reported DeCecco's remark to the UPS integrity hotline); R. Exh. 55 (Bates 01781); Tr. 103, 107.)

L. April 2014—The Vote No Campaign Ends but Atkinson's Activities Continue

In late March and early April 2014, Atkinson continued his work in support of the Vote No campaign, including posting on social media. UPS management was aware of Atkinson's activities. (Tr. 199, 358, 860–861, 1019–1022; CP Exh. 5 (pp. 20–43 (emails between UPS labor department managers McCready and Eans with Atkinson's, Kerr's and other individuals' Vote No Facebook postings attached); R. Exhs. 22 (Bates 1887–1888), 55 (Bates 01781).)

In addition, Atkinson and other UPS drivers posted on Facebook to voice their frustration and disagreement with UPS's procedural methods and decisions to discipline drivers for methods infractions. For example, Atkinson, Kerr and other drivers posted their objections to UPS using Telematics as a source of information that could lead to discipline. Atkinson and other drivers also took issue with UPS's performance standards, with Atkinson posting “I was 2 hours over yesterday . . . [laugh out loud] . . . their ‘standards’ are insane!” New Kensington center manager Bartlett received and saved screenshots of Atkinson's posts. (R. Exh. 55; Tr. 259, 262–265, 358–359, 1561–1564.) Once again, Alakson (through a passing conversation with Bill Lange in this time period) warned that UPS drivers should watch what they posted on Facebook.²¹ (Tr. 498–499, 526, 530; see also Tr. 1382–1383.)

On or about April 25, 2014, the Vote No campaign came to

¹⁸ Although Bartlett was assigned as the business manager for both New Kensington and Zelionople, Bartlett spent the majority of his time at the Zelionople center because it was a larger facility. (Tr. 1348, 1423.)

¹⁹ Before Atkinson's delivery notice incident, UPS coached or gave a documented talk with to other drivers who erroneously scanned the first delivery notice when they were making a second delivery attempt. (Tr. 401, 505–506, 573–575; see also Tr. 533–534.)

²⁰ In response to a question by Atkinson's attorney, DeCecco initially denied making the statement about being able to have every driver on a working discharge, but then stated that he did not remember making the statement. (Tr. 1295.) In light of DeCecco's equivocal testimony, I have credited Atkinson's testimony on this point.

²¹ For the reasons set forth in footnote 11, supra, I do not credit Alakson's testimony (see Tr. 1390) that he did not warn the drivers to watch what they posted on Facebook.

an abrupt end when the International Brotherhood of Teamsters amended its constitution in manner that enabled it to accept UPS's last, best, final offers on the Western Pennsylvania supplement and two other supplements even though bargaining unit members had not ratified those agreements.²² Accordingly, both the national master agreement and all 36 supplements immediately took effect, notwithstanding the persisting objections of bargaining unit members who supported the Vote No campaign. (GC Exh. 4; Jt. Exhs. 1–2, 5 (par. 1), 8; R. Exh. 50; Tr. 89–90, 188, 684–685, 800–801.)

With the Vote No campaign concluded (except for efforts to reverse the International Brotherhood of Teamsters' decision to amend its constitution and approve the contracts), Atkinson turned his attention towards a new goal: running to be elected as the new business agent of Teamsters Local 538. Atkinson therefore remained active on social media by, among other things, making posts about his dissatisfaction with the incumbent leadership of Teamsters Local 538 and his view that the leadership was not standing up for UPS drivers on discipline, the Western Pennsylvania supplement, and other matters. (Tr. 45–46, 210–211, 302, 364–365, 451; GC Exh. 38 (p. 5); CP Exh. 5 (pp. 3–9, 12–14, 50–56); R. Exh. 22 (Bates 01913, 02036–02037); see also CP Exh. 5 (pp. 47–49) (Atkinson also used social media to voice his displeasure with the International Brotherhood of Teamsters regarding its decision to amend the union constitution and approve the national master agreement and Western Pennsylvania supplement).) UPS's labor department was aware of Atkinson's developing campaign to become the business agent of Teamsters Local 538 because the incumbent business agent Betty Fischer emailed copies of Atkinson's Facebook posts to McCready, and McCready forwarded the posts to other members of the labor department. (CP Exh. 5 (pp. 3–9, 12–14, 50–56).)

*M. April/May 2014—New Kensington Center
Management Concerns About Driver Productivity*

Also in April 2014, UPS managers were concerned about the production of drivers in the New Kensington center because UPS data on "over allowed hours" showed that, on average, drivers in the New Kensington center were exceeding the estimated times for their routes by a larger margin than the previous year. At a PCM shortly after he was reassigned to the New Kensington and Zelionople centers, Bartlett asked the drivers to look at how they were running their routes and see if they could assist with reducing over allowed hours (e.g., by minimizing

²² The amended clause in the constitution stated as follows, in pertinent part:

[I]n the event that the master agreement has been approved pursuant to the provisions of this Article, but the members covered by a supplement or rider do not approve the employer's last, best and final offer, as determined by the master negotiating committee, and the supplemental or rider negotiating committee reports that the members have rejected the supplement or rider because of a provision in the ratified master agreement, then the master negotiating committee shall have the authority to declare the master agreement and all supplements to be in effect.

(R. Exh. 50 (p. 2).)

the time they spent handling packages). In addition, after a grievance meeting on or about April 18,²³ McCready, Eans and Bartlett asked Atkinson and Fischer to speak with the New Kensington drivers about improving efficiency. The UPS managers added that they might need to conduct OJS rides if driver efficiency did not improve. (Tr. 255–256, 259, 812–814, 846–847, 854, 922–923, 955, 1054, 1117–1119, 1260, 1296, 1431–1435, 1554; R. Exh. 24 (p. 1).)

In the same time period DeCecco told driver (and occasional assistant union steward) Dan Morris that he (DeCecco) needed every driver in the New Kensington center to finish their routes 15 minutes earlier to solve the problem with over allowed hours. (Tr. 613–614, 617–618, 1226–1227; see also Tr. 1431–1432, 1558 (Bartlett made a similar remark to Atkinson about needing 15 minutes of improvement from each driver).) And, more ominously, Alakson warned driver Robert Larimer on multiple occasions that things were going to get bad at the New Kensington center unless drivers improved their numbers.²⁴ (Tr. 586–587.)

On or about May 19, supervisor Joe Iaquina provided Bartlett with a screenshot of Facebook postings made by various UPS drivers, including Atkinson, on the same Facebook page where Atkinson joked about being two hours over in running his route. (R. Exh. 55; Tr. 1561–1562; see also Findings of Fact (FOF), section L (discussing R. Exh. 55 (Bates 01782); Jt. Exh. 6 (noting that Iaquina worked as a supervisor at another UPS facility).) The postings on the screenshot stated as follows:

J.B.: New Ken walk out coming soon?

²³ The grievance meeting concerned UPS's decision to discharge employee B.C., and was a point of contention between certain drivers and managers in the New Kensington center because UPS predicated the discharge in part on claims that B.C. had been dishonest in handling a Next Day Air package. Atkinson and Eans had such a strong disagreement in the grievance meeting that afterwards, Dan Morris took over in handling B.C.'s grievance. In that role, Morris asked DeCecco what could be done to address B.C.'s discharge. DeCecco responded that the matter was out of his hands, but noted that if the drivers and managers at the center could work together to improve over allowed hours, then management might be more receptive to a compromise in B.C.'s case. DeCecco added that the drivers' performance was bringing a lot of unwanted attention to the New Kensington center. Later, Morris participated in a meeting in which UPS and B.C. settled the grievance by reducing the discharge to a suspension and "last chance" agreement. (Tr. 337–340, 620–623, 823–826, 854–855, 861–863, 1224–1229, 1558, 1662; CP Exh. 5 (pp. 3, 44–46); R. Exh. 22 (Bates 01906–01907).)

In this connection, I note that I do not credit Morris' testimony that DeCecco referred to the Vote No signs in car vehicles when DeCecco said drivers were bringing unwanted attention to the New Kensington center. Morris' testimony on that point was inconsistent, rendering it unreliable. (Tr. 620, 624–635.)

²⁴ Alakson testified that he did not recall making these statements to Larimer (see Tr. 1395), but I credit Larimer's testimony because it is consistent with other evidence in the record that Alakson had a tendency to give casual tips or warnings to employees about what was happening in the New Kensington center.

Atkinson: I think we'll jus[t] stay and make sure we really start doing our jobs to the best of our abilities [smiley face indicated by semicolon and parenthesis]

Kerr: It takes a very long time to do the job correctly

J.B.: Some of the safety stuff is just plain dumb like crossing behind the vehicle instead of in front. But play the game their way

Atkinson: Fair days work for a fair days pay [three smiley face symbols] . . . we ain't walking out . . . jus[t] walkin . . . like up long driveways . . . at a nice safe pace . . . doin this job jus[t] like . . .

(R. Exh. 55 (Bates 01783); see also Tr. 265–266 (Atkinson explaining that in these posts, he was expressing his view that it takes additional time for drivers to follow all of UPS's methods); Tr. 441–443, 1563 (noting that J.B. is a UPS employee and Vote No supporter at another facility); Jt. Exh. 3 (Bates 00870, instructing drivers to "walk with a brisk pace"); Jt. Exh. 4 (Bates 00947, same).) Bartlett was concerned by these posts because he believed the posts indicated that bargaining unit members were planning a work slowdown or voluntary work stoppage at a time when the New Kensington center already was having problems with over allowed hours.²⁵ (Tr. 1564–1565.)

N. May 19, 2014 – Atkinson Receives 3-Day Suspension for Failing to Complete DIAD Training in a Timely Manner

On or about May 15, Atkinson received a message on his DIAD to complete a training module.²⁶ Atkinson did not complete the training on May 15, and thus received another DIAD message on May 16 that the training was still available and needed to be completed. Upon receiving the second message, Atkinson contacted Alakson and suggested that UPS send future messages about training after 10:30 am, because drivers were busy delivering Next Day Air packages in the early morning hours. Alakson promised to speak to DeCecco about Atkinson's suggestion. Atkinson completed the DIAD training

²⁵ The collective-bargaining agreement requires employees to give a fair days work for a fair days pay, and thus UPS's position is that work slowdowns are not permitted. (Tr. 777; Jt. Exh. 1 (Article 37, Section 1(a) (stating, inter alia, that the "parties agree that the principle of a fair day's work for a fair day's pay shall be observed at all times and employees shall perform their duties in a manner that best represents the Employer's interest").)

²⁶ Respondent maintains that Alakson verbally instructed Atkinson to complete the DIAD training on May 14. I do not credit the evidence that Respondent provided in support of that assertion. (See Tr. 884, 1108, 1350–1351, 1424–1425, 1516–1517, 1572–1753; R. Exh. 8 (p. 1).) Respondent submitted copies of the DIAD transmissions about the training in question, and there is no record of a DIAD transmission about training on May 14 or at any other point before May 15. Instead, the first DIAD transmission about training is dated May 15, and the reminder transmission is dated May 16. Those transmissions are consistent with Atkinson's testimony about when he received communications on his DIAD to complete the training, and are also consistent with credible testimony from other witnesses that UPS generally initiates DIAD training requests by sending a message to the drivers on their DIADs. (See Tr. 115, 251, 431–432, 507–508, 575, 598–599; R. Exh. 8 (pp. 1–2).)

later in the day on May 16. (Tr. 112–115, 250–253, 357–358, 884–889, 1110–1112, 1352–1353; R. Exh. 8 (pp. 2–3) (DIAD messages sent on May 15 and 16); see also Tr. 401–402, 431–432, 575, 598–599 (describing how UPS provides training modules through the DIAD).)

On May 19, Atkinson met with Bartlett and DeCecco to discuss Atkinson's delay in completing the assigned DIAD training. UPS classified Atkinson's delay in completing the training as a failure to follow proper methods, procedures and instructions, and issued Atkinson a 3-day suspension (the next step in the progressive discipline process since Atkinson's January 27 warning letter was still active). (GC Exh. 7; Tr. 110, 114–116, 1107, 1112, 1356, 1425–1426.) Atkinson posted on Facebook to complain about the suspension and Teamsters Local 538's failure to prevent it. UPS labor department managers were aware of Atkinson's Facebook posts about the suspension. (CP Exh. 5 (p. 55–56).)

On May 20–21, Atkinson filed a grievance to contest the 3-day suspension as unfair and as discrimination against him for engaging in union activity as the union steward. (R. Exh. 9 (pp. 1–2); GC Exh. 14(a); Tr. 117, 892.) Before Atkinson was disciplined on May 19, UPS disciplined one other employee for failing to complete DIAD training in a timely manner (employee M.R., who received a suspension in or about August 2013, after stating that he was not going to complete DIAD training because he was too busy on the day in question). Apart from that example, UPS generally relied on verbal reminders when other employees did not complete DIAD training, though DeCecco was perhaps more of a stickler for completing employee training after he arrived at the New Kensington center in January 2014. (Tr. 116, 254, 1354–1355; see also Tr. 351, 402, 484, 508–511, 534–535, 575–577, 599.)

O. May 22, 2014—Atkinson Receives Documented Talk With for Failing to Meet UPS Appearance Standards

As one of its company policies, UPS maintains "Uniform and Personal Appearance Guidelines" that set forth general expectations for employees who interact with the public while on duty. For male employees, the appearance guidelines state that except for a neatly trimmed mustache that does not extend below the corners of the mouth, employees must be clean shaven. Atkinson was aware of the policy, among other reasons for having signed a UPS Driver Uniform and Personal Appearance Standards Form on or about May 9, albeit under protest. The standards form included the facial hair guidelines noted above. (R. Exh. 10; Tr. 254–255, 895–896, 1115; see also R. Exh. 44 (DeCecco presented the form to other UPS drivers at the New Kensington center in a PCM on or about April 28, a day when Atkinson was not at work); Tr. 1113–1115.)

On or about May 22, district manager Keith Washington was visiting the New Kensington center when he and Atkinson discussed whether Atkinson was properly clean shaven. (Tr. 119–120, 254, 1632–1633.) After the conversation, Washington prepared the following memo that was placed in Atkinson's file:

Re: Robbie Atkinson Unshaven

On May 22, 2014, I had a conversation with Robbie Atkin-

son in reference to his unshaven face. I asked Robbie if he was familiar with the UPS Driver Uniform and Personal Appearance [Guidelines] and he replied yes. I asked Robbie if it had been reviewed with him and he replied yes. I then asked Robbie if that was the case then why is he not clean shaven. Robbie replied that he had forgot to shave. I explained Robbie to let this be a warning and moving forward he is to arrive to work in accordance with the UPS Driver Uniform and Personal Appearance guidelines.

(GC Exh. 8; see also Tr. 1632.)²⁷ Atkinson did not receive a copy of Washington's memo and was not aware that Washington characterized their discussion as a documented talk with. On the other hand, UPS has given documented talk with to other UPS employees for failing to comply with the facial hair rules set forth in UPS's Driver Uniform and Personal Appearance Guidelines. (Tr. 120–121, 254, 1115–1116, 1634–1635; see also Tr. 896 (noting that Atkinson did not file a grievance about this interaction with Washington).)

P. Late May/Early June 2014 – UPS Prepares for On the Job Supervision (OJS) Rides with Atkinson and Five Other Drivers at the New Kensington Center

1. Late May/Early June – UPS prepares for the OJS rides

In May 2014, UPS decided to schedule a group of on the job supervision (OJS) rides (a.k.a. an OJS ride blitz – see Tr. 806, 1637) at the New Kensington center in an effort to improve driver efficiency. Accordingly, UPS reviewed the over allowed hours of each driver, as well as additional data and factors, and exercised its discretion to select Atkinson and five other drivers (R.B., D.H., S.H., Lange and R.Sc.) to participate in OJS rides that would be conducted by supervisors from various facilities in the area. DeCecco and Alakson (with Bartlett's and Washington's approval) selected drivers for the OJS rides based at least in part on the following data and factors:

Driver	Over Allowed Hours (Average from January – April 2014)	Other Factors Considered	Selected for June 2014 OJS ride?
Robert Atkinson	1.30	None identified	Yes
R.B.	0.95	UPS believed the route "could do more"	Yes
J.B.	0.97	Average over allowed hours improved in	No

²⁷ Atkinson and Washington dispute the content of their May 22 discussion, and also dispute whether Atkinson was clean shaven. (Compare Tr. 119–120 with Tr. 1632–1634 and GC Exh. 8.) Be that as it may, the result was the same – that is, Washington placed the memo in Atkinson's file, and UPS cited to the memo as evidence of a documented talk with when discussing Atkinson's prior rules infractions in grievance proceedings concerning UPS's subsequent decisions to suspend and discharge Atkinson. (Tr. 894–895.)

Driver	Over Allowed Hours (Average from January – April 2014)	Other Factors Considered	Selected for June 2014 OJS ride?
		March and April (as compared to January and February)	
B.C.	0.38	None identified	No
J.G.	1.13	Driver was on leave for much of the relevant time period and thus the over allowed hours might not be representative of the driver's efficiency	No
D.H.	0.79	UPS wished to assess D. H.'s assertion that his route was too heavy (in general and as to Next Day Air packages)	Yes
S.H.	1.24	None identified	Yes
William (Bill) Lange	1.23	UPS wished to assess the accuracy of the planned day for this route, and whether Next Day Air drivers needed to be assigned to the area	Yes
E.M.	0.31	None identified	No
D.Mc.	1.71	Rural route that might not produce a significant and immediate improvement in efficiency	No
T.M.	0.33	None identified	No
D.Mo.	0.35	None identified	No
W.M.	0.02	None identified	No
T.O.	0.18	None identified	No
E.S.	1.51	Route needed an updated	No

Driver	Over Allowed Hours (Average from January – April 2014)	Other Factors Considered	Selected for June 2014 OJS ride?
		time study	
A.S.	1.19	Rural route that might not produce a significant and immediate improvement in efficiency	No
R.Sc.	1.14	UPS wished to assess R.Sc.'s assertion that he could not take on any more work and had difficulty delivering Next Day Air packages on time	Yes
D.V.	1.01	Average over allowed hours improved in March and April (as compared to January and February)	No

(R. Exh. 25;²⁸ Tr. 62–63, 738–739, 804–805, 842–843, 1123–1131, 1263–1264, 1357–1358, 1429, 1435–1436, 1639–1640; Jt. Exh. 5; see also Tr. 1356–1357, 1635–1636, 1639 (noting that UPS decided to conduct OJS rides at the New Kensington center because over allowed hours had increased in comparison to 2013); R. Exh. 24 (chart showing over allowed hours at the New Kensington center in 2013 and 2014).)²⁹

To have a sense of each OJS ride driver's efficiency before the OJS rides, DeCecco reviewed the performance of each OJS ride driver on their usual route to calculate their baseline "stops per on road hour" (SPORH – i.e., the number of stops that the individual driver makes per hour on his or her route).³⁰ DeCec-

²⁸ UPS did not analyze over allowed hours for drivers who handled multiple routes on an as-needed basis (regular temporary drivers, a.k.a. cover drivers). (Tr. 1124–1125.)

²⁹ Also in late May 2014, Alakson asked Atkinson to "clean up," or review, his (Atkinson's) EDD to see if the delivery order could be improved. Alakson made a similar request of the other five drivers who were selected for OJS rides (though the drivers were not aware of the forthcoming OJS rides at the time). Atkinson did not fulfill Alakson's request due to lack of time. (Tr. 211–213; 1371–1372; see also Tr. 1298–1299, 1369–1371, 1621.)

³⁰ Although UPS used over allowed hours as a primary statistic to assess how efficiently drivers were completing their routes, UPS used SPORH as the primary statistic to assess driver efficiency on OJS rides

co calculated the following SPORH's for the drivers who would participate in the OJS rides:

Driver	Baseline SPORH
Robert Atkinson	10.26
R.B.	17.43
D.H.	15.65
S.H.	16.71
William (Bill) Lange	10.83
R.Sc.	16.63

(R. Exhs. 34–39; see also Tr. 1429.) UPS's hope was that with some on road supervision, each OJS driver would be able to move through their route more efficiently, and thus both increase his or her SPOHR while on the OJS rides and develop the ability to maintain the higher SPOHR while unsupervised. (Tr. 701–702, 744, 781, 1436–1437.)

On or about May 27, the UPS supervisors who would be conducting the OJS rides (Bartlett, DeCecco, Mark Goodwin, Iaquina, Jason Rezak and Shaun Witherow)³¹ participated in a conference call. Eans joined the call to answer any labor-related questions that might arise, and Washington participated as the division manager. During the call, Washington explained why UPS was conducting the OJS rides and stated that he wanted the supervisors to conduct the rides in a professional manner. Bartlett explained how to complete the procedures and methods checklist that would be used during the rides. Eans, meanwhile, outlined dos and don'ts for supervisors to keep in mind during the rides (such as not assisting the driver during the rides and thereby artificially inflating the driver's statistics), advised the supervisors to familiarize themselves with the driver's assigned route, and encouraged the supervisors to call for guidance if any problems arose. (Tr. 814–815, 818–819, 848, 1135–1139, 1265–1266; R. Exh. 33; see also Jt. Exh. 6.)

because the union viewed over allowed hours as a "company number." By contrast, the union viewed SPORH as a more acceptable measure of driver efficiency because SPORH indicated how quickly the driver was moving through his or her route each day and is based on an objective, and simpler, standard of how many stops the driver makes per hour when driving the same route. (See Tr. 83–85, 184–185, 703–705, 731–734, 771–773, 782, 785–786, 1072–1073, 1139–1140, 1401–1402, 1523–1524, 1594–1595, 1682–1684; see also Jt. Exh. 5.)

³¹ Goodwin, Iaquina, Rezak and Witherow were assigned to other UPS facilities but were brought in to the New Kensington center to assist with the OJS ride blitz. (Tr. 161, 1132, 1439, 1640–1641; Jt. Exh. 6.)

*Q. June 2014—UPS Conducts OJS Rides at the New Kensington Center*³²

1. UPS notifies drivers of the OJS rides

In the morning on June 3, UPS notified Atkinson and the other five drivers that they would be having OJS rides.³³ Bartlett decided which supervisor would be paired with each driver and decided that he would conduct Atkinson's OJS ride because Atkinson was a veteran driver and also was an influential employee and a leader in the New Kensington center. (Tr. 124, 160, 231, 417–418, 511–512, 1132, 1439–1441, 1444–1445, 1471, 1641; see also Tr. 1429–1430 (explaining that UPS did not provide drivers with advance notice that they would be doing OJS rides because UPS wanted to avoid giving the drivers an incentive to change how they ran their routes before the OJS rides).)

Each of the drivers doing OJS rides drove their usual route, but with some modifications that Alakson made to ensure that the number of stops on the route was comparable to the number of stops that the driver had when DeCecco calculated the driver's baseline SPORH. Alakson made additional modifications to driver routes (including Atkinson's route) on each subsequent day of the OJS rides based on feedback from the supervisors who were conducting the OJS rides. (Tr. 1358–1359, 1364–1366, 1495–1499; see also Tr. 1364, 1403–1405, 1407 (noting that Alakson adjusts the routes of all drivers on a daily basis to make sure that the load of stops is evenly distributed between the drivers).)

2. June 3–5, 2014—Atkinson's OJS ride

There was some friction between Atkinson and Bartlett during Atkinson's OJS ride. Before starting Atkinson's route on June 3, Bartlett warned Atkinson that if Atkinson demonstrated a malicious intent to deviate from the way he would normally run his route (e.g., by running the route in a manner that was intentionally slow), Bartlett would view that as an act of dishonesty. Bartlett was also impatient whenever Atkinson took more time in carrying out a task on his route (such as looking for and sorting packages) than Bartlett thought was necessary, and Bartlett demonstrated his frustration by pacing backwards and forwards and sighing heavily while he waited. (Tr.

³² On various occasions during trial, Atkinson and Bartlett differed somewhat about what they said to each other during the OJS rides. Since their accounts of the OJS ride conversations were equally credible, I have given the benefit of the doubt regarding that conflicting testimony to Respondent because the General Counsel bears the burden of proving the allegations in the complaint by a preponderance of the evidence. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express, Inc.*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997). Consequently, I did not credit (for example) Atkinson's testimony that Bartlett warned him about drinking water while running his route, or Atkinson's testimony that Bartlett muttered "Joe Iaquinta" repeatedly after Atkinson had an argument with Iaquinta. (Compare Tr. 162, 166–167, 173, 360–361 with Tr. 1448, 1451–1452.)

³³ Atkinson did not file a grievance to challenge his selection for an OJS ride. (Tr. 274–275.)

167, 170, 1449–1450, 1471–1472; see also Tr. 325, 1512 (Bartlett told Atkinson that if every driver finished their routes 15 minutes earlier then "this would all go away").)

In addition to his friction with Bartlett, Atkinson had an argument with Iaquinta, who was brought in from another facility to conduct another driver's OJS ride. The following exchange occurred on or about June 4 before drivers left the UPS facility to begin their routes:

Iaquinta: You don't want me in this building.

Atkinson: I don't know who you are. I don't know why you're saying that to me.

Iaquinta: Just trust me. You don't want me in this building. [Proceeds to tell Atkinson to remove a necklace that Atkinson was wearing, and asks Atkinson if he shaved, ironed his pants, and polished his boots.]

Atkinson: Who are you? Are you a supervisor?

Iaquinta: You don't worry about who I am.

(Tr. 164–165.)³⁴ Bartlett approached after the end of Atkinson's argument with Iaquinta and instructed Atkinson to comply with Iaquinta's direction to take off the necklace in question. (Tr. 165, 324–325, 1445–1448.)

Over the course of the three days that Bartlett conducted Atkinson's OJS ride, Bartlett made notations about each stop on a "Package Driver Methods Checklist." The checklist gives the OJS ride supervisor the option to indicate one of the following for each of 21 methods (many of which have multiple sub-parts): driver used proper method (box left blank); driver used proper method and was commended (box marked with a checkmark); driver did not use proper method, should have (box marked with an "x"); and driver did not use proper method, should have, and was instructed on proper method (box marked with an "x" inside of a circle). (See GC Exh. 3 (example checklist); Tr. 511, 1472–1473, 1488–1489, 1582–1583, 1607–1609.)

The primary area where Bartlett believed Atkinson did not use the proper method was "minimum handling," because Bartlett noted various occasions where Atkinson was delayed on his route because he was having trouble finding packages (including times when Atkinson had recently sorted the packages in the truck and/or when the truck only had a few packages left to be delivered). Indeed, Bartlett's frustration about this issue led him to tell Atkinson on June 5 that methods infractions (and specifically, delays caused by handling packages too much) would be the death of him (Atkinson). (Tr. 1468–1469, 1474–1476, 1481–1482, 1486, 1499–1500, 1504–1505, 1507–1508; R. Exh. 27 (pp. 1–9) (indicating that Atkinson also occasionally failed to use proper methods for "planning ahead," "smooth on car routine," "moving out without delay" and other areas).)

3. June 6, 2014 – meeting to discuss results of Atkinson's OJS ride

On June 6, Bartlett and Atkinson met to discuss the results of Atkinson's OJS ride. Kerr attended the meeting as Atkinson's

³⁴ None of the parties called Iaquinta to testify as a witness, and thus Atkinson's testimony about this conversation is un rebutted.

union representative. Bartlett described in general terms some of the methods infractions that he found Atkinson committed on the OJS ride and advised Atkinson that with supervision during the OJS ride, Atkinson increased his SPORH from a baseline of 10.26 to a 3-day average of 13.73. Bartlett added that going forward, UPS would expect Atkinson to maintain the 13.73 SPORH when running his route without a supervisor present. Bartlett referenced the Package Driver Methods Checklist during the meeting but did not provide a copy of the checklist for Atkinson to review Bartlett’s notations. (Tr. 167–168, 170, 1508–1510; GC Exh. 32 (indicating that Atkinson’s SPORH was 14.03 on June 3, 13.62 on June 4, and 13.53 on June 5).)

During the June 6 meeting (and during trial), Atkinson maintained that he was able to increase his SPORH because UPS made his route shorter and easier in comparison to the route Atkinson normally handles. In support of that claim, Atkinson asserted that: on the first day of the OJS ride, UPS did not assign Atkinson any Next Day Air deliveries that would take him away from his normal route; at Bartlett’s direction, Atkinson did not drink water (and thus saved time by not having to drink water and later make bathroom stops); and UPS deleted certain areas that Atkinson normally handled from his OJS ride route. (Tr. 171–173, 175–176, 323–324, 359–360, 1410–1412, 1574; see also Tr. 1364–1365, 1494–1497 (noting that Alakson added one rural area back on to Atkinson’s route after the first day of the OJS rides); R. Exh. 64 (chart providing data about Atkinson’s OJS rides, including the number of delivery stops Atkinson made each day during the OJS rides).) Atkinson also disagreed with Bartlett’s findings that Atkinson committed methods infractions by lacking a smooth car routine and failing to move out without delay. (Tr. 277.)

4. June 16, 2014—UPS issues letter of record to Atkinson about his OJS ride

On June 16, Bartlett sent Atkinson a letter of record to Atkinson about the results of Atkinson’s OJS ride. The letter stated as follows:

Dear Mr. Atkinson:

On June 3, 4, and 5, 2014, I performed OJS rides with you. During my observation, you performed your normal delivery and pick-up routine on the Adrian (23B) Route. While with you, we experienced normal daily delays. We experienced on call air, multiple package dolly deliveries, inclement weather, and traffic delays. Listed below is a comparison of the average daily and pick-up activities on your route for the weeks ending (5-17-2014 and 5-24-2014)³⁵ and the averages from the OJS rides performed on the dates above.

	Unsupervised	Supervised
Total Packages	238	255
Total Stops	108	114
Miles		139
S.P.O.R.H.	10.26	13.73

³⁵ UPS specified these dates in error, as UPS in fact calculated Atkinson’s baseline SPORH using dates from April 18 to May 2, 2014. (Tr. 1180–1181, 1427–1429; R. Exh. 34.)

Paid Day 11.10

During the OJS ride, you demonstrated that you are capable of performing the proper delivery driver methods in an effective and safe manner. When instructed on the proper methods that would assist you while performing your daily assignment, you responded in a positive manner. During this ride, it was determined that you must concentrate on the following areas in order to maintain these positive gains and improve in the future:

- Plan Ahead
- Smooth on Car Routine
- Minimum Handling
- One Look Habit
- Get Signature First
- Move Out Without Delay
- Customer Contact Time

I would like to thank you for your effort and hope that you maintain these methods in order to improve your overall job performance. If you continue to improve upon the areas that I have mentioned, you should exceed the results that you demonstrated while supervised. I will continue to follow-up on your progress and I encourage you to reach out to me or any member of the management team with any concerns that you may have in the future.

(GC Exh. 23; see also Tr. 173–176, 896–897, 1179–1181, 1426–1427.)

5. Results of other drivers’ OJS rides

Like Atkinson, the other five drivers selected for the June 3–5 OJS rides increased their average SPORH while on their OJS rides. Accordingly, UPS issued letters of record to R.B., D.H., S.H., Lange and R.Sc. that, like Atkinson’s letter, set the expectation that the drivers would follow proper methods and procedures and maintain their higher SPORH while unsupervised. (GC Exhs. 34, 36, 39–42, 47–50; see also R. Exhs. 28–32 (methods checklists for the other five drivers’ OJS rides), 40 (noting that on average, the drivers selected for OJS rides reduced their daily paid hours by 1.30 hours while supervised); Tr. 327, 517, 925–926, 1155–1163, 1174–1175, 1177–1178, 1181, 1276–1279, 1300, 1508, 1510, 1644–1645.)

Lange maintained that the route used for his OJS ride differed from his normal route because certain areas and Next Day Air pickups were deleted from the OJS ride route. Alakson admitted that he made those changes to Lange’s route during the OJS ride to level out the workload for all drivers, and noted that after the OJS rides, the Next Day Air pickups that had been on Lange’s route were reassigned to another driver on a permanent basis because it was more efficient to have the other driver handle those packages. (Tr. 328–329, 513–516, 1390–1392.)

R. June 16, 2014—Atkinson Accidentally Damages Gas Station Pump

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On June 16, Atkinson stopped at a gas station to put fuel in his UPS truck. In an effort to make use of the delay associated with filling the gas tank, Atkinson left the truck and went to deliver a package. When Atkinson returned to the truck, he forgot to remove the gas pump hose from the gas tank, and thus

pulled the hose off of the gas pump when he attempted to drive off and resume making deliveries. UPS investigated the incident and determined that the accident was avoidable and occurred because Atkinson “failed to concentrate at the task at hand and remove the fuel pump from the vehicle before pulling away,” and “failed to scan [the] area around the vehicle when walking back to car.” (R. Exh. 12; Tr. 121–123, 128–129, 927–929, 1055, 1517–1518; see also Tr. 165–166, 535–536, 556 (noting that during the OJS rides, UPS supervisors advised drivers, including Atkinson, to make effective use of the delay while pumping gas into their trucks).)

When Atkinson reported for work on June 18, Bartlett gave Atkinson a 10-day suspension for getting into an avoidable accident at the gas station. In connection with the suspension, Bartlett sent Atkinson a letter (dated June 20) that stated as follows:

Dear Mr. Atkinson:

On June 18, 2014, a meeting was held in the New Kensington facility. Present were you, Union Representative Mark Kerr, and myself. Discussed was the avoidable accident in which you were recently involved.

On June 16, 2014, while operating a UPS vehicle you were involved in an avoidable accident. This accident could have been avoided had you followed the proper safe-driving methods in which you have been trained. It is of the utmost importance that you exercise the Space and Visibility Training that you have received; be aware of your surroundings, and utilize the five (5) seeing habits; however you failed to do so. Actions such as yours will not be tolerated. It is apparent by your actions and blatant disregard for your job responsibilities that you have no intention of correcting this problem; therefore, it is my decision to issue you a ten (10) day suspension. Your responsibilities regarding this matter have been clearly reviewed with you. If in the future, should you fail to follow the proper safe-driving methods at all times and be involved in another avoidable accident, further disciplinary action will be taken, up to and including discharge.

This is an official suspension letter as outlined in our current labor agreement between UPS and the International Brotherhood of Teamsters, Local #538.

(GC Exh. 9; see also Tr. 124–125, 926–927, 929–930, 1518–1519, 1601.)

Atkinson filed a grievance to contest the 10-day suspension. In the grievance, Atkinson asserted that UPS was “engaging in disparate treatment of the shop steward [Atkinson] and is discriminating and retaliating against the steward for his union activity. This is additionally believed to be a violation of Section 8(a)(3) of the NLRA.” (GC Exh. 15(a) (p. 1); see also Tr. 930.)

In the time frame of Atkinson’s incident at the gas station, UPS disciplined drivers for automobile accidents if UPS deemed the accident to be avoidable (e.g., an accident that the driver could have avoided if the driver followed UPS’s methods, procedures and instructions). By contrast, UPS did not discipline drivers if they were involved in unavoidable accidents. When it disciplined a driver for getting into an avoidable

accident, UPS generally imposed the next level of discipline under its progressive discipline policy. The center manager, however, retained some discretion about whether to impose discipline for avoidable accidents. (Tr. 283–284, 931–932, 1240, 1388, 1663.) The following table provides some examples of how UPS handled accidents in and before 2014:

Driver	Nature of Accident	Accident Avoidable (per UPS)?	Discipline Imposed
Bill Lange	Swerved to avoid hitting a deer and thus drove truck into a ditch, requiring a tow truck to get out (Tr. 229, 537–538, 556)	No	None
Bill Lange	Parked on a driveway in hot weather, and truck wheels damaged the driveway asphalt (Tr. 230, 538–540, 556)	No	None
Bill Lange	Drove truck into a ditch to avoid hitting a snow plow that veered into his lane of traffic (Tr. 230, 536–537)	No	None
T.M.	Head on collision with another vehicle because the other vehicle’s driver was blinded by sunlight and veered into the UPS driver’s lane (Tr. 229, 1240–1243; see also Tr.	Yes – although the police department concluded that the UPS driver was not at fault in the accident, UPS determined that its driver could have avoided the collision by us-	None – center manager exercised discretion and did not impose discipline

Driver	Nature of Accident	Accident Avoidable (per UPS)?	Discipline Imposed
	1026–1027 (indicating that T.M. was not a union steward and was not involved in the Vote No campaign)	ing driver training	
C.P.	Side swiped another vehicle while driving on a snow covered road (Tr. 228, 1243–1245)	Yes – UPS determined that its driver was going too fast given the weather conditions	Disciplinary warning letter (R. Exh. 15 (Bates 01706)) ³⁶
J.S.	Hit an overhanging decorative flag pole while avoiding another vehicle that had crossed over the center line (Tr. 230–231, 1245–1247, 1559–1560)	N/A – no property damage resulted to either vehicle or to the flag pole. Accordingly, UPS deemed this incident not to be an accident.	None
R.Sc.	Truck was not secured properly and rolled away, causing property damage (Tr. 280–281; R. Exh. 56 (p. 2))	Yes	Discharge (later reduced to a lower form of discipline)
R.Sy	[No evidence presented on this point]	Yes	Disciplinary warning letter (R. Exh. 15

³⁶ When asked what, if any, discipline C.P. received for this incident, Atkinson stated that he did not recall C.P. receiving any discipline. (Tr. 229.) I have not given weight to Atkinson’s testimony on this point because Atkinson’s testimony was equivocal and UPS presented credible evidence to demonstrate that C.P. received discipline (see transcript and exhibits cited for C.P.’s table entry).

Driver	Nature of Accident	Accident Avoidable (per UPS)?	Discipline Imposed
			(Bates 01741))

S. June 18, 2014—Bartlett Evaluates Atkinson on a “Blended” Safety and OJS Followup Ride

In light of his June 16 accident, Atkinson was obligated to complete a safety ride to review safety methods (e.g., procedures for driving and delivering packages safely) when he returned to work on June 18. Since a supervisor would have to take the time to ride with Atkinson in his truck to do the safety ride, and since Atkinson had just had an OJS ride, Bartlett decided to conduct a “blended” ride that would satisfy the safety ride requirement and also serve as a followup ride to see how Atkinson was performing after his OJS ride. (Tr. 62–63, 82–83, 128–129, 285, 455–456, 552–553, 701, 1436–1437, 1539, 1595–1596; see also GC Exh. 25 and Tr. 131 (explaining that, in light of the June 16 accident, UPS also required Atkinson to complete a computer training module on driver safety).)

On June 18, Bartlett rode with Atkinson on Atkinson’s delivery route to conduct a one-day blended ride. During the ride, Bartlett made notations on two checklists – the “Package Driver Methods Checklist” that is used for OJS rides, and a safety ride evaluation form. (Tr. 129–132; GC Exhs. 24, 26.) In connection with the OJS followup aspect of the blended ride, Bartlett found that Atkinson committed various methods infractions while running his route. For example, at the first delivery stop on his route, Atkinson had trouble finding the package that he needed to complete the delivery (Atkinson explained that the package was small and was obscured by other packages on the shelf that shifted when he drove to the delivery stop), prompting Bartlett to cite Atkinson for not following minimum handling procedures and ask Atkinson if they were “going to start the day in this manner.” In addition, Atkinson (among other issues): had trouble locating packages for at least three other stops on his route; rolled through a stop sign without coming to a complete stop; and drove past a delivery stop, thereby delaying progress on his route. (Tr. 1530–1539, 1697–1700, 1706–1708, 1711–1713; GC Exh. 26.) Overall, Atkinson completed his blended ride with an increased SPORH and in less time than UPS’s estimated planned day for his route. (Tr. 285–286, 933–934; R. Exh. 13 (p. 1).)

T. June 19 & 20, 2014 – UPS Discharges Atkinson Twice Following the Blended Ride

1. The June 19 discharge (for failure to maintain SPORH while unsupervised)

On June 19, Bartlett met with Atkinson and notified him that UPS was discharging him for not working as quickly while unsupervised as he did while supervised. Kerr was present as Atkinson’s union representative. Specifically, Bartlett observed that Atkinson demonstrated a SPORH of 13.73 during the OJS rides (supervised), a SPORH of 12.12 during the week of June 8–14 (unsupervised), and a SPORH of 13.72 on the

June 18 blended ride (supervised).³⁷ Bartlett decided to discharge Atkinson because discharge was the next step under UPS's progressive discipline system. (Tr. 133–134, 410, 1520–1522, 1525–1526, 1594, 1605; R. Exh. 34 (p. 2); see also Tr. 734–735 (noting that UPS managers have some discretion in deciding what type of discipline to issue to an employee who does not sustain their performance after an OJS ride), 816–817, 845, 934–935, 1525, 1602, 1648–1649 (McCready, Eans and Washington were all consulted before Bartlett discharged Atkinson on June 19).)³⁸

On June 20, UPS followed up on the June 19 meeting by sending Atkinson a discharge letter that stated as follows:

Dear Mr. Atkinson:

On June 19, 2014, a meeting was held in the New Kensington Center. Present were you, Union Representative Mark Kerr, and myself. Discussed were your level of performance, supervised versus unsupervised, and your continued failure to follow the proper methods, procedures and instructions.

While supervised, you have demonstrated the ability to work in a safe and professional manner that provides efficient and quality service in a timely manner to our valued customers. After a review of your performance statistics, both supervised and unsupervised, it has been noted that you fail to obtain the same results when under direct supervision as opposed to when you are not supervised. It is your responsibility to make every effort to maintain a fair day's work for a fair day's pay, as you have demonstrated under direct supervision; however, despite our efforts to assist you, you have failed to do so.

It is apparent by your actions and blatant disregard for your job responsibilities that you have no intention of correcting this problem; therefore, you have given UPS just cause to discharge you from our employ.

This is an official discharge letter as outlined in our current labor agreement between UPS and the International Brotherhood of Teamsters, Local #538.

(GC Exh. 10.)

Atkinson filed a grievance to contest the June 19 discharge. In the grievance, Atkinson asserted that UPS was “engaging in disparate treatment of the shop steward [Atkinson] and retaliating against the steward for his union activity and position. The employer is attempting to use production as their reasoning for discharge. This is additionally believed to be a violation of Section 8(a)(3) of the NLRA.” (GC Exh. 16(a) (p. 1); Tr. 942.)

³⁷ As previously indicated, Atkinson maintains that the SPORH from the OJS ride was artificially high because UPS removed delivery areas and certain Next Day Air deliveries from Atkinson's normal route. (Tr. 175–176; see also Tr. 215–226 (discussing CP Exh. 8 and asserting that it demonstrates that Atkinson had more rural and Next Day Air deliveries on his route on June 13 than he did during the June 3 OJS ride).)

³⁸ Atkinson testified that Bartlett also stated that the discharge was “out of my hands, and as you know, when things get into labor's hands, it's out of my hands at this point, and this is what they want to do.” I have not credited that testimony because it was only equally credible to Bartlett's testimony denying that he made the remark. (Tr. 133, 231, 1526.)

2. The June 20 discharge (for methods infractions during the blended ride)

On June 20, Bartlett met again with Atkinson and Kerr and advised them that UPS was discharging Atkinson, but this time for not following UPS methods, procedures and instructions during his June 18 blended ride. In support of the discharge, Bartlett generally asserted that notwithstanding the instructions that Atkinson received during the June 3–5 OJS rides, Atkinson still did not follow proper methods and procedures concerning moving out without delay, planning ahead and having a smooth car routine (among other areas) during his June 18 blended ride. (Tr. 137–139, 419, 1529, 1541–1542, 1604–1605; see also Tr. 946–947, 1542, 1603 (noting that Bartlett consulted with McCready before issuing the June 20 discharge).)

On June 23, UPS followed up on the June 20 meeting by sending Atkinson a discharge letter that stated as follows:

Dear Mr. Atkinson:

On June 20, 2014, a meeting was held in the New Kensington Center. Present were you, Union Representative Mark Kerr, and myself. Discussed was your continued failure to follow the proper methods, procedures and instructions along with your overall unacceptable work record.

Despite our efforts to assist you, you have failed to follow the proper methods and procedures. You have been trained on the proper methods and are expected to follow these methods at all times while performing your daily work assignment. Failure to do so places our reputation as a quality service provider in jeopardy to our valued customers. Actions such as yours will not be tolerated.

It is apparent by your actions and blatant disregard for your job responsibilities that you have no intention of correcting this problem; therefore, you have given UPS just cause to discharge you from our employ.

This is an official discharge letter as outlined in our current labor agreement between UPS and the International Brotherhood of Teamsters, Local #538.

(GC Exh. 11.)

Atkinson filed a grievance to contest the June 20 discharge, and thus continued working for UPS while the grievance was pending. In the grievance, Atkinson asserted that UPS was “engaging in disparate treatment of the shop steward [Atkinson] and retaliating against the steward for his union activity and position. The employer is attempting to use methods violations as their basis. This is all believed to be a violation of the NLRA Section 8(a)(3) in addition.” (GC Exh. 17(a) (p. 1); Tr. 139, 952.)

3. Comparator evidence

UPS has an established history of disciplining drivers for failing to maintain production while unsupervised (as compared to their production while supervised). Similarly, UPS has an established history of disciplining drivers for failing to follow UPS methods, procedures and instructions. (R. Exh. 15; Tr. 706–709, 774–775, 950–951, 1544–1546.)

Four of the other five drivers at the New Kensington center

who went on OJS rides from June 3–5 were later disciplined after followup rides. Among the five other drivers, only Lange overtly supported the Vote No campaign, and Lange’s Vote No activity was limited to posting a Vote No sign in his window. (Tr. 305–306, 1025–1026.) The following table summarizes the discipline that UPS imposed after the followup rides, as well as any additional discipline that UPS imposed (with all dates listed being in 2014, unless otherwise indicated):

Driver Name	Discipline After Followup Ride	Additional Discipline
R.B.	July 15: Followup ride conducted July 17: official warning for failing to follow procedures, methods and instructions July 18: 3–day suspension for supervised vs. unsupervised performance	October 30: 10–day suspension for failing to follow procedures, methods and instructions
D.H.	August 20: Followup ride conducted August 21: official warning for supervised vs. unsupervised performance	None
S.H.	September 10: Followup ride conducted September 11: official warning for supervised vs. unsupervised performance September 12: 3–day suspension for failing to follow procedures, methods and instructions	October 29: 10–day suspension for supervised vs. unsupervised performance May 5, 2015: 10–day suspension for failing to follow procedures, methods and instructions
Bill Lange	None (no followup ride was conducted)	July 3: official warning for failing to follow procedures, methods and instructions
R.Sc.	June 26: Followup ride conducted July 2: official warning for supervised vs. unsupervised performance	October 28: discharge for supervised vs. unsupervised performance November 10: re-

Driver Name	Discipline After Followup Ride	Additional Discipline
	vised performance July 3: 3–day suspension for failing to follow procedures, methods and instructions August 28: another followup ride conducted September 3: 10–day suspension for supervised vs. unsupervised performance September 4: discharge for failing to follow procedures, methods and instructions	signed employment before his grievances concerning discipline were resolved

(R. Exhs. 14, 15 (Bates 01682, 01694, 01732), 64; see also Tr. 181, 305–306, 326, 333, 527–528, 938–942, 947–950, 1055–1057, 1181–1184, 1526–1529, 1543, 1546, 1645–1648.)

U. Late June/Early July 2014 – Kerr Attempts to Request Information Concerning Atkinson’s Discipline and Discharge

In late June 2014, Kerr prepared and submitted an information request for documents related to Atkinson’s suspension, discharges and any other pending grievances. Kerr submitted the request because he was serving as Atkinson’s union representative for those matters. DeCecco told Kerr that the information request needed to be on union letterhead. Accordingly, on or about July 1, Kerr sent a revised information request to Eans and the business agent for Teamsters Local 538 (Fischer). The revised request included the heading “Union Information Request” typed on the top of the request. (Tr. 214–215, 376, 410–413, 1223–1224; CP Exhs. 10–11.) In a letter dated July 9, Eans responded to Kerr as follows:

Dear Mr. Kerr:

I am in receipt of two information requests you submitted on July 1, 2014. The longstanding practice of the parties is that information requests are requested through the local union business agents on official union letterhead. If you would like to submit your request to your business agent, you can do so. Your business agent will be able to determine what information would be appropriate to request.

(CP Exh. 12; Tr. 413; see also Tr. 1036–1037, 1224 (explaining that UPS requires information requests to be submitted by the union business agent because UPS’s responses may include sensitive documents or internal reports).) Kerr called Fischer to ask her to submit the information request, and also filed a

grievance to contest the “lack of [disclosure] of reasonably related documents and information for pending grievances. (CP Exh. 13; Tr. 414.) Ultimately, on or about October 13, 2014, UPS (through McCready) provided information in response to an information request that Teamsters Local 538 submitted at Kerr’s request. (CP Exh. 14; Tr. 1038.)

V. July 5, 2014 – Supervisor Warns Atkinson that UPS is Aiming to Discharge Him

On July 5, Atkinson and Kerr were on vacation with their significant others when Kerr received a telephone call from Matt Blystone, who at the time was the preload supervisor at the New Kensington center (Blystone went on to hold other supervisory positions after this time frame). (Tr. 178–179, 403–406, 461–466, 1094; Jt. Exh. 6; GC Exh. 33 (Kerr’s telephone records showing calls to and from Blystone on July 5).) During telephone call, a discussion to the following effect occurred:

Blystone: [Tells Kerr that he was with Alakson and DeCecco, and that they said that Atkinson was a troublemaker and they needed to get rid of him (Atkinson).]

Kerr: [Speaking to Atkinson, who was present but not yet on the phone] Hey, Rob. You got to hear this.

Atkinson: [Takes phone and greets Blystone]

Blystone: Hey, I just want you to know what’s happening to you at that building isn’t your fault. I hear these guys talking up in the office, Jeremy Bartlett, Matt DeCecco, Ray Alakson, and they’re singling you out and they’re coming after you. This is because of you being a shop steward and because of the things you have done with those window signs and everything like that.

Please don’t tell them that I’m telling you this because they’ll fire me. I just didn’t want you to not know that this is what’s happening because you’re a good guy and, you know, I just wanted you to know what was happening, but don’t tell them that I told you this.

(Tr. 179–180, 404–405, 468; see also Tr. 180, 405, 477, 487 (noting that a few days later Blystone separately called Atkinson and Kerr to again ask them not to tell anyone about the July 5 conversation); Tr. 231–234, 343–344, 356–357.)³⁹

³⁹ I have credited Atkinson’s and Kerr’s testimony about their telephone conversations with Blystone because Atkinson’s and Kerr’s testimony on that issue was corroborated by Kerr’s telephone records, and more important, was for the most part un rebutted. First, UPS did not call Blystone to testify as a witness about the July telephone calls or otherwise. Second, although Bartlett testified, he did not in any way address or refute Atkinson’s and Kerr’s testimony about Blystone’s July remarks. And third, when DeCecco and Alakson testified on this issue, their testimony was exceedingly narrow and limited. Specifically, DeCecco only testified that he did not remember having a conversation in front of Blystone about wanting to get rid of Atkinson because Atkinson was a troublemaker. Similarly, Alakson only testified that he never heard Bartlett or DeCecco say they would find some way to get rid of Atkinson, and that he never heard them say they would get rid of Atkinson because no drivers can follow all of the methods all the time. Alakson added they (Alakson, Bartlett and DeCecco) never referred to

W. October 2014 – Atkinson Loses Teamsters Local 538 Election for Business Agent

In October 2014, Teamsters Local 538 held its election for the position of business agent. Fischer prevailed over Atkinson in the election, and thus continued serving as Teamsters Local 538’s business agent. UPS was aware that Atkinson’s Vote No Facebook page remained up and active during this timeframe. (Tr. 45–46, 140–141, 234, 415–416; CP Exh. 5 (p. 75) (posting on Vote No page by Kerr to voice unhappiness about UPS management).)

X. October 27, 2014 – Atkinson Fails to Download EDD before Starting His Route

In the morning on October 27, Atkinson reported to work and joined other drivers in the customary routine of attending the PCM and preparing to start their routes. During the PCM, DeCecco informed drivers that they would not be able to wear their UPS hoodies while on duty (even in the wintertime), and thus Atkinson spent part of his morning fielding questions from drivers about DeCecco’s announcement. Atkinson then left the facility to start his route, but without first downloading EDD on to his DIAD.⁴⁰ (Tr. 141–142, 289–290, 362–363; R. Exhs. 20 (Bates 00337–00338), 62; see also Jt. Exhs. 3–4 (section 1(vii), stating that drivers should perform the “get EDD” function as part of their morning pre trip routine), 9 (explaining that drivers must be on UPS facility premises to be connected to UPS wireless intranet and perform the “get EDD” function; attempting to get EDD while not on UPS facility premises will produce an error message).)

After making a few deliveries, Atkinson discovered that he did not have EDD on his DIAD and communicated the problem to Kerr and Larimer (Atkinson, Kerr and Larimer were already talking in a three-way telephone call about the morning PCM).

Atkinson as a trouble maker or said that they needed to get rid of Atkinson. Those limited denials fall well short of refuting the evidence in the record about what Blystone reported to Kerr and Atkinson. (Tr. 1296, 1389, 1392–1393; see also generally Tr. 1420–1482, 1485–1597, 1600–1624 (Bartlett’s testimony, which did not address Blystone’s remarks to Kerr and Atkinson); Tr. 1555–1556 (while testifying about another topic, Bartlett noted that his office at the New Kensington center was adjacent to the office space used by Alakson, Blystone and DeCecco).)

⁴⁰ I do not credit Atkinson’s testimony that he attempted to download EDD in the morning and received an error message. Atkinson conceded that it was a “confusing morning [with] a lot of things going on,” so it is certainly plausible that under those circumstances Atkinson forgot to download EDD. (Tr. 142, 290.) In addition, UPS presented credible evidence that Atkinson’s DIAD: (a) was functioning properly and received multiple automatic downloads in the morning on October 27; (b) did not show a record of any unsuccessful attempts to download EDD in the morning; and (c) did show unsuccessful attempts to download EDD in the late afternoon on October 27. (R. Exh. 16, 62 (p. 1); Tr. 963–972, 1327–1328.)

I note that Atkinson denied attempting to download EDD in the afternoon on October 27. While it certainly seems plausible that Atkinson may have tried to download EDD in the afternoon in light of the morning’s events, that detail is not material to my analysis. Instead, what matters is that the DIAD records unsuccessful download attempts, and did not record an unsuccessful download in the morning before Atkinson started his route.

Larimer offered to call Alakson at the UPS facility because he thought Alakson might be more understanding and could bring Atkinson a new DIAD with EDD.⁴¹ Once Larimer's call to Alakson was connected (thereby adding Alakson to the conference call) Alakson advised Atkinson to continue making deliveries, and that Alakson would bring a new DIAD to Atkinson at a meeting point on Atkinson's route. (Tr. 142–145, 290, 352–353, 407–408, 421–422, 579–581, 602–603, 1187–1188, 1373–1374; CP Exh. 16; R. Exhs. 17 (Bates 00307), 20 (Bates 00337–00338).)

After the conference call, Alakson notified DeCecco that Atkinson needed a new DIAD with EDD. DeCecco and Alakson spoke with Atkinson again to determine where Atkinson was on his route, and then, following the advice of McCready, drove together to meet Atkinson. At the meeting point, Atkinson asserted that he tried to download EDD before leaving the UPS facility that morning, but erroneously believed that the download was successful despite receiving a transmission error message at the time. DeCecco verified that Atkinson did not have EDD on his original DIAD and provided Atkinson with a new DIAD that had EDD (Atkinson also kept the original DIAD until he finished his route). Atkinson asked DeCecco what was going to happen regarding the DIAD incident, and DeCecco responded that they would talk about it at another time. With the new DIAD in hand, Atkinson completed the remainder of his route without incident. (Tr. 146, 1188–1193, 1197–1198, 1279–1280, 1301–1302, 1331–1332, 1373–1375, 1378, 1681–1682; R. Exh. 17 (Bates 00307–00308), 59 (Atkinson's two timecards for October 27, with one timecard relating to his original DIAD, and the other timecard relating to his replacement DIAD with EDD).)

Y. October 28, 2014—UPS Discharges Atkinson for Failing to Download EDD

1. The October 28 discharge

On or about October 27, Washington, DeCecco and Alakson spoke with McCready about Atkinson's failure to download EDD. Collectively, those managers decided to discharge Atkinson for the incident in part because Atkinson: was already on two separate discharges; had an overall unacceptable work record; and, based on his failure perform a routine task like downloading EDD, did not appear to be trying to change his behavior. (Tr. 961–962, 1057, 1066, 1198–1199, 1279, 1301, 1650–1652.)

On October 28, Washington and DeCecco met with Atkinson and Kerr and advised them that UPS was discharging Atkinson and Kerr and advised them that UPS was discharging Atkinson for not following UPS methods, procedures and instructions.⁴² Specifically, Washington explained that UPS's decision to discharge Atkinson was based on Atkinson's failure to down-

load EDD before leaving the facility to start his route on October 27. Atkinson asserted that UPS was singling him out for discipline because he was the shop steward. (Tr. 140, 147–148, 291–293, 418, 1186, 1650–1651; see also Tr. 1651 (noting that UPS also maintained that Atkinson should not have tied up Kerr and Larimer with addressing his problem of not having EDD).)

On October 29, UPS followed up on the October 28 meeting by sending Atkinson a discharge letter that stated as follows:

Dear Mr. Atkinson:

On October 28, 2014, a meeting was held in the New Kensington Center. Present were you, Union Representative Mark Kerr, Supervisor Matt DeCecco, and myself. Discussed was your continued failure to follow the proper methods, procedures and instructions along with your overall unacceptable work record.

Despite our efforts to assist you, you have failed to follow the proper methods and procedures. You have been trained on the proper methods and are expected to follow these methods at all times while performing your daily work assignment. Failure to do so places our reputation as a quality service provider in jeopardy to our valued customers. Actions such as yours will not be tolerated.

It is apparent by your actions and blatant disregard for your job responsibilities that you have no intention of correcting this problem; therefore, you have given UPS just cause to discharge you from our employ.

This is an official discharge letter as outlined in our current labor agreement between UPS and the International Brotherhood of Teamsters, Local #538.

(GC Exh. 12.)

Atkinson filed two grievances to contest the October 28 discharge, and thus continued working for UPS while the grievances were pending. In the grievances, Atkinson asserted that UPS was intimidating, harassing, coercing and overly supervising/disciplining him because of his union and steward activities. Atkinson added that UPS's actions were retaliatory and discriminatory and violated Section 8(a)(3) of the NLRA. (GC Exhs. 18(a)–(b); Tr. 149, 290–291, 962–963.)

1. Comparator evidence (concerning DIADs and EDD)

The comparator evidence is limited regarding when and whether UPS has disciplined drivers at the New Kensington center for problems with their DIADs and EDD, primarily because the issue does not arise frequently and when it does, drivers often correct the problem without UPS's knowledge. (Tr. 1000, 1186–1187, 1377, 1654; see also Tr. 974–975, 1000, 1069, 1378–1379, 1408, 1653 (noting that UPS does not discipline drivers when they need a new DIAD because their original DIAD crashes, malfunctions or loses battery power); Tr. 553–554, 558–559 (noting that Lange neglected to download EDD, but returned to the UPS facility on his own to complete the download); R. Exh. 20 (Bates 00336) (same, regarding

⁴¹ Larimer believed that Alakson would be more understanding in part because Alakson brought Larimer a replacement DIAD in summer 2014, when Larimer discovered that one of two DIADs he was using did not have EDD. (See FOF, Section II(Y)(2), *infra*.)

⁴² Bartlett was reassigned to another UPS facility on or about August 1, 2014, and thus did not participate in the October 28 discharge. Washington attended the discharge meeting because John Lojas, the new center manager at the New Kensington center, was on vacation. (Jt. Exh. 6; Tr. 962, 1057, 1651.)

Morris.)⁴³

However, in summer 2014, UPS did not discipline Larimer when he discovered that one of two DIADs he was using did not download EDD properly (Larimer was running a “combination route” that had a few bulk delivery stops on one DIAD, and Larimer’s usual route on a second DIAD). In that instance, Alakson agreed drive out from the facility and meet Larimer to give him a replacement DIAD, in part because Alakson believed that the replacement DIAD would assist with Alakson’s recordkeeping (as opposed to Larimer making the bulk deliveries without a DIAD).⁴⁴ (577–579, 603–604, 1393–1394, 1408–1409; R. 20 (Bates 00338))

Z. Comparator Evidence (Treatment of Other Employees in Western Pennsylvania Who Were Union Stewards and/or Vote No Campaign Supporters)

The evidentiary record includes some information about the extent to which UPS disciplined certain other employees who UPS knew were union stewards and/or were active participants in the Vote No campaign in Western Pennsylvania. Those employees include, but are not limited to:⁴⁵

Employee	Type of Activity (with date if available)	Discipline in 2013–2015?
J.B.	Social media postings in support of Vote No campaign (R. Exh. 22 (Bates 01887–01888)) April 2014 – Social media posting expressing frustration with UPS methods and procedures (R. Exh. 55 (Bates 01783); see also	January 10, 2014 – Warning letter for failing to follow proper methods, procedures and instructions (R. Exh. 66) Otherwise still employed (Tr. 820–821, 1680–1681.)

⁴³ UPS provided testimony about one driver who was disciplined in summer 2016, for failing to download EDD, and another driver who was disciplined on an unspecified date for losing his DIAD. I have given little weight to that testimony because the incidents are too remote in time and location (there is no evidence that either driver worked in the New Kensington center) from the events at issue in this case. (See Tr. 1546–1547, 1653–1654.)

⁴⁴ Kerr also testified that Alakson brought him a replacement DIAD (in summer 2013) because Kerr did not have EDD. Alakson denied that this incident occurred. (Compare Tr. 408–409 and R. Exh. 20 (Bates 00337) with Tr. 1377, 1393.) I have not given weight to Kerr’s testimony on this point because it was only equally credible to Alakson’s denial.

⁴⁵ In my view, it is not necessary to include an exhaustive list here of every UPS employee mentioned in the record who supported the Vote No campaign and/or served as a union steward. (See R. Posttrial Br. at 23–24 (listing some additional employees who were Vote No campaign supporters and/or union stewards).) The list of employees here is sufficient to make the point (which does not appear to be in dispute) that UPS did not discipline all Vote No campaign supporters or union stewards.

	FOF, Section M, supra) Generally active in the Vote No campaign (Tr. 1553, 1563)	
R.DiF.	Union steward (Tr. 819, 1006–1008, 1680) Generally active in the Vote No campaign (Tr. 1012–1013, 1018)	None (Tr. 1680–1681)
M.F.	Union steward (Tr. 819, 1680)	None (Tr. 1680–1681)
M.H.	Posted Vote No literature on a UPS bulletin board (Tr. 1016–1017, 1032–1033; R. Exh. 58 (Bates 002374–002375)) Generally active in the Vote No campaign (Tr. 1012–1013)	None (Tr. 1033)
D.L.	December 2013 – Displaying Vote No signs (R. Exh. 22 (Bates 01824))	July 26, 2013 – Warning letter for unacceptable attendance record (R. Exh. 66) Otherwise still employed (Tr. 820–821, 1680–1681.)
G.P.	Social media postings in support of Atkinson’s campaign to be the new Local 538 business agent (R. Exh. 22 (Bates 01913, 02036)) July 2013 – quoted and photographed for a Vote No flyer (R. Exh. 58 (Bates 002355); Tr. 1013–1015, 1028–1029) March 2014 – quoted in article about the Vote No cam-	None (See (R. Exh. 58 (Bates 002356); Tr. 820–821, 1030)

	<p>paign (CP Exh. 2)</p> <p>April 2014 – social media posting indicating that UPS management is hypocritical with its rules (R. Exh. 55 (Bates 01779))</p> <p>Generally active in the Vote No campaign (Tr. 820, 1012–1013.)</p> <p>Union steward (Tr. 1006–1008)</p>	
K.M.	<p>May 2013 – distributing Vote No petition (R. Exh. 22 (Bates 01839–01840, 02101); Tr. 1018)</p> <p>January 2014 – expressing his displeasure with local union officials who recommended voting yes on the supplement (R. Exh. 22 (Bates 01867))</p> <p>Union steward (Tr. 1006–1007, 1680)</p> <p>Generally active in the Vote No campaign (Tr. 1012–1013)</p>	None (Tr. 820–821, 1680–1681)
M.M.	<p>Union steward (Tr. 1006–1008, 1680)</p> <p>Generally active in the Vote No campaign (Tr. 1012–1013)</p>	None (Tr. 1680–1681)
R.N.	<p>Union steward (Tr. 1006–1007, 1018)</p> <p>Generally active in the Vote No campaign (Tr. 1012–1013, 1018–1019)</p>	<p>January 14, 2014 – Warning letter for failing to follow proper methods, procedures and instructions (R. Exh. 66)</p> <p>October 29, 2015 – Warning letter for</p>

		<p>failing to follow proper methods, procedures and instructions (R. Exh. 66)</p> <p>Otherwise still employed (Tr. 1006, 1680–1681.)</p>
R.S.	<p>August 2013 – distributing Vote No flyer (R. Exh. 58 (Bates 002370); Tr. 1017, 1030–1031)</p> <p>Generally active in the Vote No campaign (Tr. 1012–1013)</p>	None (See (R. Exh. 58 (Bates 002360); Tr. 820–821, 1033)

AA. November 4, 2014 – Grievance Panel Rules on Atkinson’s May/June Grievances

On November 4, a grievance panel issued its rulings on the Atkinson’s grievances for the following disciplinary actions: May 19 (3–day suspension for not completing DIAD training in a timely manner); June 18 (10–day suspension for avoidable accident); June 19 (discharge for supervised vs. unsupervised performance); and June 20 (discharge for methods infractions during June 18 blended ride). The grievance panel did not find that UPS retaliated or discriminated against Atkinson for engaging in protected activity, and reached the following decisions:

Original discipline imposed	Grievance panel decision
3–day suspension (May 19)	Reduced to a written warning letter
10–day suspension (June 18)	Reduced to a 3–day suspension
Discharge (June 19) with a final warning	Reduced to a 45–day suspension
Discharge (June 20)	Deadlocked (no decision—grievance may proceed to arbitration)

(GC Exhs. 14–17; see also Tr. 117–118, 134–137, 139, 893, 931, 942–944, 953–954.) UPS was aware that Atkinson and other individuals posted on Atkinson’s Facebook page about the grievance panel’s decisions. (CP Exh. 5 (pp. 63–65).)

BB. Late 2014—Atkinson Serves His Suspension and Hears an Explanation from the Center Manager of the New Kensington Center

In late 2014, Atkinson began serving the suspensions (a total of 48 days) set forth by the grievance panel. Towards the end of the suspension period, Atkinson spoke with John Lojas, who had become the center manager for the New Kensington center in August 2014. (Tr. 150, 180, 1544; Jt. Exh. 6.) The follow-

ing conversation occurred:

Atkinson: Hey. You know, you seem like a nice guy. I'm sorry that you seem to be caught up in a lot of stuff here that you probably didn't wto be caught up in.

Lojas: Yeah, yeah. It's tough.

Atkinson: You know, it started with those window signs back in January.

Lojas: I definitely agree that's what put you on the radar.⁴⁶

(Tr. 180–181.)⁴⁷

CC. December 18, 2014 – Atkinson Files Unfair Labor Practices Charge in Case 06–CA–143062

On December 18, 2014, Atkinson filed an unfair labor practices charge against UPS in Case 06–CA–143062. The charge set forth the following statement of facts constituting the alleged unfair labor practices:

- (1) [UPS], through its officers, agents, and representatives:
- (2) discriminatorily enforced a bulletin board policy; discriminatorily issued the disciplines described in ULP Charge No. 06–CA–131900;
- (3) discriminatorily terminated Mr. Atkinson again on October 28, 2014; and
- (4) On or about November 4, 2014, explicitly relied on Mr. Atkinson's filing of Charge No. 06–CA–131900 as a justification for his termination.

All of the above-listed actions were taken because Mr. Atkinson's protected activities including vigorously representing co-workers as a steward, organizing opposition to a proposed CBA, running for union office, and filing a ULP against the Employer. They constitute part of a pattern and practice of interference with his protected activity.

⁴⁶ UPS did not call Lojas as a witness during trial, and thus Atkinson's testimony about this conversation is unrebutted. I also note that although Atkinson quoted himself as saying that window signs were posted in January (2014) and I have found that Atkinson and other drivers posted Vote No signs in their vehicle windows in March 2014 (see FOF, Section II(J), supra), I do not find that difference in dates to be material to my analysis.

⁴⁷ The General Counsel presented testimony from Lange that in or about February 2015 (and thus after Atkinson's discharge was finalized), manager Nicholas Passaro told Lange and Kerr that the New Kensington center "was a problem center, and I'm here to fix the problem. We already got rid of one problem." Passaro denied making that remark. (Tr. 523, 560–561, 1598–1599; see also Jt. Exh. 6.) I have not given weight to Lange's testimony on that point because (among other reasons): it was at most only equally credible to Passaro's; and Kerr did not corroborate Lange's testimony about what Passaro said. (See Tr. 541–548.)

The General Counsel also presented testimony from former UPS driver Mitchel Rodriguez that in or about July 2015, Rodriguez was speaking to DeCecco about seniority concerns when DeCecco stated "You're really trying to be like Rob Atkinson, aren't you. I can take your job just like I did to him." DeCecco denied making that remark. (Tr. 637–638, 1239–1240, 1296.) I have not given weight to Rodriguez's testimony on this point because it also was at most only equally credible to DeCecco's.

(GC Exh. 1(a); see also R. Exh. 54 (explaining that in the charge in Case 06–CA–131900, Atkinson alleged that UPS violated the Act by suspending him on May 19 and June 18, 2014, and by discharging him on June 19 and 20, 2014).)

DD. January 15, 2015—Grievance Panel Rules on Atkinson's Grievances Regarding the October 28 Discharge

On January 14, 2015, a grievance panel conducted a hearing and ruled on Atkinson's grievances regarding UPS's decision to discharge him on October 28 for not downloading EDD onto his DIAD. UPS, through McCready, contested Atkinson's allegations that UPS retaliated against him (Atkinson) for engaging in union activities. (R. Exhs. 17, 20; Tr. 293, 295–296, 962–963, 975–976, 978–985, 999–1000.) Ultimately, the grievance panel denied Atkinson's grievances and upheld Atkinson's October 28 discharge, stating its decision (in its entirety) as follows:

Based on the facts presented and the grievant's own testimony the committee finds no violations of any contract articles therefore the grievances (#22310 and #22311) are denied. NRNP.

(GC Exh. 18; R. Exh. 21; Tr. 1062; see also Tr. 151 (noting that Atkinson learned of the grievance panel's decision the evening before he was scheduled to return to work after serving his suspensions); Tr. 136–137 (explaining that the notation "NRNP" stands for non-referencing, non-precedent setting).)

EE. May 9, 2015—Atkinson Posts on Facebook about Eans and McCready

On May 9, 2015, Atkinson made the following post on Facebook in response to posts by other individuals:

Here's a couple more names for people to watch out for:

Rob Eans . . . this piece of garbage is the District Labor manager that has insinuated himself into every step of my discipline . . . a condescending, self righteous little man who's creepy demean[or] will just plain make your skin crawl . . . I have to say I have never seen a man sit in a chair and cross his legs in a more dainty and effeminate way, he legitimately looks like he should be sitting on a tuffet eating his curds and whey! . . . he definitely gives off the impression that he's trying as hard as he can to compensate for something. . . . my guess, erectile dysfunction [smiley face indicated by semicolon and parenthesis]

Tom McCready . . . this knuckle dragger is the Division Manager who [buffoons] his way along trying to do his master Rob Eans bidding . . . he's a cross between Barney Rubble, Shrek, and Captain Caveman . . . listening to him talk is actually quite humorous, it sounds like he's chewing on cotton balls and marbles . . . I've yet to hear him ever say one intelligent thing, but then again, it'd be difficult to decipher it if he did [smiley face indicated by semicolon and parenthesis]

(R. Exh. 5.) Atkinson admitted to (and said he was sorry for) making the Facebook posting about Eans and McCready, and explained that he made the statements because he believed Eans and McCready lied about Atkinson and took away his career.

McCready saw Atkinson's post and believed Atkinson's remarks were attacks on his disability (McCready's voice and difficulty with pronunciation). (Tr. 345, 378–380, 383, 1039–1040.)

UPS has issued an "Equal Opportunity Statement" that outlines its policies concerning discrimination, harassment and other misconduct. The equal opportunity statement reads, in pertinent part:

UPS is committed to a policy of treating individuals fairly and recruiting, selecting, training, promoting and compensating based on merit, experience and other work-related criteria. We comply with all laws governing fair employment and labor practices. We do not discriminate against any applicant for employment or any employee in any aspect of their employment at UPS because of age, race, religion, sex, disability, sexual orientation, gender identity, military status, pregnancy, national origin or veteran status. . . . Freedom from wrongful discrimination includes freedom from any form of discriminatory harassment. Prohibited harassment includes conduct that is intended to interfere or that has the effect of unreasonably interfering with a fellow employee's work performance or creating an environment that is intimidating, hostile or offensive to the individual.

Additional information can be found in the UPS Professional Conduct and Anti-Harassment Policy available from Human Resources. . . .

(R. Exh. 6 (p. 1); see also Tr. 1042.) As indicated in its Equal Opportunity Statement, UPS also has issued a Professional Conduct and Anti-Harassment Policy. That policy states, in pertinent part:

UPS is proud of its professional and congenial work environment and will take all necessary steps to ensure that our workplace remains pleasant for everyone. In order to remain a positive work environment, all employees must treat each other with courtesy, consideration, and professionalism. The Company prohibits unprofessional and discourteous actions, even if those actions do not constitute unlawful harassment.

In addition, harassment of any person or group of persons on the basis of race, sex, national origin, disability, sexual orientation, gender identity, veteran/military status, pregnancy, age or religion is a form of unlawful discrimination which is specifically prohibited in the UPS community and which may subject the Company and/or the individual harasser to liability. Accordingly, derogatory or other inappropriate remarks, slurs, threats or jokes will not be tolerated. . . .

(R. Exh. 6 (p. 2); see also Tr. 1042.)

In 2013, and 2014, UPS discharged several employees covered by the Western Pennsylvania supplement for engaging in conduct that violated UPS's Professional Conduct and Anti-Harassment Policy. The discharge letters in the evidentiary record do not provide any specific factual details about the nature of the misconduct/harassment that led UPS to discharge the employees. Atkinson was not aware of, and the record does not include evidence of, any employees in the New Kensington center who were disciplined or discharged for engaging in con-

duct that violated UPS's Professional Conduct and Anti-Harassment Policy. (R. Exh. 23; Tr. 381–382, 1043.) McCready testified, however, that UPS would not tolerate the types of remarks that Atkinson made in his May 9, 2015 post because UPS has a zero-tolerance policy and issues immediate discharges for remarks such as Atkinson's. (Tr. 1041–1042; see also R. Exh. 23.)

FF. NLRB Region 6's Deferral Decisions

1. March 30, 2015 – Region 6 dismisses the charges in Cases 06–CA–131900 and 06–CA–143062

In a letter dated March 30, 2015, the Regional Director for Region 6 of the NLRB contacted counsel for the Charging Party about unfair labor practice charges filed in Cases 06–CA–131900 and 06–CA–143062 (as well as additional charges in cases not at issue here). The Regional Director advised counsel that the charges in those cases would be dismissed, stating as follows:

We have carefully investigated and considered [the charges filed in Cases 06–CA–131900 and 06–CA–143062] that United Parcel Service . . . [has] violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss these [charges because] there is insufficient evidence to establish a violation of the Act.

(R. Exh. 26; see also *id.* (notifying counsel of the right to appeal the decision to the General Counsel); Tr. 1565–1566.)

3. December 24, 2015 – the General Counsel sustains the Charging Party's appeal in part and denies the appeal in part

On December 24, 2015, the General Counsel sent a letter to counsel for the Charging Party to advise (among other things) that the General Counsel would sustain in part and deny in part the Charging Party's appeal of the Regional Director's decision to dismiss the unfair labor practice charges in Cases 06–CA–131900 and 06–CA–143062. The General Counsel stated as follows in his letter:

This office has carefully considered your appeal in the above captioned cases. We are sustaining the appeal in part and denying the appeal in part.

In Case 06–CA–131900, we are denying the appeal. In this regard, we agree with the Regional Director's decision to defer to the first [grievance] panel decision addressing the discipline of the alleged discriminatee in May and June [2014]. There is insufficient evidence to establish that the panel decision did not meet the standards set forth under *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) and *Olin Corporation*, 268 NLRB 573 (1984).

...

In Case 06–CA–143062, we are sustaining the appeal in pa

...

To the extent that you reiterated conduct alleged in 06–CA–131900, such allegations are encompassed by the deferral decision in that case. However, we are remanding the Section

8(a)(3) allegation that the Employer unlawfully discharged the alleged discriminatee on October 28, 2014, back to the Regional Office for further proceedings, including possible deferral to the parties' grievance and arbitration proceedings.

(R. Exh. 45; see also *id.* (noting that absent a settlement of the charges in the sustained appeals, the Regional Director would issue a complaint and an administrative law judge would hold a hearing); Tr. 1566–1567.)

2. December 24, 2015—the General Counsel sends a corrected letter concerning the Charging Party's appeal

Later on December 24, 2015, the General Counsel sent counsel for the Charging Party a corrected letter to clarify its decision on the Charging Party's appeal. The General Counsel stated as follows in his corrected letter:

In reviewing the appeal in the instant case, we are sending a corrected copy to clarify the findings concerning the specific allegations contained in the instant charges. We apologize for any confusion that may have occurred with our previous letter dated December 24, 2015. We are sustaining the appeals in part and denying the appeals in part.

In Case 06–CA–131900, the charge alleged that the Employer unlawfully suspended the Charging Party on May 19, 2014 and June 18, 2014. The charge also alleges that the Employer discharged the Charging Party on June 19, 2014 and June 20, 2014. The investigation disclosed that an arbitration panel reviewed the suspensions issued on May 19 and June 18, as well as the June 19 discharge. Concerning the arbitration panel decision, we are denying the appeal with respect to the suspensions and the June 19 discharge. In this regard, we agree with the Regional Director's decision to defer to the panel decision addressing the suspensions of the alleged discriminatee in May and June, and the June 19 discharge. We find there is insufficient evidence to establish that the panel decision did not meet the standards set forth under *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) and *Olin Corporation*, 268 NLRB 573 (1984).

Also in Case 06–CA–131900, the charge alleged that the Employer unlawfully terminated the Charging Party on June 20, 2014. We adhere to the Regional Director's original decision to defer such allegation under *Collyer Insulated Wire*, 192 NLRB 837 (1971), pursuant to the parties' arbitration proceedings. Accordingly, we deny the appeal in Case 06–CA–131900.

In Case 06–CA–143062, we are sustaining the appeal in part and denying the appeal in part. Initially, we note that Case 06–CA–143062 alleged, *inter alia*, that the Employer discriminatorily issued the disciplines alleged in 06–CA–131900. To the extent that the Charging Party reiterated the allegations that the Employer unlawfully issued the May 19, June 18 and June 19 disciplines, these allegations are encompassed by our decision in the earlier case to defer to the first panel decision addressing the disciplines. However, the evidence indicated that the parties reached a [deadlock] on the June 20, 2014 discharge and the parties never resolved that grievance. In light of our finding in Case 06–CA–143062, discussed *infra*, that

the Employer unlawfully discharged the Charging Party on October 28, we find that the outstanding grievance on the June 20, 2014 discharge is no longer moot. Accordingly, that allegation is remanded back to the Region for further proceedings. . . .

(R. Exh. 54; see also *id.* (upholding the Regional Director's decision, based on the new standards set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), not to defer to the January 14, 2015 arbitration panel decision concerning the October 28, 2014 discharge); Tr. 1568.)

Discussion and Analysis

It is well established that before considering the merits of the allegations in the complaint, I first must resolve the threshold issue of whether the Board should defer the dispute to the grievance-arbitration procedure set forth in the collective-bargaining agreement. See *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 17 (2015) (pre arbitration deferral); *United Hoisting & Scaffolding, Inc.*, 360 NLRB No. 137, slip op. at 4 (2014) (same); *Olin Corp.*, 268 NLRB 573, 574 (1984) (post arbitration deferral), overruled on other grounds, *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014). Accordingly, in the analysis below I first address the issues that the parties have raised concerning deferral, and I then (because I have found that deferral is not appropriate) address the merits of the allegations in the complaint.

A. Was it Permissible for the General Counsel to Include the June 20, 2014 Discharge as an Allegation in the Complaint in this Case?

1. Background

At some point in the summer of 2014, Atkinson filed an unfair labor practices charge in Case 06–CA–131900 to contest UPS's decisions to suspend him on May 19 and June 18, 2014, as well as UPS's decisions to discharge him on June 19 and 20, 2014. On or about August 26, 2014, Region 6 decided to defer Case 06–CA–131900 to the parties' grievance and arbitration procedure. Later, on March 30, 2015, Region 6 notified the parties that based on its investigation, it would be dismissing the charges in Case 06–CA–131900 (as well as the charges in Case 06–CA–143062). (FOF, Section II(CC), (FF)(1); Tr. 19.)

Through counsel, Atkinson appealed the Region's March 30, 2015 dismissal decisions and succeeded in getting some of the charges reinstated. The General Counsel denied Atkinson's appeal in Case 06–CA–131900, explaining that it agreed with the Region's decision to defer to the grievance panel's November 4, 2014 order concerning Atkinson's May and June 2014 suspensions and Atkinson's June 19, 2014 discharge. On the other hand, the General Counsel sustained Atkinson's appeal in part in Case 06–CA–143062, and remanded that case to the Region for further proceedings not only on Atkinson's October 28, 2014 discharge, but also on Atkinson's June 20, 2014 discharge that was (also) contested in Case 06–CA–131900. In support of that outcome, the General Counsel explained that although it agreed with the Region's decision to defer the June 20 discharge to the grievance and arbitration procedure, the grievance panel deadlocked on the June 20 discharge and thus the grievance was never resolved and was "no longer moot."

Thereafter, the General Counsel issued the complaint in this case and alleged that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Atkinson on June 20 and October 28, 2014. (FOF, Section II(FF)(3); GC Exh. 1(c).)

2. Analysis

At the start of trial and in its posttrial brief, Respondent requested that I dismiss the allegation in the complaint that Respondent violated the Act when it discharged Atkinson on June 20, 2014, or alternatively remand that allegation to the grievance and arbitration procedure. (R. Posttrial Br. at 2–3; Tr. 19–21.) The General Counsel and Atkinson oppose Respondent’s request. (GC Posttrial Br. at 58–60; CP Posttrial Br. at 2–6.)

The essence of Respondent’s argument for dismissal/deferral of the June 20 discharge allegation is that the allegation is not properly before the Board (and, if anything, should be proceeding through the parties’ grievance and arbitration procedure). The Board has explained, however, that the General Counsel has discretion to choose “procedures for processing unfair labor practice charges, including whether and under what circumstances to defer to arbitration before issuing complaints.” *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1139 (2014); see also *BCI Coca-Cola Bottling Co. of Los Angeles*, 361 NLRB 839, 843 5 to “[decide] what steps to take before issuing a complaint, including how to investigate the charge and whether to defer to pending or possible arbitration of the charge”). More pointedly, the Board has stated:

[D]eferral is a matter of discretion. . . . ‘There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have subject of an arbitration proceeding and award.’

Babcock & Wilcox Construction Co., 361 NLRB 1127, 1129 (quoting *International Harvester Co.*, 138 NLRB 923, 925–926 (1962), enf.d. 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964)); see also *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1130 (explaining that “the discretionary aspect of the Board’s deferral policy is particularly significant in 8(a)(3) and (1) cases such as this, where employees’ contractual rights, implicated in the grievance, are separate from their rights under the Act”).

Based on the Board’s guidance, I find that it was within the General Counsel’s discretion to include the June 20 discharge allegation in the complaint, particularly where the June 20 discharge had not been resolved through the grievance and arbitration procedure and was part of a progression of disciplines and discharges that Atkinson asserted (in Case 06–CA–143062) were unlawful.⁴⁸ Accordingly, I deny Respondent’s request

⁴⁸ I am not persuaded by Respondent’s argument that Atkinson only reasserted that UPS issued discriminatory “disciplines” in the charge in Case 06–CA–143062, and thus did not reassert that the June 20 discharge was discriminatory. (See R. Posttrial Br. at 3.) I do not agree that the charge in Case 06–CA–143062 should be read so narrowly, particularly given that Atkinson explained in the charge that he believed UPS was engaging in a pattern and practice of interfering with his protected activities. Perhaps more important, even if I agreed that Atkinson only reasserted that UPS issued discriminatory disciplines in the charge, the General Counsel would still be within its rights to challenge the June 20 discharge in the complaint because the June 20 dis-

charge is closely related to the allegations in the charge in Case 06–CA–143062. See *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 30 (2016) (explaining that to decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge).

B. Should the Region Have Deferred to the Grievance Panel’s Decision to Uphold Atkinson’s October 28, 2014 Discharge?

1. Background

Under the national master collective-bargaining agreement and the Western Pennsylvania supplement (both of which took effect on April 25, 2014), a UPS employee may use the grievance/arbitration procedure to contest disciplinary action that the employee believes is discriminatory under federal or state law. (FOF, Section II(A)(4), (L).) As previously noted, Atkinson filed two grievances to contest UPS’s October 28, 2014 decision to discharge him for failing to download EDD. In the grievances, Atkinson (among other things) explicitly asserted that the October 28 discharge was retaliatory, discriminatory and violated Section 8(a)(3) of the NLRA. (FOF, Section II(Y)(1).)

After the Western Pennsylvania grievance panel conducted a hearing on January 14, 2015, concerning Atkinson’s grievances of his October 28 discharge, the grievance panel upheld UPS’s decision to discharge Atkinson. The grievance panel’s decision stated (in its entirety) as follows:

Based on the facts presented and the grievant’s own testimony the committee finds no violations of any contract articles therefore the grievances (#22310 and #22311) are denied. NRNP.

(FOF, sec. II(BB).) UPS maintains that the Region should have deferred to the grievance panel’s decision. By contrast, the General Counsel and Atkinson maintain that deferral is not appropriate and that I should address the merits of the complaint allegation that UPS violated the Act when it discharged Atkinson on October 28.

2. Applicable legal standard for post arbitration deferral

On December 15, 2014, the Board modified its standard for deferring to decisions that an arbitrator or grievance panel issues pursuant to the parties’ grievance/arbitration process. Under the new standard for post arbitration deferral, “if the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound, the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor

charge is closely related to the allegations in the charge in Case 06–CA–143062. See *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 30 (2016) (explaining that to decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge).

⁴⁹ In light of my finding here, I need not address the General Counsel’s and Atkinson’s argument that deferral of the June 20 discharge would not be appropriate because conflict of interest issues and bias against Atkinson would prevent any grievance/arbitration proceedings from being fair and regular. (See CP Posttrial Br. at 12–16 (arguing that Atkinson’s representative and members of the panel supported ratifying the national collective-bargaining agreement and the Western Pennsylvania supplement, and thus were at odds with Atkinson, who opposed ratification); GC Posttrial Br. at 59–60 (same).)

practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.” *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1131. The Board added that the new standard for post-arbitration deferral would apply to all future arbitrations (i.e., arbitrations after December 15, 2014) in cases where parties have already, either contractually or explicitly for a particular case or cases, authorized arbitrators to decide unfair labor practice claims. *Id.* at 14.

3. Analysis

The modified standard for post arbitration deferral that the Board announced in *Babcock* applies in this case because the national collective-bargaining agreement and Western Pennsylvania supplement authorize arbitrators and grievance panels to hear and decide claims that UPS unlawfully discriminated against an employee in violation of federal law. Unfair labor practice claims under the NLRA are covered by that broad grant of authority.

Applying the post arbitration deferral standard set forth in *Babcock* to this case, I find that UPS did not carry its burden of demonstrating that the Board should defer to the grievance panel’s decision to uphold Atkinson’s October 28 discharge.⁵⁰ Specifically, UPS did not show that the grievance panel considered the statutory issue of whether Atkinson’s discharge violated the NLRA. There is no dispute that Atkinson asserted in his grievances that his discharge violated the Act, and there is no contention that Atkinson prevented the grievance panel from considering the NLRA aspects of his grievances. The grievance panel’s decision, however, only states that Atkinson’s discharge did not violate any contract articles, and thus (at best) leaves one to speculate as to whether the panel’s decision implicitly includes a finding that Atkinson’s discharge was not discriminatory or retaliatory within the meaning of the NLRA. That level of ambiguity is not sufficient to justify post arbitration deferral, particularly given the Board’s instruction that a finding that “the arbitrator has actually considered the statutory issue” is only warranted “when the arbitrator has identified that issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation.” See *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1133; see also *id.* at 6 (explaining that that Board will no longer countenance post arbitration deferral where there is “simply no way to tell” whether the grievance panel considered the statutory issue of whether an employee’s discharge violated the Act). Accordingly, I find that it is not appropriate to defer to the grievance panel’s decision concerning Atkinson’s October 28 discharge.

⁵⁰ To the extent that Respondent asserts that post-arbitration deferral is warranted concerning the October 28 discharge because the grievance panel hearing was “fair and regular,” I reject that argument because it relies on case law that pre-dates (and thus does not account for) the modifications to the post-arbitration deferral standard that the Board set forth in *Babcock*. (See R. Posttrial Br. at 33–35 (citing, inter alia, *Botany 500*, 251 NLRB 527 (1980)).

C. Did UPS Violate the Act when it Discharged Atkinson on June 20, 2014 and/or on October 28, 2014?

Before evaluating the merits of the General Counsel’s claims that UPS discharged Atkinson unlawfully, it is important to understand the General Counsel’s (and Atkinson’s) theory for this case. The General Counsel contends that UPS requires its drivers to comply with a myriad of procedures and rules (e.g., the 340 methods) that, while facially valid, drivers will inevitably break as they complete their work. Within that context, the General Counsel maintains that because of Atkinson’s union and protected concerted activities, UPS improperly found opportunities to discipline, and ultimately discharge, Atkinson for various rule violations. Respondent, on the other hand, maintains that its decisions to discharge Atkinson were valid and nondiscriminatory.

As explained below, I find that the General Counsel demonstrated that UPS discharged Atkinson unlawfully on June 20 and October 28. Although the General Counsel’s theory of the case was a challenging one to prove, the General Counsel presented persuasive evidence that UPS, through key managers who were involved in the decisions to discharge Atkinson, was motivated to get rid of Atkinson because of his union and protected concerted activities.

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on or about June 20, 2014, discharging employee Robert Atkinson because he refrained from supporting and assisting the Teamsters Local 538 and otherwise engaged in protected concerted activities. (GC Exh. 1(c) (pars. 7(a), 8).)

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on or about October 28, 2014, discharging employee Robert Atkinson because he refrained from supporting and assisting Teamsters Local 538 and otherwise engaged in protected concerted activities. (GC Exh. 1(c) (pars. 7(b), 8).)

2. Applicable legal standard

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860–861 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party’s failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861. My credibility findings are set forth above in the findings of fact for this decision.

The legal standard for evaluating whether an adverse em-

ployment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011); *Consolidated Bus Transit, Inc.*, 350 NLRB at 1066; *Pro-Spec Painting*, 339 NLRB at 949. The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal — an unlawful motive — at least where the surrounding facts tend to reinforce that inference.) (citation omitted); *Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel"). However, a respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861

3. Analysis—the June 20 discharge

Turning to the merits of the General Counsel's allegation that UPS violated the Act when it discharged Atkinson on June 20, I find that the General Counsel made an initial showing that Atkinson's union and protected concerted activities were a substantial or motivating factor in UPS's decision to discharge Atkinson. First, I find that Atkinson engaged in union and protected concerted activities during the relevant time period (from mid 2013 to October 28, 2014). Atkinson led the Vote No campaign in the New Kensington center by, among other things, using the following methods to encourage drivers to vote against ratifying the Western Pennsylvania supplement:

maintaining a Vote No webpage; posting on social media; posting and/or distributing Vote No literature; and creating Vote No signs that drivers could display in the windshields of their personal vehicles.⁵¹ In addition, Atkinson was a ringleader among employees who used social media to voice (often sarcastically) their frustrations with UPS's extensive rules and procedures for package car drivers. (FOF, Section II(D), (G), (I), (J), (L) .)

Second, there is no dispute that UPS was aware of Atkinson's union and protected concerted activities. Specifically, from various sources as well as from their own monitoring of the Vote No campaign, managers in UPS's labor department and at the New Kensington center were aware of Atkinson's postings on social media, and were also aware of Atkinson's activities at the New Kensington center. Indeed, Alakson warned Atkinson to be careful about what Atkinson was posting on Facebook, and DeCecco spoke to Atkinson about the guidelines that Atkinson needed to follow regarding posting or distributing Vote No literature at the UPS facility, and about the Vote No window signs that employees were displaying in their vehicles. Similarly, after being assigned to the New Kensington center in April 2014, Bartlett learned that Atkinson was leading the Vote No campaign and was also communicating with other employees in a sarcastic manner about the challenges of running their routes efficiently while complying with UPS's procedures and methods. (FOF, section II (D), (G), (I)–(J), (L)–(M).)

Third, the evidentiary record establishes UPS's animus towards Atkinson's union and protected concerted activities. Shortly after employees (at Atkinson's urging) began displaying Vote No signs in their vehicles, McCready confronted Atkinson by saying that he saw the Vote No signs and telling Atkinson "I guess you can do whatever you want." Consistent with McCready's sentiment, Lojas agreed (in December 2014) with Atkinson that the Vote No window signs put Atkinson "on the radar." As for the social media postings, Alakson gave Atkinson and his coworkers several friendly but ominous warn-

⁵¹ It is well established that the NLRA protects union dissident activities. See, e.g., *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004) (finding that a union violated the Act by asking the employer to suspend and discharge an employee because of her union dissident activity, which included opposing the union's efforts to secure quick ratification of a successor collective-bargaining agreement); *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1043–1044 (1997) (union unlawfully attempted to cause employer to discipline employee because the employee had engaged in union dissident and other protected concerted activities). To be sure, there are some exceptions (such as certain unprotected wildcat strikes, see, e.g., *Energy Coal Partnership*, 269 NLRB 770, 770–771 (1984)), but none of those exceptions is applicable here.

In this case, Respondent maintains that many of Atkinson's activities in support of the Vote No campaign were not protected by the Act because, in Respondent's view, the Vote No campaign should have ended in June 2013, when a majority of bargaining unit members voted to ratify the national collective-bargaining agreement. (R. Posttrial Br. at 26–27.) That argument fails, however, because the Western Pennsylvania supplement was not ratified in June 2013 (or after another ratification vote in January 2014), and Atkinson and other Vote No campaign supporters were well within their rights to continue exhorting bargaining unit members to vote against ratifying the supplement. (FOF, section II(A)(2), (E), (I).)

ings that they should watch what they posted on Facebook. And perhaps most directly, in July 2014, Blystone told Atkinson that Bartlett, DeCecco, and Alakson⁵² were singling Atkinson out and trying to get rid of Atkinson because of Atkinson's activities (such as generally being a troublemaker and orchestrating the Vote No signs that employees posted in their vehicle windows).⁵³ (FOF, section II(G), (J), (L), (V), (BB).)

As an affirmative defense to the General Counsel's initial showing that UPS discriminated against Atkinson when it discharged him on June 20, UPS asserts that it would have discharged Atkinson even in the absence of his union and protected activities because Atkinson committed methods infractions during his June 18 blended ride with Bartlett. The problem with Respondent's theory is that it was Bartlett who decided (in his discretion) to convert Atkinson's safety ride into a blended ride that would serve as both a safety ride and an OJS ride followup, and it was Bartlett who cited Atkinson for the methods infractions in question. Since I have found that Bartlett (and others) had an unlawful goal of using UPS's rules to single out and get rid of Atkinson because of his union and protected concerted activities, the June 18 blended ride is tainted, as is the June 20 discharge that resulted from methods infractions that Bartlett identified in that ride.⁵⁴ Indeed, the taint remains even though it is true that Atkinson committed at least some methods infractions during the blended ride (such as rolling through a stop sign and having trouble finding certain packages) and it is true that UPS has a track record of disciplining drivers for committing methods infractions – even with those facts, the fact remains that UPS (through Bartlett and other supervisors) unlawfully had its thumb on the proverbial scale when it decided to discharge Atkinson on June 20 based on methods infractions that Bartlett found Atkinson committed during the June 18 ride. (FOF, Section II(S), (T)(3), (Z).) Because of that taint, UPS's affirmative defense falls short, and I find that UPS violated Section 8(a)(3) and (1) when it discharged Atkinson on June 20, 2014.

Analysis—the October 28 discharge

For the same reasons cited above concerning Atkinson's June 20 discharge, I find that the General Counsel made an

⁵² I pause here to note that although Alakson delivered friendly warnings to Atkinson and others to be careful about what they posted on social media, that fact is not inconsistent with Alakson supporting a plan to get rid of Atkinson because of Atkinson's union and protected activities. Alakson could have had any number of reasons for supporting a plan to get rid of Atkinson, including but not limited to going with the crowd, following the lead of his supervisor (Bartlett), or simply tiring of Atkinson's protected activities.

⁵³ In litigating this case, UPS has posed the question of what makes Atkinson so special, and thus a target for an unlawful discharge, as opposed to countless other Vote No campaign supporters and union stewards? (See, e.g., R. Posttrial Br. at 21–23, 28.) The evidence of UPS's animus towards Atkinson that I have set forth here (among other evidence) answers that question.

⁵⁴ I realize that my reasoning would also apply to Atkinson's June 19 discharge for supervised vs. unsupervised performance, which also arose out of the June 18 blended ride. That discharge, however, is not before me, since it was resolved by the grievance panel and the General Counsel deferred to the panel's decision.

initial showing that Atkinson's union and protected concerted activities were a substantial or motivating factor in UPS's decision to discharge Atkinson on October 28, 2014. It suffices to note that UPS's animus towards Atkinson was still present in October 2014, as indicated by the fact (among others evidence) that: the June 20 and October 28 discharges occurred roughly within four months of each other; Blystone admitted in July 2014, that Bartlett, DeCecco, and Alakson were aiming to get rid of Atkinson because of Atkinson's union and protected activities; and Lojas told Atkinson in December 2014 that he agreed the Vote No window signs put Atkinson on the radar (thereby indicating that the animus persisted throughout the relevant time period). (See Discussion and Analysis, Section C(3), supra.)

As its affirmative defense concerning the October 28 discharge, UPS asserts that it would have discharged Atkinson even in the absence of his union and protected activities because Atkinson committed a methods infraction on October 27 by failing to download EDD before leaving the facility and starting his route. There is no dispute that Atkinson did not get EDD before leaving the facility on October 27. (FOF, Section II(X).) UPS, however, does not have an established track record of disciplining drivers for not downloading EDD, in part because the issue does not arise frequently, and in part because on some occasions when the issue has arisen, UPS has handled the problem informally (i.e., without discipline) or drivers have returned to the facility on their own to complete the EDD download without notifying management.⁵⁵ (FOF, Section II(Y)(2).) In addition, as with the June 20 discharge, the fact remains that UPS's decision to discharge Atkinson on October 28 was tainted by UPS's unlawful plan to use its rules to single out and get rid of Atkinson because of his union and protected concerted activities. Indeed, although Bartlett was no longer assigned to the New Kensington center, DeCecco and Alakson were still present and were directly involved in both UPS's initial response to Atkinson's failure to get EDD and in UPS's decision to discharge Atkinson. (FOF, section II(V), (X), (Y)(1).) Because of the persisting taint from the plan to get rid of Atkinson and because UPS lacks a clear track record of disciplining drivers for not downloading EDD, UPS's affirmative defense falls short, and I find that UPS violated Section 8(a)(3) and (1) when it discharged Atkinson on October 28, 2014.

CONCLUSIONS OF LAW

1. By discharging Robert Atkinson on June 20, 2014, because he refrained from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and otherwise engaged in protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By discharging Robert Atkinson on October 28, 2014, because he refrained from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and otherwise engaged in protected concerted activities, Re-

⁵⁵ Presumably, using Telematics and DIAD records, UPS could determine when a driver returns to the facility to download EDD after starting his or her route. There is no evidence, however, that UPS has used Telematics or DIAD records to identify drivers who engage in that sort of self-help regarding downloading EDD.

spondent violated Section 8(a)(3) and (1) of the Act.

3. By committing the unfair labor practices stated in Conclusions of Law 1–2 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

A. Does After-Acquired Evidence about Atkinson's Remarks about McCready and Eans affect the Remedies that are Available to Atkinson?

The Board has held that if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. *Tel Data Corp.*, 315 NLRB 364, 367 (1994), reversed in part on other grounds, 90 F.3d 1195 (6th Cir. 1996); *Marshall Dublin Poultry Co.*, 310 NLRB 68, 69–70 (1993), reversed in part on other grounds, 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856, 856–857 (1990); see also *Bob's Ambulance Service*, 183 NLRB 961, 961 (1970) (explaining that the issue of employee misconduct goes to the remedy (i.e., whether reinstatement with full backpay is appropriate) and not to compliance with the remedy). The Board follows this rule concerning after-acquired evidence of discriminatee misconduct to “balance [its] responsibility to remedy the Respondent’s unfair labor practice against the public interest in not condoning” the discriminatee’s misconduct. *John Cuneo, Inc.*, 298 NLRB at 856.

In this case, UPS presented evidence that on May 9, 2015, Atkinson made a social media post in which (among other things) he questioned Eans’ masculinity and whether Eans was compensating for having erectile dysfunction, and described McCready as a knuckle dragger who sounds as if his mouth is full of cotton balls when he (McCready) speaks. Atkinson admitted that he made the post. McCready, meanwhile, explained that he has struggled for some time with his voice and pronunciation. (FOF, sec. II(EE).)

There is no dispute that UPS maintains an Anti-Harassment policy that prohibits harassment of any person or group of persons on the basis of race, sex, national origin, disability, sexual orientation, gender identity, veteran/military status, pregnancy, age or religion. The Anti-Harassment policy also states that UPS will not tolerate derogatory or other inappropriate remarks, slurs, threats or jokes. Consistent with that language, UPS has a track record of immediately discharging employees who violate its Anti-Harassment policy. McCready testified, without rebuttal, that Atkinson’s May 9, 2015 posting violated UPS’s Anti-Harassment policy and would have led to Atkinson’s immediate discharge.⁵⁶ (FOF, sec. (DD).)

Based on the evidentiary record concerning Atkinson’s May 9, 2015 remarks about Eans and McCready, I find that reinstatement is not an appropriate remedy because Respondent has

⁵⁶ In this connection, I note that none of the parties maintain that UPS tolerated remarks like Atkinson’s in the New Kensington center or elsewhere. Accordingly, any arguments to that effect have been waived.

demonstrated that, under its Anti-Harassment policy, it would have discharged any employee for making remarks like Atkinson’s. I also find that Atkinson is not entitled to full backpay. However, since Respondent did not present evidence about when it first learned of Atkinson’s May 9, 2015 remarks,⁵⁷ I will set June 21, 2016 (the day that UPS presented evidence at trial about Atkinson’s May 9, 2015 remarks – see Tr. 378–383), as the cutoff date for Atkinson’s backpay award.

B. Applicable Remedies

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

Respondent, having discriminatorily discharged Robert Atkinson, must make him whole for any loss of earnings and other benefits up to the backpay cutoff date of June 21, 2016.⁵⁸ The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Atkinson for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate Atkinson for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 6 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security

⁵⁷ The closest that UPS came to identifying when it learned of Atkinson’s May 9, 2015 remarks was when McCready answered a question about whether he heard anything from Atkinson after Atkinson’s October 28, 2014 discharge. McCready responded that he heard from Atkinson “indirectly” because there was a social media post that Atkinson made four to five months after the grievance panel decision (i.e., a post that Atkinson made in May 2015, which would have been roughly four months after the January 2015 panel decision). McCready stopped short, however, of providing a date when he or anyone else at UPS learned of the May 2015 post. (Tr. 1038–1039.)

⁵⁸ As part of its request for make whole relief, the General Counsel asked that I order Respondent to pay consequential damages to reimburse Atkinson for costs he incurred as a result of Respondent’s unfair labor practices. As the Board has recognized, a change in Board law would be required for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law (which does not authorize me to award consequential damages), I deny the General Counsel’s request for consequential damages.

Administration at the appropriate time and in the appropriate manner.

Last, Respondent shall be required to expunge from its files any references to its unlawful June 20 and October 28, 2014 decisions to discharge Atkinson, and within 3 days thereafter shall notify Atkinson that this has been done and that those unlawful decisions will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁹

ORDER

Respondent, United Parcel Service, Inc., North Apollo, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they refrain from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and otherwise engage in protected concerted activities.

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

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

(a) Make Robert Atkinson whole for any loss of earnings and other benefits suffered as a result of the unlawful June 20 and October 28, 2014 discharges against him, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(b) Within 14 days from the date of this Order, remove from its files any references to the unlawful June 20 and October 28, 2014 discharges of Robert Atkinson and, within 3 days thereafter, notify him in writing that this has been done and that those unlawful discharges will not be used against him in any way.

(c) Compensate Robert Atkinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6, 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(s).

(d) Within 14 days after service by the Region, post at its New Kensington center facility in North Apollo, Pennsylvania, copies of the attached notice marked "Appendix A."⁶⁰ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by 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 distrib-

⁵⁹ 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.

⁶⁰ 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."

uted electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at its New Kensington center at any time since June 20, 2014.

(e) 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 Respondent has taken to comply.

Dated, Washington, D.C. November 25, 2016

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they refrain from supporting and assisting the International Brotherhood of Teamsters and/or Teamsters Local 538 and otherwise engage in protected concerted activities.

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

WE WILL make Robert Atkinson whole for any loss of earnings and other benefits suffered as a result of the unlawful June 20 and October 28, 2014 discharges against him, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the judge's Order, remove from our files any references to the unlawful June 20 and October 28, 2014 discharges against Robert Atkinson and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that those unlawful discharges will not be used against him in any way.

WE WILL compensate Robert Atkinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, 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(s).

UNITED PARCEL SERVICE

The Administrative Law Judge's decision can be found at www.nlr.gov/case/06-CA-143062 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.



APPENDIX B

[Appendix B omitted from publication.]