UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC. and ADAM CUMMINGS, AN INDIVIDUAL	Case No. 34-CA-013051
AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC. and SHANNON SMITH, AN INDIVIDUAL	Case No. 34-CA-065800

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE BOARD

Respectfully submitted,

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Answering Brief to the Exceptions and Brief in support thereof filed by Respondent.

I. STATEMENT OF THE CASE

On November 20, 2012, Administrative Law Judge Raymond P. Green issued his Decision in the instant case, finding that American Medical Response of Connecticut, Inc. (herein called Respondent) violated Section 8(a)(1), (3) and (5) of the Act by: 1) unilaterally, without notice to or bargaining with the duly designated union, changing the terms and conditions of employment of the employee in the bargaining unit; 2) issuing disciplinary warnings to employees pursuant to the change in policy and rules relating to oil and coolant checks and the requirement that employees file daily checklists; and 3) discharging employee Adam Cummings because of his union and/or protected concerted activities (ALJD 13, lines 8-17).[1] Respondent excepts to all of these findings.[2]

On January 18, 2013, Respondent filed 26 exceptions to the judge's findings and recommended order, and a supporting brief. For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel respectfully urges the National Labor Relations Board (the Board) to reject all of Respondent's

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[1] Throughout this brief, the following references will be used:

Respondent's Exceptions.....REX (followed by page number)
Respondent's Brief Supporting Exceptions..... RSB (followed by page number)
Administrative Law Judge's Decision.....ALJD (followed by page number)
Transcript.....Tr. (followed by page number)
General Counsel's Exhibits .....GCX (followed by page number)
Respondent's Exhibits ..... RX (followed by page number)

[2] In addition, the judge found that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging employee and former supervisor Shannon Smith. Counsel for the Acting General Counsel is declining to file cross exceptions with respect to Smith's discharge.

exceptions and to affirm the Administrative Law Judge's rulings, findings, and conclusions, and to adopt his recommended Order, as described herein.

II. OVERVIEW

This case concerns Respondent's clear refusal to operate within the confines of the Act by providing notice and opportunity to bargain to the Union over changes to employees' terms and conditions of employment and its desire to rid itself of an effective and active Union official who dared to question such actions. When challenged by Cummings, who protested Respondent's unilateral imposition of a vehicle check off sheet that required changes to employees' daily work duties and attached disciplinary consequences for a failure to perform such duties, Respondent overreacted to his protestations by accusing him of initiating a contractually prohibited "work action". Judge Green correctly found that Respondent selectively parsed out and misconstrued a single comment made by Cummings in an email discussion in which Cummings advanced employees' concerns about Respondent's unilateral change. Judge Green further found that without any investigation or discussion with the Union, Respondent summarily imposed discipline on over a hundred employees for allegedly failing to turn in completed vehicle check off sheets on an unspecified day during one particular week. Judge Green further found that Respondent improperly reliance on its misguided interpretation of Cummings' email comment in order to discharge him lacked rationale, as Respondent failed to: (1) discuss the reason for the discipline with a single employee; (2) investigate whether employees' alleged failure to turn in the check off sheets were at the encouragement of Cummings; (3) consider employees' written protests that they had performed the check off; and (4) respond to numerous claims that

Respondent's record keeping regarding the completed check off sheets was faulty and unreliable.

Respondent's defenses are essentially that: (1) the Union waived any right to bargaining as it had agreed to the vehicle check off sheets when it agreed to the proposed Standard Operating Procedure; and (2) that it presented conclusive proof that Cummings incited a prohibited work action by virtue of his email stating that he would advise employees to go to a mechanic for assistance in checking the oil until Respondent provided proper training, buttressed by employees failure to remit vehicle check off sheets. Following eight days of hearing and consideration of the parties' briefs, Judge Green properly dismissed Respondent's defenses. Respondent's appeal followed. For the reasons noted below, the Board should reject Respondent's rehashed argument set forth in their Exceptions, and affirm the judge's well-reasoned decision.

III. RELEVANT FACTS

Respondent is a nation-wide provider of emergency and related transportation services. Four different unions have represented Respondent's employees since 2001 (ALJD 3, lines 13-21). At the time of the events at issue, the employees were represented by NEMSA, which served as employees' representative from 2008 until November 1, 2011, when Teamsters, Local 559 became the employees' representative (*Id.*).

The discriminatees worked at Respondent's facility in West Hartford, Connecticut (West Hartford facility), the primary facility in Respondent's Greater Hartford AMR division (GHAMR). GHAMR provides emergency medical and transportation services in Hartford, West Hartford, Windsor, Newington and Bloomfield, Connecticut.

Approximately 300 employees report to the West Harford facility. These employees include Emergency Medical Technicians (EMTs) at the Basic, Intermediate and Paramedic levels, Chair Car Drivers, Livery Drivers, Dispatchers, Billing and Payroll employees, Maintenance employees, Building and Grounds employees, and other Office Clericals. Respondent's fleet includes 30 to 40 ambulances, approximately 30 wheelchair transport vehicles, about 15 fly cars, and other EMS vehicles. The fleet includes both diesel and gasoline powered vehicles. The newer gasoline powered vehicles use more oil than the older diesel powered vehicles (Tr. 540-541). The ambulances are used on a 24-hour continuous basis.

Every shift, 365-days a year, EMTs and paramedics arrive at work and follow the exact same routine (Tr. 319). They clock in, report to the supervisor of the day, and the supervisor gives the EMT/Paramedic his/her vehicle assignment, keys, computer, and envelope for documenting calls and holding any paperwork received (Tr. 66, 205, 319). If the supervisor is not there, the necessary paperwork is left on a table outside the window of the supervisor's office (Tr. 67).

After gathering all of his/her equipment, the EMT/Paramedic then goes out to the vehicle bay and finds his/her vehicle (Tr. 320). Respondent's ambulances are manned by two person crews and fly cars are manned by a single Paramedic (Tr. 68). Because many of the vehicles are on the road nearly 24-hours a day, frequently the vehicle will be arriving at the facility as the next crew is heading to find it. If the vehicle is just coming in, the crews exchange information about the vehicles like what supplies were used and need to be replaced (Tr. 320). If the vehicle, however, had been sitting idle, the crew goes through the vehicle, determines if any medical supplies are needed, and

then replaces any of the necessary supplies (Tr. 86, 320). If the crew wishes, they can use a check sheet that lists what supplies are required to be in the vehicle, but the check sheet is not required, does not need to be turned in to the supervisor, and has never been the subject of discipline (Tr. 72-73, 269-271, 539).

In addition to making sure the vehicle is stocked, the crew also checks the operability of the vehicle (Tr. 216, 320, 537). Until the events that led to the charges filed in this matter, the thoroughness of the check varied from crew to crew. All the EMTs and Paramedics, who testified, stated that they checked the sirens and lights on the vehicles and would bring the vehicle to the mechanics if any warning lights came on (Tr. 86-87, 216-217, 322, 537). While EMTs and Paramedics were not required to check the oil or other fluids in the vehicles, some of the EMTs and Paramedics testified that they took it upon themselves to check the oil periodically (Tr. 87, 556, 579). Even though Respondent insinuates otherwise, the witnesses all testified that they never checked the fluids daily (Tr. 89, 216-217, 537, 556; RSB 6). Once the crew was satisfied that they had all their necessary supplies and that the vehicle was operable, they would sign on the radio with dispatch and receive their first assignment (Tr. 322).

While in the field, the crew is required to place any "trailing documents", paperwork from nursing homes and doctors that the billing department needs, into the envelope provided by the supervisor at the beginning of each shift (Tr. 65, 206, 324). At the end of the shift, the crew returns to the facility. The vehicle is then turned over to the next crew. The exiting crew places the trailing documents and laptop in the envelope, which is remitted to the on-duty supervisor (Tr. 71, 206).

Unlike Respondent's claim, at no time has a crew been required to complete or turn in any check sheets. In 2008, when NEMSA became certified as the bargaining representative for Respondent's employees, NEMSA and Respondent began negotiations for their one and only collective bargaining agreement. The negotiations lasted almost a year with a contract finally being reached on April 2, 2009 (Tr. 316, 1026; GCX 4). Following the ratification of the contract, the parties, per the contract, agreed to meet and settle any disputes that arose between employees' contract rights and Respondent's Standard Operating Procedures (SOP) (Tr. 374, 1027; GCX 4; RX 2). In this regard, Respondent contends that the Union agreed to changes, which included a provision at Section 2.22 of the SOP, entitled "Start of Shift Procedures" that required employees to:

> Report to the vehicle and complete a vehicle checklist and include it in the daily paperwork. Ensure that the vehicle is ready to respond by checking the oil level and starting the vehicle. Any vehicle failures shall be promptly reported to the Operations Supervisor.

(RX 2, p.15).[3] Respondent relies on this language to assert that the parties had an agreement regarding the vehicle check sheets it instituted in April 2011, and thus it had no obligation under the Act to provide the Union with notice and an opportunity to bargain before instituting its new vehicle check sheet policy. However, the judge correctly found that these negotiations did not result in an agreement being reached between the parties and that the Union never assented to the SOP (ALJD 3-4). The

[3] Respondent cites Section 2.22 as stating "Report to the vehicle and complete a **Vehicle Inspection** sheet..." (emphasis added). However, a review of Respondent's own exhibit clearly reveals that the language cited above is the correct quote.

judge reached this conclusion based on Respondent's failure to provide any witness,[4] document, e-mail, or other memorandum indicating that the Union agreed to the proposed Standard Operating Procedure (*Id.*).

In its brief in support of its exceptions, Respondent cites witness testimony to demonstrate that Respondent had a policy in effect that required vehicle checklists and oil checks (RSB 6-7). Here, Respondent's assertion is misleading. Witness testimony clearly explains that approximately once a year when it came time for Respondent's annual inspection, the crew would be notified a few days before that an inspector was going to come (Tr. 326). The supervisor would hand the crew a check off sheet and ask the crew to go through the vehicle and make sure everything listed on the sheet was in the vehicle (Tr. 327). If anything was missing, the crew was to notify the supervisor (Tr. 327). As part of this process, the crew checked the status of the vehicle's lights, but they were not required to check anything under the hood of the vehicle (Tr. 328). In addition to this yearly check, employees testified that they were aware that there was a corporate policy in place that required checklists but that the policy was never enforced (Tr. 639).

Based on the foregoing, the judge correctly concluded, "[i]n all cases, the testimony was that since 2001, [employees] did not check oil and coolant on a daily basis and that no employees were ever required to document that they did so or were disciplined for failing to do so" (ALJD 4, lines 46-48). Furthermore, Respondent concedes that until April 2011 it did not enforce any checklist policy or require employees to check vehicle oil levels (RSB 24). Thus, at no time did Respondent

[4] Respondent's claim that Counsel for the Acting General Counsel's own witnesses testified that the SOPs were agreed to is unsupported by the record (RSB 4). To the contrary, General Counsel's witness who Respondent cited testified that the SOPs were not finalized (Tr. 432).

require employees to check the oil or fluid levels of their vehicles on a daily basis, or to fill out any sheet certifying this was done. Most significantly, Respondent did not discipline them for failing to do so and the SOP does not contemplate such adverse actions. That is until April 8, 2011.[5]

On April 1, Supervisor Duane Drouin sent an email to Respondent's Field Supervisors (FS) and Field Training Officers (FTO). FTOs are bargaining unit members who take on some supervisory duties in addition to their EMT duties. Attached to the email was a new proposed "pre-trip inspection" form,[6] which Drouin was requesting feedback on before rolling out (RX 10). The email was not sent to any representatives of the Union, including the stewards (RX 10). Furthermore, the email did not explain that the Company would be instituting a new policy that required employees to check oil and coolant levels for each shift, complete and turn in a vehicle check sheet for each shift, and be disciplined if they failed to do so (RX 10).

On April 6, Drouin sent an email to the FS and FTOs with the new checklist attached. In the email, Drouin stated: "Please start utilizing them asap. We will need to work on tracking them. We have had 2 situations this past week with vehicles extremely low on oil. We don't need to blow another engine... 913 and 903 both were found to be 4+ quarts low..." (RX 13). Again, Drouin did not explain that the check sheets were to be utilized on every shift, that they were to be turned in, if they were to

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5 All subsequent dates are in 2011, unless otherwise indicated.

6 Respondent incorrectly claims that the ALJ erred by incorrectly stating that Drouin emailed a new form when it was simply a revised version of the previously existing "Pre-Trip Inspection" sheet (RSB 9). The judge acknowledged that the form was "somewhat similar to the form used before 2001" (ALJD 5, lines 12-13). Notwithstanding, Drouin's email refers to the sheet as a "very preliminary setup" indicating that it was a new form. As such, the judge's classification of the attachment as "a new proposed 'pre-trip inspection' form'" is reasonable (RX 10).

be turned in what the process was to be, or that failure to turn in a check sheet would result in employee discipline (RX 13).

Around April 8, employees of Respondent arrived to work and learned that they had new job duties (Tr. 328, 555). Posted in the crew area and on the supervisor's window was a memo entitled "Questions Regarding – Vehicle Check Sheets" (Tr. 329, 551-552; GCX 15). The memo which had a picture of the Grim Reaper said "Don't let him catch us off guard" and informed employees that the check sheets were not new but that employees were now required to fill one out for each shift worked (GCX 15).

When Cummings arrived to work on April 8, his coworkers approached him about the vehicle check off sheet. Cummings, a Union Steward, told them he did not know what they were referring to, at which point he saw the memo. Cummings seeing the memo found Supervisor Chris Handel and asked him where the new vehicle check off sheet was and what it required (Tr. 330). Handel showed Cummings where to find the sheet on the table and told him it was self-explanatory (Tr. 330). Handel did not explain to Cummings how to perform the tasks required by the sheet or what to do with the sheet when he was done completing it (Tr. 331). Cummings and the other employees took the sheet and began to fill them out as the memo required (Tr. 331, 553).

Still three major issues developed immediately. First, some employees never saw the memo and having never been informed of the vehicle check off sheet by a supervisor, they did not learn of this new requirement (Tr. 531). Second, the vehicle check off sheet required employees to document that they had checked the operability of the vehicle before heading into the field (GCX 6). In addition to the traditional checking of lights and sirens, the sheet required employees to check the outside

physical condition of the vehicle, the oil level, windshield washer fluid, engine coolant level, and tire pressure (GCX 6). Employees had not been trained in how to check these items on the various vehicles in Respondent's fleet and the sheets did not come with any instructions or opportunities to sign up for training (Tr. 221, 333, 542, 553, 557). Furthermore, because Respondent had announced the new vehicle check off sheet requirement through a memo, employees did not have an opportunity to ask Respondent how to complete the sheet, how to check the fluid levels or tire pressure, and if they could receive training (Tr. 331, 553, 603, 648, 700). The final major issue that ensued was that Respondent never informed its employees what to do with the sheet once it was completed (Tr. 209, 331, 553, 603, 648, 674). This issue was further compounded because Respondent never informed its supervisors what to tell employees to do with the sheets (Tr. 208).

When the employees could not get any help from Respondent, they turned to their stewards for support. Stewards Eichler and Cummings both testified that they were approached by members regarding the new vehicle check off sheet requirement (Tr. 353, 715-716). Both told employees that NEMSA was going to address it with Respondent but that in the interim they needed to complete the vehicle check off sheets to avoid discipline (Tr. 353, 613-614, 715-716). At no time did Cummings or any other representative from NEMSA instruct or suggest to employees that they should not complete the vehicle check off sheet or the tasks it requires (Tr. 353-354, 543, 561, 613-614, 650, 715-716).

Just before 2:00 p.m. on April 8, Cummings emailed General Manager Sean Piendel, copying Labor Representative Sparks, Chief Steward Eichler, and Stewards

Chris Dennis and Ben Orioli (Tr. 335, GCX 16, p.1). In his email, Cummings noted that Ambulance Crews were "newly being ordered to check oil and coolant levels in their vehicles," and went on to observe that training for these tasks had not been provided, and that this presented "cause for concern for crew safety among other things" (GCX 16, p.1). Cummings also inquired if this was a new policy and requested that Respondent provide more information about it to either Eichler or himself (GCX 16, p.1). Within an hour, Piendel replied by email copying the others as well as Director Zagami and referred Cummings to four subsections of the SOP, and then falsely claimed that the Vehicle Check Sheets had "always been required"[7] (Tr. 337, GCX 16, p.1; RSB 24).

Around the same time Cummings emailed Piendel on April 8, Human Resources Specialist Kelly Gauthier emailed Union Representative Toby Sparks, officially notifying the Union for the first time about the vehicle check sheet (RX 14). The email did not include a copy of the vehicle check sheet but instead had the grim reaper memo attached (RX 14). Based on this timeline of events, as corroborated by Respondent, the Union was notified after the employees of the unilateral change to employees' terms and conditions of employment (RSB 25).

On Sunday, April 10, Cummings had a conversation with FOS Chris Chaplin about the vehicle check off sheet requirement (Tr. 355). Chaplin is the health and safety officer, so Cummings went to speak with him about his safety concerns. Cummings told Chaplin that he was concerned about employees getting hurt on the hot engine especially since employees did not know their way around all the different types of ambulance engines (Tr. 356).

[7] Respondent admits that the check off sheets had not been previously required (RSB 24).

On the morning of April 11, Director Zagami restarted the email chain with Cummings, copying the others, and stated that it would save time for the Union and Respondent if Cummings "review[ed] manuals prior to making accusations" (GCX 16, p.2). Within 20 minutes of this, Chief Steward Eichler emailed Zagami, copying the others, and reiterated the safety concern Cummings raised in his April 8 email, as well as noting that Respondent's policies regarding vehicle checklists and engine fluid checks had never been enforced, that some employees were not skilled in performing the fluid checks, that the notice should remain posted for the 30 days as outlined in Article 14 of the collective bargaining agreement before implementation, and that "proper vehicle safety classes (as far as engine compartment things)" should be scheduled (GCX 16, p.2).

Within minutes of Eichler's email, Cummings emailed Manager Piendel again, copying the others and adding Stewards Omason Modeste and Turk Aksoy, in which he reiterated that he did not dispute the existence of the policy or a vehicle checklist, but that neither had been enforced or utilized at the facility in his 6 years with Respondent (Tr. 337-338; GCX 16, p.2-3). Cummings also noted that he and Chief Steward Eichler had further concerns they wanted to discuss with Respondent, including the need for training and the safety risks of having employees checking fluid levels on hot engines during or at the end of their shifts (GCX 16, p.2-3). Cummings concluded the email by conceding the importance of having the vehicle checks performed, but observing that they should be done correctly and safely, and requesting that either Steward Eichler or he be notified when a meeting could occur (GCX 16, p.2-3).

Within 10 minutes of Cummings' last email, Manager Piendel emailed a response to Steward Eichler, copying the others, and he repeated his previous direction that employees "uncomfortable" checking vehicle engine fluids should see a Supervisor or a Mechanic for proper guidance. Piendel also argued that all those who had undergone training had received training in checking fluid levels (GCX 16, p.3).

About 20 minutes later, Steward Eichler replied to Piendel's email reiterating that the Union's priority was to ensure employee safety, and she observed that the Employer was implementing a policy she had not seen enforced in her 8 years with AMR and without first consulting the Union about it (GCX 16, p.4). Steward Eichler also noted in her email that the regular training course she underwent did not address any matters "under the hood" of ambulances,[8] and she concluded by reiterating Cummings' request for a meeting (GCX 16, p.4).

Forty minutes after Eichler's email on April 11, Steward Dennis emailed the group and stated that "the fact is we have new, gas powered vehicles that go through lots of oil," and "the supervisors that were asked, weren't able to assist the crews," and, for some of the Employer's vehicles, the fluid reservoirs under the hood are too difficult even to see (GCX 16, p.4).

Much later in the day, Manager Piendel replied to Dennis' email, copying the others, and asked to know which Ambulance Crews were operating the newer gas powered ambulances without knowing how to check engine fluids (GCX 16, p.4).

Within 10 minutes, Cummings replied, copying Eichler, Sparks, Orioli, Dennis, and Kerr, and stated that he had recently operated one of the newer ambulances

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[8] Respondent once again takes great liberty with the record evidence by stating that its "mechanics demonstrate many aspects of vehicle maintenance including how to check the oil level of the emergency vehicles", yet its employees repeatedly testified that they did not receive such training (RSB 6).

without ever having been provided with fluid check training from the Employer, and observing that the newer ambulances differ from the others in the fleet (GCX 16, p.4). It was in this email that Cummings also made the following statements, which Manager Piendel interpreted as a threat to instigate a work action in violation of Article 17 of the collective bargaining agreement:

> I can assure you that my hire class had no training what so ever in regards to checking anything under the hood. What you have asked the employees to do is among other things not safe. You need to provide everyone with the proper [sic] training before asking anyone to do these tasks. *Until then I will be advising the employees to have a mechanic check the trucks to protect the equipment and employees.*

(GCX 16, p.4; emphasis added). It is important to note that earlier in the day Piendel had instructed the Stewards to have employees go to a supervisor or mechanic if they needed guidance or were uncomfortable checking engine fluid levels (GCX 16, p.3).

Just 20 minutes later, Manager Piendel replied to Cummings with an email, copying the others, and stated in legalese, "[a]m I to understand that you are <u>initiating a concerted job action</u> against AMR? Please respond and based on your response, I will take the necessary action immediately!" (GCX 16, p.5) (emphasis added).

Fifteen minutes later, Cummings replied by email, copying the others, stating, "Have at it if you feel that is [what] my response entailed, and you feel that is a more appropriate response than meeting with the union about this situation" (GCX 16, p.5).

Later in the evening, Manager Piendel replied directly to Cummings' email, copying the others, and stated that it was a "yes/no question" and that Cummings' response was not really an answer (GCX 16, p.6).

Later still, Cummings responded by email, copying the others, and stated the following:

> I feel that I have made my concerns and intentions quite clear. I also think that it is clear that the other stewards feel as I do. Do with that knowledge as you will. I should hope that you will meet with the union and confer on this matter.

This concluded the broader group exchange between the Stewards and Respondent.

As is shown by this email exchange, the NEMSA stewards repeatedly requested that Respondent meet with them to discuss how the vehicle check sheets would affect employees' working conditions specifically with regard to health and safety concerns (Tr. 339; GCX 16). Respondent's response was simple -- it did not have to meet with them and that it would not meet with them (Tr. 339; GCX 16).

On April 19, Steward Cummings filed grievance no. 6900 alleging that Respondent violated Article 14.02 by "implementing a new enforcement of an alleged 'old' policy of vehicle maintenance without proper notice given to the union and employees" (GCX 20). By way of remedy, the grievance requested that "the company cease and desist enforcement of this policy until the union can air the concerns of the workforce as mandated in article 14.02 of the CBA" (GCX 20). Cummings testified that he filed the grievance because he did not believe that the other stewards and he were making any progress in getting Respondent to meet and confer about Vehicle Maintenance Job Duties (Tr. 368).

On May 9, 10 and 11, Respondent's Field Operations Supervisors and Human Resources Specialist handed out written warnings to about 116 EMTs and Paramedics for allegedly failing to complete or turn in their Vehicle Check Sheets (GCX 57). The discipline Cummings, Dennis, and approximately 114 other EMTs and Paramedics received did not specify the date of the alleged infraction - rather it stated "[a] review of the vehicle check sheets for week ending 5/8/2011 revealed that you failed to complete

and hand in a vehicle check sheet" (Tr. 223-224, 377-378, 532, 719-720; GCX 14, 48, 50-52, 54, 57; RX 17). The disciplines cited SOP provisions 2.19 Documentation, 2.22 Start of Shift Procedures, 2.24 Shift Relief, and 7.6 Assigned Equipment and Vehicle (GCX 14, 48, 50-52, 54, 57; RX 17). Numerous employees disputed their disciplines writing comments on the disciplines to Respondent as to why the discipline was unjust (GCX 57). A review of the disciplines and vehicle check off sheets for the relevant time period showed that Respondent disciplined employees who had completed the vehicle check off sheets and did not issue discipline in cases where the employees did not complete the sheets. Even within a crew, one partner would receive a discipline and the other would not (GCX 57, RX 19).

On May 12, Union Representative Toby Sparks sent a letter to Piendel disavowing Cummings' actions. The letter stated:

> Pursuant to the CBA that NEMSA negotiated with GHAMR, specifically section 17.02, with respect to NEMSA's responsibility in the event of a work action:
>
> NEMSA has received an email from you stating that a union steward and member, Adam Cummings, potentially faces a Bad Faith charge in relation to an issue with specific policies (2.17, 2.19. 2.23 and 2.24) that were negotiated in good faith with Mr. James Gambone, a previous employee of NEMSA.
>
> Mr. Cummings actions are not representative of NEMSA. Mr. Cummings actions are his alone, and his actions have in no way been approved or condoned by NEMSA or its Board.
>
> NEMSA does not agree with Mr. Cummings actions and advises all members to follow company policies.

(GCX 28, p.3; RX 20). Respondent requested that this letter be posted on the union bulletin board at the facility but Eichler refused to do so (GCX 28).

On May 27 at 3:18 p.m., Piendel emailed Sparks and inquired why the May 12 letter had not yet been posted on the union bulletin board (GCX 32, p.3). Sparks replied to Piendel's email stating that Eichler had refused to post the letter and that he did not have the keys to the union board (GCX 32, p.2). Sparks then told Piendel, "FYI she is now being removed with Adam, for supporting his work action (by refusing to post the letter)" (GCX 32, p.2). Sparks told Piendel that in the interim period, he would send an e-mail to employees addressing the letter (GCX 32, p.2). Sparks concluded the e-mail by asking Piendel if Cummings was going to be facing any discipline for his work action (GCX 32, p.2).

At 6:41 p.m., Piendel emailed Sparks stating, "What I will say in writing, off the record, is that [Zagami] and I have scheduled him for a disciplinary hearing on Tuesday at 1:00 regarding his actions. We can talk in person when I see you" (GCX 32, p.1). Sparks replied, "That works just fine. I sent another email to [Eichler] letting her know that by not posting the letter she was supporting the work action... we shall see what she has to say about that. I will see you in Hartford on Tuesday, we can talk then" (GCX 32, p.1).

On June 1, Cummings and Eichler met with Zagami, Piendel, and Human Resources Representative Kelly Gauthier at 2pm at the Shield Street office (Tr. 397, 406, 744, 1046). While Eichler invited Sparks, he refused to attend the meeting (Tr. 408-409, 747; GCX 63, 4:52). Cummings, Eichler and Piendel testified to what took place at the meeting, which lasted less than ten minutes (Tr. 1047). General Counsel also provided a recording of the meeting that Cummings took on his iPad (Tr. 397, GCX 63).

The meeting began with Zagami explaining that the purpose of the meeting was to afford Cummings the opportunity to explain the May 12 letter that Sparks wrote and the findings against him based on that letter (Tr. 405, 745, 1046, 1067; GCX 63, 0:03). Zagami explained that NEMSA had determined Cummings had violated Article 17 of the collective bargaining agreement (Tr. 396, 405; GCX 63, 1:13, 1:24). Cummings responded that he would like Respondent to explain what he did to create a work action because he did not know (Tr. 406, 408, 1067; GCX 63, 2:29). After a nearly 30 second pause, Zagami merely repeated that this was Cummings' opportunity to rebut Sparks' letter; he did not explain what Respondent was accusing Cummings of having done (Tr. 405, 745, 1067-1068, GCX 63, 3:16).

Eichler and Cummings then explained that they could not explain the letter because Sparks had written it without first talking to them about what was going on (Tr. 405, 408, 746, 1047, 1068-1069; GCX 63, 3:29). Cummings read aloud Article 17 and pointed out to Respondent that Article 17 covered nothing he talked about with Piendel in any emails (Tr. 405; GCX 63, 3:59). Article 17.01 of the collective bargaining agreement entitled "No Strike/Work Action" states:

> The duties performed by the employees subject to this Agreement involve potential life and death situations. Any delay in treating patients, transporting them to hospitals or other medical facilities, or in responding to calls can result in exacerbating the problems of ill and injured patients. To that end, during the term of this Agreement, neither the Union nor its agents or any of its members will collectively, concertedly, or in any manner whatsoever, engage in, incite or participate in any picketing, strike, sit-down, stay-in, slowdown, boycott, work stoppage, paper strike (deliberate failure to submit timely, quality, accurate, and complete medical reports and billing information) at any Employer location within the bargaining unit covered by this Agreement. Nor will employees engage in any sympathy strike against the Employer or honor the picket line of any other bargaining unit not covered by this Agreement while on duty or in uniform. The Union further agrees that this Section shall specifically

> prohibit any of the aforementioned conduct for alleged unfair labor practices. Such alleged unfair labor practices shall be handled under the National Labor Relations Act.
>
> Employees who violate this Article shall be discharged from employment. Any such discharge may be grieved under the Grievance Procedure; however, the sole issue for determination in any such grievance shall be whether the grievant's conduct was in violation of this Article.

Cummings then stated, "I didn't do anything or prevent anybody from doing a call, doing the run forms, so I would like to know what supposedly I did that even pertains to Article 17" (Tr. 405, 747; GCX 63, 5:07). Zagami again did not explain to Cummings what he had done wrong but instead asked if Cummings wanted to speak to anything regarding the emails (Tr. 1068; GCX 63, 6:02). When Eichler and Cummings asked Zagami what emails he wanted them to discuss, Zagami raised his voice and became combative and belligerent toward Cummings and Eichler (GCX 63, 6:10).

Cummings responded once again that he did not have anything to do with the May 12 letter and that he did not know how he had violated Article 17 (Tr. 746, 1047, 1068; GCX 63, 6:50). Cummings stated that <u>he did not do anything to violate Article 17</u> and then once again asked Respondent to explain how it felt he had committed a work action (406, 747; GCX 63, 6:50). Zagami, still agitated, responded, that this was not a forum for them to ask questions, "[w]e're asking you the questions to this, that's all there is to it. We got this letter and we're asking you what's going on" (Tr. 408; GCX 63, 7:22-7:33). Cummings repeated two more times that he did not know because he had nothing to do with the letter being written (Tr. 1047, 1067-1068; GCX 63, 7:34, 7:35). Zagami concluded the meeting by handing Cummings a pre-typed letter informing him

that Respondent was placing him on administrative leave[9] (Tr. 409, 748, 1048; GCX 40).

At no time during the meeting did Respondent explain how Cummings had incited a work action, disclose or tell Cummings the names of any individuals who Respondent claimed that Cummings had instructed not to complete the check off sheet, mention that there were employees who had come forward about Cummings alleged work action, or even tell Cummings that it thought he told 116 employees to refuse to turn in their vehicle check off sheet and that this was what amounted to the work action[10] (Tr. 407-408, 1068; GCX 63). In fact, during the meeting, Respondent never even referenced the vehicle check off sheet but instead only referred to the May 12 letter (Tr. 408, 1067; GCX 63). Respondent also never explained why it waited until June to issue Cummings discipline if it actually thought he told 116 employees to refuse to turn in their vehicle check off sheets back in April. Finally, Respondent's contention that "Cummings did not state that he did not incite a work stoppage" is patently false as Cummings clearly stated throughout the June 1 meeting that he did not do anything that violated Article 17 and did not do anything that interfered with any employee performing his job responsibilities (Tr. 405-406, 747; GCX 63, 5:07, 6:50; RSB 4, 12 and 23)

On June 3, Gauthier sent Cummings a scanned copy of his termination letter that she had also sent by certified mail that same day (Tr. 411; GCX 44). Piendel testified, "I

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[9] Once again Respondent attempts to mislead by stating that Cummings was not placed on administrative leave until "after" the June 1 meeting when the testimonial evidence, including that of Respondent's own witness, clearly shows he was placed on leave during the June 1 meeting (Tr. 409, 748, 1048; GCX 40).

[10] The Board has considered an employer's failure to provide employees with specific information concerning their alleged misconduct or to afford them an opportunity to explain their actions to be significant factors in findings of discriminatory motivation. *Burger King Corp.*, 279 NLRB 227, 239 (1986); *Syncro Corp.*, 234 NLRB 550, 551 (1978).

fired [Cummings] because I believed that he through those e-mails incited a job action" (Tr. 1094). Former supervisor Shannon Smith testified that in early June she saw Supervisor Duane Drouin in his office and asked, "Is it true that you got Adam Cummings fired?" (Tr. 135). Drouin said yes and when Smith asked him how, he replied, "Well, it takes a little bit more time to set the smart ones up" (Tr. 135). This was all that was said between them.

On June 10, Respondent issued written warnings to about 50 EMTs and Paramedics for failing to turn in or complete their vehicle check off sheets (GCX 58). The disciplines were for missing sheets for the dates May 21 through May 29. This time the sheet told the recipient for what date(s) he/she had failed to fill out a sheet. With the exception of eight, the recipients only failed to complete a sheet once during the review period. The majority of the recipients of the discipline wrote a note disputing Respondent's allegation[11] (GCX 58).

Employees upset that they were being unfairly written up went to Supervisor Smith, who was employees' union delegate when New England Health Care Employees Union, District 1199 represented the employees from 2002 to 2008. Smith investigated employees' concerns and confirmed that there was no system in place for collecting and

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[11] Respondent claims that it did not harbor any animus towards Cummings for his complaints as is illustrated by the fact that Respondent did not terminate or discipline the numerous employees who complained, including Eichler, Orioli, and Dennis. In advancing this argument, Respondent completely misses the point that the actions for which Cummings was discharged were protected and concerted, and did not lose the protection of the Act (as developed below). Therefore, a fortiori Respondent's animus is indisputable. Even if Respondent had applied the proper reasoning, its argument falls short on three fronts. First, Respondent did not provide any evidence to substantiate its claim that it did not discipline the complaining employees. Second, in the case of Eichler, Orioli, and Dennis, Respondent issued them discipline on May 9 and again on June 10 for failing to complete vehicle check sheets. Eichler, Orioli and Dennis each disputed these disciplines and Respondent eventually removed Dennis' discipline because it was entirely unsupported, even by Respondent's suspect standards. Finally, just because an employer does not discipline everyone it harbors animus towards is not evidence that it does not harbor animus for the discriminatee. Frequently, an employer will target the most vocal of the group to make an example to other employees. This is clearly what Respondent did here.

keeping track of which employees had turned in their checklists. Smith also discovered that some of the vehicle check sheets had been disposed of by an employee in the billing department. Smith notified Supervisor Drouin of the problem and created a system to keep track of the sheets. It is unclear whether Smith's system corrected the problem because Respondent did not conduct any further audits to confirm whether employees were complying with the vehicle check off sheet policy after it fired Cummings.

IV. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

As noted above, Respondent filed 26 Exceptions to the judge's decision. Exceptions 14 – 21 and 24 concern the judge's findings and determination that Cummings discharge violated Section 8(a)(1), (3) and (5) of the Act. Exceptions 2 – 11 and 22 except to the judge's findings of fact and determination that Respondent violated Section 8(a)(5) of the Act when it unilaterally instituted the vehicle check off policy. Exceptions 2 – 13 and 23 except to the judge's findings of fact and determination that Respondent violated Section 8(a)(1) of the Act when it issued discipline to employees in order to enforce its unlawful unilateral change. Exception 1 disputes the judge's denial of Respondent's Motion to Defer. Exception 25 attacks the Board's authority to act in light of the recess appointments and recent determinations. Finally, Exceptions 26 – 28 contest the judge's remedy and order, specifically the reinstatement of Cummings given his post-discharge Facebook posting.

A. Respondent's Exceptions Concerning Cummings' Discharge

Respondent's brief provides no new evidence or interpretation of the facts as to undermine or contradict the judge's correct determination. Respondent argues it had a

subjective belief supported by objective facts that Cummings was inciting a work stoppage, but the judge properly found this was not the case and that Respondent discharged Cummings because of his union and protected concerted activities.

The judge appropriately analyzed Cummings discharge under *Interboro Contractors*, 157 NLRB 1295 (1966) enfd., 497 F.2d 901 (6th Cir. 1974). An employer violates Section 8(a)(1) of the Act when it disciplines its employee for enforcing the provision of an existing collective bargaining agreement. The Board held in *Interboro* that individual action taken to implement a collective bargaining agreement is concerted activity because it is but an extension of the concerted activity that gave rise to the agreement. *Id.* at 1298. In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court endorsed the Board's *Interboro* rule and agreed that an individual employee's mere invocation of a right grounded in a collective-bargaining agreement is an integral part of the collective bargaining process and is therefore a "concerted activity" protected by Section 7 of the Act. In approving this interpretation of the Act, the Supreme Court agreed with the Board that an employee need not file a formal written grievance, nor explicitly refer to the collective-bargaining agreement as the basis for his or her complaint, to be protected under the Act. *Id.* at 840. Moreover, the Court found that the employee does not have to be correct in his or her assertion that the collective-bargaining agreement has been violated for the activity to be protected. *Id.* Rather, as long as the employee's action is based on a reasonable and honest belief that his contractual rights have been violated and is reasonably directed toward enforcement of a collectively bargained right, he is entitled to the protection of the Act. *Id.* Finally, the

Court concluded that an employer who disciplines an employee engaged in such protected activity violates the Act under Section 8(a)(1). *Id.* at 841.

The Court did limit how far an employee can take his concerted activity reminding us that "[a]n employee may engage in concerted activity in such an abusive manner that he loses the protection of Section 7." If, for example, the Court stated, the employer negotiates a no strike provision and then the employee violates such a provision by refusing to work, his activity is unprotected even though it may be concerted. *Id.* at 837. However, as Cummings did not instigate a work stoppage this limitation does not apply here.

Respondent admitted that it discharged Cummings because it believed that the statement he made in his April 11 email was evidence that Cummings incited a work action (Tr. 1037). While Respondent denies this in its Brief in Support of its Exceptions, Respondent also stated that it relied on Sparks' May 12 letter as evidence that Cummings engaged in a work action in violation of Article 17 of the collective bargaining agreement (Tr. 1044; GCX 1(r); RSB 20). In both of these cases, there is no evidence to support that Cummings was engaging in a work action or had incited a work action. Rather, the evidence shows that Cummings was attempting to enforce the contract and was therefore engaged in protected concerted activity under the *Interboro* doctrine. As such, Respondent discharged Cummings in violation of Section 8(a)(1).

Under the *Interboro* test, the first question is whether Cummings was seeking to enforce a contract right. In this regard, it is undisputed that a collective bargaining agreement, including Article 14.02 entitling NEMSA to sufficient notice and a meeting to discuss any modification by Respondent to existing policies, procedures, or work rules,

was in force at the time that Cummings exchanged emails with Respondent in April and May (GCX 4, 16, 22). It is also undisputed that the use or failure to use a check off sheet had never been required or resulted in discipline during Cummings six years of employment with Respondent (Tr. 333, 530, 551, 555). In this regard, it is undisputed that Respondent provided no notice to NEMSA, any of the stewards, or the bargaining unit employees prior to implementing the Vehicle Check Off Sheet policy on April 8 (Tr. 329, 551-552, 701, 1061). Finally, it is undisputed that Cummings, in his 9:38 a.m. April 11 email, directed Respondent to the appropriate contract provisions that he believed Respondent was violating - "you are obligated to notify all employees and the Union and post the intended change in working conditions for 30 days!" (GCX 16, p.2). Given the foregoing, the judge correctly determined that Cummings was attempting to enforce Article 14.02 of the contract and therefore was engaging in protected concerted activity under the *Interboro* doctrine.

Since Respondent disciplined Cummings for protected activity, the judge appropriately inquired whether Cummings engaged in any conduct, which removed him from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NRLB 1319 (2006). More specifically, the judge examined whether Respondent discharged Cummings based on an *honest belief* that he had engaged in a work stoppage during the protected activity. The judge concluded, "a subjective belief that Cummings was inciting a work stoppage is insufficient to constitute a defense where, as here, that belief is not supported by objective facts" (ALJD 10-11). See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

The judge found that, for the following reasons, Respondent's specious claim did not withstand even the slightest scrutiny. First, and easiest, the statement Respondent relies upon as evidence of Cummings inciting a work action clearly does no such thing. In his email, Cummings stated that Respondent needed to provide employees with the proper training before asking employees to check oil and engine coolants (GCX 16, p.4). Cummings went on to state that until Respondent provided such training, he would advise employees to go to a mechanic for checking the trucks to protect the equipment and employees (GCX 16, p.4). Respondent conveniently ignores that this suggestion of going to a mechanic if an employee did not know how safely to check the oil and engine coolant was its own (GCX 16, p.1). Furthermore, Cummings' statement does not say or even hint that he was going to tell employees not to complete the vehicle check off sheet or satisfy its requirements (GCX 16). Accordingly, the judge concluded that Cummings did not incite a work action through this email and that the whole thing was an example of "how a relatively small matter can blow up in a large misunderstanding" (ALJD 10, lines 29-31).

Second, the judge found that there was "no evidence Cummings ever actually urged any employees to engage in a work stoppage" (ALJD 10, lines 36-37). The record evidence overwhelmingly supports this conclusion.[12] As the judge explained:

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[12] Respondent incorrectly argues that Chris Dennis who was copied on the email communications was not a Union steward and thereby Cummings communicated his work stoppage intent to employees (RSB 5). However, Dennis testified that he was a steward elect as of February 2011 (Tr. 598). At trial, Respondent did not dispute Dennis' steward status on cross-examination or object to any witnesses who testified that Dennis was a steward. The evidence also clearly demonstrates that Piendel considered Dennis a steward (GCX 16). In the April 8 and 11 email exchange, Dennis was copied on most of the emails (GCX 16). At one point, Dennis joined in the conversation reinforcing Eichler and Cummings' previous arguments. Piendel directly responded to Dennis and requested that Dennis let him know which crews did not know how to check the oil on gas ambulances because they should not be assigned to those vehicles (GCX 16, p.4). At no point did Piendel question why Dennis was being included in the email exchange or remove Dennis from the exchange when he was responding to Cummings' and

> The evidence does not show that any employees were ever advised or solicited by Cummings or any other shop steward to not do the oil and coolant checks or to refuse to turn in the checklists. To the contrary, the evidence presented at this hearing was that there were (a) some employees who simply forgot to submit the checklists, (b) some employees who did submit checklists which were either lost or discarded by office personnel, and (c) some employees who were given warnings for not turning in checklists on days that they were not actually working. The Respondent did not produce a single person who testified that Cummings ever asked him or her either to not check oil and coolant levels or to refuse to turn in the checklists.

(ALJD 10 lines 1-8). In contrast, each of General Counsel's witnesses Smith, Below-Citta, DeNino, Tierney, Dennis, Quinn, Eichler, and Grimmeisen consistently testified that they never were told by, asked by, or overheard Cummings say that employees should not complete their vehicle check off sheets (Tr. 227-228, 353-354, 543, 561, 613-614, 650, 715-716). Each of these witnesses also testified that any discussion they had with Cummings regarding completion of vehicle check off sheets centered on safety concerns and that employees should talk to a supervisor or mechanic if they did not know how to perform what was required of them, essentially communicating Respondent's own instructions (Tr. 227-228, 353-354, 543, 561, 613-614, 650, 715-716). It would be absurd to conclude that Cummings somehow incited a work action without any employee hearing about it, but that is exactly what Respondent would have us believe. Even Respondent's own witnesses testified that they never heard from a single employee that Cummings had told or requested employees not to complete their vehicle check off sheets (Tr. 1062, 1063-1064). Of course, as Respondent never

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Eichler's emails (GCX 16). In addition to Piendel considering Dennis a steward, there is ample evidence that Union Representative Toby Sparks also considered Dennis a steward (GCX 31). There were multiple exchanges between the two about Dennis needing training and how Sparks needed to get his act together. Since Respondent relied so heavily on Sparks' assertion that Cummings incited a work action which it admitted to in its answer, but later falsely denied in its brief in support of its exceptions, then it clearly should have relied on Sparks' opinion that all the recipients of Cummings' email were union representatives (GCX 1(r); RSB 20).

bothered to speak to a single employee about the alleged work stoppage or an employee's failure to complete a vehicle check off sheet, it had no way of determining whether Cummings had actually incited a work action. As a result, it was most likely not until hearing that Respondent learned the actual reasons the checklists were not completed – employees' utter confusion and Respondent's complete failure to provide a system to collect check off sheets and communicate with its employees.

Third, the judge concluded that Cummings expressly informed Respondent "he did not instigate a work stoppage" (ALJD 9, line 37). In this regard, Cummings specifically stated at the June 1 meeting with Zagami and Piendel that he did not do anything to violate Article 17 and then once again asked Respondent to explain how it felt he had committed a work action (406, 747; GCX 63, 6:50). This testimony is unrebutted and verified by the tape recording of the meeting (406, 747; GCX 63, 6:50).

Finally, the judge noted Respondent's history of animus and the comment made by Supervisor Duane Drouin as evidence that Respondent's belief regarding Cummings misconduct was not an honestly held belief. Specifically, the judge pointed to *American Medical Response*, 356 NLRB No. 155 (May 10, 2011) in which the Board approved the judge's findings that the Respondent violated Sections 8(a)(1), (3) and (5) of the Act and *American Medical Response of Connecticut Inc.*, JD (NY)-15-11, which is currently pending before the Board, but in which the judge found Respondent violated Section 8(a)(1) and (5) of the Act (ALJD 4). Furthermore, the judge credited former supervisor Shannon Smith's testimony that when she asked Supervisor Drouin if it was true that he got Cummings fired, Drouin responded, "Well it takes a little bit more time to set the smart ones up" (ALJD 10, lines 16-18).

Based upon the foregoing, it is apparent that Cummings, in stating that he would recommend employees go to the mechanics for help in completing the vehicle check off sheet policy, did not engage in misconduct that warrants losing the protection of the Act. As such, Respondent violated Section 8(a)(1) of the Act by discharging Cummings. Furthermore, as the judge correctly found since Cummings' communications were done in his role as a shop steward to management and to the other shop stewards, they must be construed both as union activity and protected concerted activity. As discussed above, Cummings conduct did not cause him to lose protection of the Act, thus, Respondent's discharge of Cummings violates Section 8(a)(1) and (3) of the Act. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083, 1089 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), as modified in *Office of Workers' Compensation Programs v. Greenwich Colleries*, 512 U.S. 267 (1994) (herein *Wright Line*).

B. Respondent's Exceptions Concerning the Unilateral Change and Relevant Disciplines

Respondent also excepts to the judge's conclusion that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally changing its policies regarding the checking of oil and coolants and the requirements that employees fill out daily checklists and by imposing discipline for infractions (ALJD 6-7, 13). In support of its exceptions, Respondent relies on misstated evidence and misapplied case law.

Respondent correctly cites in its brief in support of its exceptions that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without affording the certified representative an opportunity to

bargain (RSB 14). *Flambeau Airmold Corporation*, 334 NLRB 165 (2001). Yet, Respondent seems to fail to grasp the significance of this statement. Respondent concedes that in April 2011 it implemented a new vehicle check off sheet policy that for the first time Respondent was (1) requiring employees to check the vehicle's oil and coolant levels on a daily basis, (2) requiring employees to turn in a sheet at the end of each shift, and (3) disciplining employees who failed to complete the vehicle check off sheet (RSB 24). Respondent seems to believe that it had the right to implement these new policies because it had reached an agreement with the Union over the SOPs in 2009, which included a requirement that emergency personnel complete a vehicle inspection form and check vehicle oil levels (RSB 24). As the judge correctly determined, nothing could be further from the truth. And, as such, Respondent had an obligation to bargain with the Union before implementing the vehicle check off sheet policy and enforcing the new policy with discipline.

First, the earliest possible date that Respondent could reasonably argue that the parties reached an agreement as to the SOPs is the Spring of 2010 not 2009 as Respondent states (RSB 24). In this regard, the parties did meet following the ratification of the collective bargaining agreement in the fall of 2009 and winter of 2010 (ALJD 3, lines 26-29). Furthermore, during these meetings the parties discussed the checklist policies in dispute (ALJD 3, lines 29-30). Respondent then asserts that on February 23, 2010, it emailed to Union Representative James Gambone a new checklist, which included a provision at Section 2.22 entitled "Start of Shift Procedures." However, the exhibit provided at hearing contained no attachment and Respondent was unable to show or verify any response from Gambone or any other representative of the

Union. Because Respondent could produce no witness, "document, e-mail, or other memorandum indicating that the Union assented to the proposed Standard Operating Procedure" the judge correctly concluded that there was no agreement between the parties (ALJD 3-4). Because there was no agreement between the parties, the judge reasonably held that the requirements surrounding the vehicle checklists that Respondent put into effect on April 8, 2011, constituted a unilateral change in employees' terms and conditions of employment (ALJD 6, lines 31-33).

Respondent argues that even if the vehicle checklist requirement was not permitted under the SOPs, Respondent still did not violate the Act because it provided sufficient notice to emergency personnel that it would be enforcing the requirement (RSB 25). Here, Respondent refers to the fact that Supervisor Drouin emailed a draft of the new vehicle checklist sheet to Field Training Officers (FTOs) who are bargaining unit members (RSB 25). However, Drouin's email does not alleviate Respondent of its unlawful unilateral change, as it does not provide sufficient notice under the Act. The notice to the Union must be clear and explicit and will not be implied. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Sykel Enterprises*, 324 NLRB 1123, 1123 (1997) (In the absence of clear notice of an intended change, there is no basis to find the union waived its right to bargain over the change).

The email does not notify the Union as to what the unilateral change to employees' terms and conditions of employment was going to be. As stated above, a vehicle checklist had existed in multiple forms for years. But, the unilateral change was that for the first time, Respondent was (1) requiring employees to check the vehicle's oil and coolant levels on a daily basis, (2) requiring employees to turn in a sheet at the end

of each shift, and (3) disciplining employees who failed to complete the vehicle check off sheet. Drouin's email, did not explain any of these changes (RX 10). Furthermore, the email did not provide notice to the Union as none of the FTOs who were sent the email were Union representatives in any capacity. Thus, the only notice to the Union came on April 8 when Respondent implemented the new vehicle checklist requirements and finally emailed the April 8th grim reaper memo to the Union's representative, Sparks (RSB 25). The Board has held that merely providing notice to employees of a unilateral change at the time of implementation is not sufficient notice. *Maple Grove Health Care Center*, 330 NLRB 775 (2000); *Town & Country Manufacturing Co.*, 136 NLRB 1022, 1030 (1962), enforced 5th Cir. 316 F.2d 846 (1963) ("[n]o genuine bargaining . . . can be conducted where [the] decision has already been made and implemented.") Based on the foregoing it is inexplicable how Respondent can argue that the Union had notice of the vehicle checklist changes and the ALJ's findings should be upheld.

C. Respondent's Exceptions Concerning the Judge's Denial of the Motion to Defer

The judge properly denied Respondent's Motion to defer. Deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984) (herein called *Collyer*) is wholly inappropriate under the particular facts of this case.

First, there are significant procedural barriers to deferral as NEMSA is no longer the certified collective bargaining representative of Respondent's employees in this case, and the collective bargaining agreement that provided for the contractual grievance and arbitration procedures is no longer in effect. NEMSA and Respondent's contract was effective April 2, 2009 to December 31, 2011. (GCX 4). However, on

November 1, 2011, NEMSA was removed as the employees' collective bargaining representative and Teamsters, Local 559 became the certified representative (GCX 3(d)). Thus, while the terms and conditions of employment contained in this contract continue while Teamsters, Local 559 negotiates an initial contract with Respondent, the contractually created arbitration procedure did not survive. See *More Truck Lines, Inc.*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003)(explanation of contract as null and void); *Indiana and Michigan Electric Company*, 284 NLRB 53 (1987)(general proposition that arbitration provision does not survive contract expiration for post expiration grievances).

Furthermore, even if NEMSA was able to proceed to arbitration on the merits of Cummings' grievance and prevailed, it is unlikely that NEMSA would be able to enforce the arbitrator's decision in Federal Court. This would undermine the basic tenement of *Collyer*, which requires that the parties' contract provide for final and binding arbitration. In this regard, several Federal Courts have found that a union lacks standing to enforce an arbitration award where the union has been replaced as the bargaining representative for a particular bargaining unit. See e.g., *Witz Corp. v. Int'l Broth of Teamsters*, No. 10 C 2180, 2011 WL 198855, 1 (N.D.Ill. May 20, 2011); *Fed'n of Union Representatives v. Unite Here*, 736 F. Supp. 2d 790, 796 (S.D.N.Y. 2010); See also *Cent. States, Se & Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 669 (7th Cir. 2005).

Second, even assuming the grievance proceeded to arbitration under Respondent and NEMSA's collective bargaining agreement, there are a number of contractual barriers that make deferral inappropriate. Article 17 specifically provided

that although a discharge pursuant to Article 17 may be grieved, the sole issue for determination by the arbitrator "shall be whether the grievant's conduct was in violation of [Article 17]". Thus, the issues relating to Cummings' termination based on retaliation for his union activities and for his assertion of contract rights are not cognizable under the contract for the arbitrator to decide. Moreover, the parties' non-harassment and discrimination provisions did not include discrimination on the basis of union activities or protected concerted activities.[13] Additionally, Section 22.03 of the parties contract provided for an "Arbitration/Litigation Waiver" that mandates that "[t]he initiation or filing of a complaint or legal action alleging unlawful discrimination or harassment with a federal, state or local agency or court shall waive the employee' and/or Union's right to pursue the same matter as a grievance" under the contract. Both Respondent and NEMSA are bound by this provision of the contract. Finally, there are substantial impediments to the arbitrator's ability to fashion a remedy under the contract. Section 16.05 of the contract limited the arbitrator's ability to change levels of discipline and specifically provided that any back pay award cannot be "retroactive for more than thirty (30) calendar days prior to filing of the grievance to arbitration." Thus, Cummings' remedy under the contract is substantially less than the remedy he would be entitled to if successful under the Consolidated Complaint.

Third, there is an overriding issue making deferral inappropriate in this case. NEMSA was intimately involved and equally responsible, with Respondent, for

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[13] Unlike Respondent's contention, given Respondent's history of discrimination against employees for their Union activity, AMR can easily be characterized as "displaying a deep-seated animus to its employees' union representation or disregard for its employees' statutory rights." (RSB 18; ALJD 4). See *Appalachian Power Company*, 198 NLRB 576, 579 (1972).

Cummings' unlawful termination.[14] Thus, NEMSA has a fundamental conflict of interest in representing Cummings in an arbitration proceeding. In challenging Respondent's termination of Cummings, NEMSA must argue that its own Labor Representative, Toby Sparks, violated his duty of fair representation to Cummings and caused Cummings termination. As was adduced at the unfair labor practice hearing, Sparks also harbored animus towards Cummings because of his internal union activities. Moreover, Sparks sent Respondent the letter "disavowing" Cummings alleged violation of Section 17 at the request of Respondent in order to protect NEMSA from liability under the parties' contract, yet he undertook no independent investigation to determine whether or not Cummings was in fact violating Article 17. Rather, Sparks merely took the word of Respondent and wrote the letter. To now require Cummings to be left in the hands of the Union that was partially responsible for his termination is wholly untenable. Although charges filed by individual employees can be deferred to arbitration, deferral is not appropriate where the interests of the individual charging party are in apparent conflict with the interests of the union as well as with the interests of a respondent employer.[15] As noted by the Board in *Kansas Meat Packers*, 198 NLRB 543, 544 (1972), "it would be repugnant to the purposes of the Act to defer to arbitration . . . as to

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[14] The initial December 2011 Consolidated Complaint also involved violations based on charges filed by Cummings in Case No. 34-CB-067936 against NEMSA, alleging that NEMSA caused Respondent to terminate Cummings in violation of 8(b)(1)(A) and 8(b)(2) of the Act. As a result of an Informal Board Settlement Agreement with NEMSA, an Order Severing Cases and Partial Withdrawal of Consolidated Complaint issued on March 13, 2012. (Order Severing Cases attached as Exhibit B). Thus, those portions of the Consolidated Complaint relating to NEMSA's violation of Section 8(b)(1)(A) and 8(b)(2) were withdrawn (GCX 1).

[15] Respondent cites two cases that it claims stand for the proposition that the Board could require NEMSA to pay for an attorney of Cummings' choice to represent him at arbitration (RSB 18-19). However, neither of these cases is relevant here. *In re Warehouse Union Local 6*, 336 NLRB No. 104 (Nov. 19, 2001) is an unchallenged case as the Union did not file an answer and the Board merely granted General Counsel's motion for summary judgment. Further, the Board in *Local 888, American Federation of Government Employees (Bayley-Seton Hospital)*, 308 NLRB 646, 651 (1992) vacated its decision. In both of these cases, the bad acts were merely carried out by the Union not by the Union in cahoots with the Company.

do so would relegate the [charging party] to an arbitral process authored, administered, and invoked entirely by parties hostile to their interests." Such is the case here.

D. Respondent's Exceptions Regarding the Reinstatement of Cummings are Meritless

Respondent excepts to the judge's remedy requiring Respondent to reinstate Cummings because it claims Cummings' has "violent tendencies towards Respondent and its management" (RSB 27). In support of its argument, Respondent merely relies on a single Facebook post by Cummings, an inference of "violence" based on Cummings' profile picture and reliance on commentary by an Arbitrator in a 2002 arbitration decision. However, as the judge correctly found, "Respondent reads far too much into [Cummings' Facebook] picture and comment and I do not construe his statements with his profile picture as constituting a threat of violence" (ALJD 13 fn. 11). In fact, Respondent, in a clear attempt to cut off Cummings' backpay, has taken Cummings' Facebook picture and comment so far out of context as to create a new reality.

More specifically, at hearing, Respondent entered evidence regarding a Facebook posting Cummings made in December 2011. In the posting, Cummings is conversing with his former coworkers about how a sharp box, which contains all the dirty needles in the ambulance, is held to the wall of the ambulance with duct tape (Tr. 509; GCX 49). Respondent's employees raise an issue of work safety and suggest this may be an issue for OSHA and that the vehicle in that condition should not be in service (GCX 49). Cummings replied that "Until AMR gets rid of the management team up to and including [Zagami] nothing will change. Only crews and patients will suffer" (GCX 49). Respondent argues that this comment should prevent Cummings from being

reinstated because Cummings' profile picture, which is a picture of him from October 2010 at a shooting range, accompanied the statement (Tr. 511; GCX 49; RX 7).[16] By taking this extreme position, Respondent once more illustrates its seeming incapacity to recognize those actions protected by Section 7 and to refrain from coercively responding to such actions.

Traditionally, the Board, supported by the courts, has been extremely reluctant to deny reinstatement to discriminatorily discharged employees for conduct consisting of statements made disparaging the business operations of the employer or the employer's officials, particularly where the statements were made in the context of protesting their unlawful terminations. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, 21-22 (Feb. 14, 2011) (discharged employee criticized management's practices on a blog and at a meeting); *Dearborn Big Boy No. 3*, 328 NLRB 705, 709, 711-712 (1999) (employee cursed at supervisor twice using the F-word, and then when picking up her belongings called supervisor a stupid, f-cking bi-ch, and as she was leaving again called supervisor a s-o-b; all of these comments were made in the presence of customers in the store); *George A. Hormel & Co.*, 301 NLRB 47 (1991), enfd. denied on other grounds, 962 F.2d 1061 (D.C. Cir. 1992) (discharged employee handed out leaflet attacking employer's product and telling an employee that employer's product "can kill people"); *C-Town*, 281 NLRB 458, 458 (1986) (employee made racially inflammatory slur directed towards her replacement); *Timet*, 251 NLRB 1180, 1180 (1980), enfd. 671 F.2d 973 (6th Cir. 1982) (letter distributed by employee accusing employer of providing "false testimony" at hearing before judge and accusing employer of "expressed and

[16] Once again, Respondent tried to mislead by only entering a portion of the Facebook conversation as its exhibit and taking Cummings' comment out of context (GCX 49; RX 7).

implied tyranny" does not disqualify employee from reinstatement, particularly since statements were made in context of protesting his unlawful discharge); *J. W. Microelectronics Corp.*, 259 NLRB 327, 327-328, 333-335 (1981) (discriminatee made racially derogatory remarks about white supervisor; employee said, "why should we listen to these people . . . and their lies . . . we know all Caucasians are animals"); *Teamsters Local 705*, 244 NLRB 794, 796-797 (1979), enfd. denied on other grounds, 630 F.2d 505 (7th Cir. 1980) (accusation made by discharged employees in pamphlet that union secretary/treasurer was a thief, and union members' pensions were being stolen); *Pincus Bros.*, 241 NLRB 805, 809 (1979), enfd. denied on other grounds, 620 F.2d 367 (3d Cir. 1980) (discriminatee published article in "dissident" newspaper accusing employer of being "crooks" and of stealing from employees);*Golden Day Schools*, 236 NLRB 1292, 1297 (1978), enfd. 644 F.2d 834, 841 (9th Cir. 1987) (discharged employees distributed flyer to parents of students while picketing; flyer disparages employer's service and facilities including accusing it of serving spoiled food, having water fountain with dirty water, using unsafe buses and having children sleep on dirty cots; flyer also protests unlawful discharge of employees for organizing to protest the conditions complained of in leaflet; court sustained Board's finding that reinstatement rights had not been forfeited even though leaflet used "harsh language and made serious charges, not all of them true," 644 F.2d at 841-842); *Coors Containers Co.*, 238 NLRB 1312, 1320 (1978) (employees displayed sign stating "Boycott Coors - Scab Beer," and when ordered by security guards to stop displaying sign, called security guards "mother-fuckers"); *Mandarin*, 228 NLRB 930, 931-932 (1977), enfd. sub nom., *M Restaurants, Inc.,* 621 F.2d 336 (9th Cir. 1980) (discharged

employee, after judge's decision, distributed letter to employees announcing judge's decision that ordered him to be reinstated and included various attacks on employer's manager referring to him as "pompous," "arrogant" and accusing him of "lying;" letter also referred to manager's "Jewish boss" and asserts that manager was "exploited by his Jewish boss to oppress his own countrymen"; Board observed that it did not condone any racial or ethnic slurs that these comments might imply, but finds that letter was insufficient to disqualify employee from reinstatement, particularly where it is part of protecting employee's unlawful discharge); *O'Daniel Oldsmobile*, 179 NLRB 398, 404-405 (1969) (handbills distributed by unlawfully locked out employees disparaging employer's business and warning customers not to "entrust their business to unqualified scabs").

Therefore, the only question is whether Cummings' comment with his profile picture is truly threatening, as Respondent would like us to believe. The answer is plainly, No! As the judge quoted the Board:

> [N]ot every impropriety deprives the offending employee of the protection of the Act. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases in which the misconduct is violent or of such character as to render the employees unfit for further service.

(ALJD 13, fn.11) *C-Town*, 281 NLRB 458 (1986). Clearly neither of those circumstances exists here. Cummings misconduct was not violent. He posted a comment about Respondent's questionable handling of a work situation. It clearly was not of such a character as to render Cummings unfit for further service as there is no evidence that Respondent disciplined any of its employees for their comments in this Facebook conversation, which were of the same tone as Cummings' comment. Therefore, Respondent is merely taking issue with Cummings' Facebook profile picture.

There is nothing inherently threatening about the picture, which shows Cummings', at target range. The picture was not chosen by Cummings to emphasize his comment or to threaten Respondent and there is no evidence to the contrary (Tr. 509-511). As such, Respondent's argument that the Facebook post evidences "Cummings' violent tendencies towards Respondent..." is meritless exaggeration and should be rejected.

E. <u>The Board Has Authority to Act in this Matter</u>

Respondent excepts to the ALJ's conclusion that the Board, as currently constituted, has authority to act in this matter. (RX 25, citing the ALJ's footnote rejecting Respondent's post-hearing argument that that the case should be dismissed because the Board, as currently constituted, does not have a legitimate quorum ALJD p. 13, fn.12).

In its Brief in Support of this exception, however, Respondent argues that the Board does not have authority to rule on pre-hearing petition to revoke. Counsel for the General Counsel assumes that the argument regarding the Board's authority to rule on a pre-hearing petition to revoke is not at issue, and that Respondent intended to raise the general issue of whether or not the Board has valid quorum. In this regard, Respondent argues that President Obama's January appointments are not valid and therefore, the current Board has only two validly appointed members, thereby lacking a quorum. (RSB pp.26-27, citing *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010)). To the extent Respondent is arguing that the Board lacks the authority to issue a decision on its exceptions, such argument should be rejected. The Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the

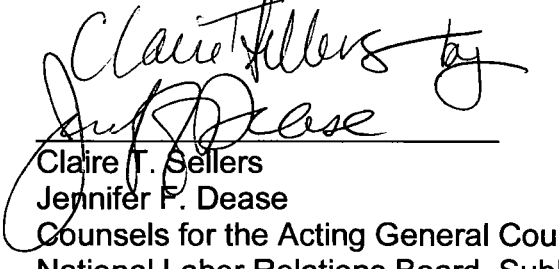
official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown,* 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926); *Center for Social Change,* 358 NLRB No. 24 (2012). Respondent's arguments should therefore be rejected by the Board.

V. CONCLUSION

For all of the above reasons, Counsel for the Acting General Counsel submits that Respondent's exceptions are without merit, and respectfully urges the Board to affirm Judge Green's decision regarding his finding that Respondent violated Section 8(a)(1), (3) and (5) of the Act by discharging Cummings, unilaterally changing terms and conditions of employment, and issuing disciplinary warnings to employees pursuant to the unilateral change.

Dated at Hartford, Connecticut, this 15th day of February 2013.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC. **and** **ADAM CUMMINGS, AN INDIVIDUAL**	**Case No. 34-CA-013051**
AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC. **and** **SHANNON SMITH, AN INDIVIDUAL**	**Case No. 34-CA-065800**

AFFIDAVIT OF SERVICE OF: **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE BOARD**

I, the undersigned employee of the National Labor Relations Board, state under oath that on February 15, 2013, I served the above-entitled document(s) by E-mail upon the following persons, addressed to them at the following addresses:

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