UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7

MICHIGAN BELL TELEPHONE COMPANY and AT&T SERVICES, INC., **and** **LOCAL 4034, COMMUNICATIONS WORKERS OF AMERICA (CWA), AFL-CIO,**	**CASE: 07-CA-161545; 07-CA-165384; 07-CA-166130; 07-CA-170664; 07-CA-176618; 07-CA-177201; 07-CA-182490; 07-CA-184669; 07-CA-190631**

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether Respondents, Michigan Bell Telephone Company and AT&T Services, Inc.'s (collectively "Company" or "AT&T"), alleged unlawful failure to bargain over a decision to assign Brian Hooker ("Hooker") to work licensed him to misuse time with impunity, in a continual and orchestrated protest of the initial decision. The Board must reject Administrative Law Judge Ira Sandron's ("ALJ") extraordinary answer of "yes" to that question. The ALJ's decision that the alleged unlawful change exempted Hooker from performing his job duties is legally and factually indefensible.

In September 2015, the Company lawfully placed Hooker, a full-time Customer Service Specialist, on the work schedule and required him to accurately report his work time. In protest, Hooker – with the blessing of Charging Party, CWA Local 4034 ("Union" or "Local") – undertook an orchestrated campaign of misusing time and avoiding work that was stunning in its scope and relentlessness. After the Union rebuked Company efforts to correct that misconduct on a non-disciplinary basis, the Company lawfully issued progressive discipline, ultimately terminating Hooker for his continual refusals to perform assigned duties for nearly a year.

The ALJ committed manifest error in concluding the Company violated Sections 8(a)(5) and (3) by placing Hooker in the load, asserting that decision was unlawfully motivated, and violated Section 8(a)(3) by progressively disciplining and then terminating Hooker. The ALJ's threshold finding of unlawful failure to bargain contravenes controlling language in the parties' labor contract. His erroneous finding that the decision to place Hooker on the load was unlawful also fatally undermines his corollary conclusion that Hooker's subsequent disciplines were inherently unlawful as "fruit of the poisonous tree." Both errors are fatal to his conclusion.

The evidence of "express and implied animus" the ALJ relied upon to infer unlawful motive for the decision to place Hooker in the load lacks temporal or causal nexus to that decision. The ALJ's finding that the "timing" of the decision to place Hooker in the load raised a question about the Company's motivation is unfounded and contravenes testimony he credited. The ALJ's primary reliance on evidence that Mrla told Hooker of the decision on October 5, 2015, the day before Hooker was to testify in an NLRB hearing, is fatal to his conclusion. The ALJ illogically concluded that the coincidental timing of that call "raises a strong inference of unlawful motivation." That inference is unfounded: That Hooker testified in an NLRB hearing on October 6, 2015, is entirely irrelevant *because Brash and Mrla indisputably were not aware of the hearing or of Hooker's participation in it when they made their decision to place him in the load*. The ALJ's parallel finding the Company failed to provide "legitimate justification" for its decision also lacks evidentiary support. His conclusion again contravenes facts he credited and other undisputed facts in the record.

The ALJ doubled-down on this error by applying an exceedingly broad "fruit of the poisonous tree" theory to Hooker's disciplines and termination that is not supported by extant Board law. The ALJ's conclusion that Hooker's disciplines (issued throughout 2016) were a "direct consequence" of the decision made in September 2015 is legally and factually indefensible. (D 39: 42-43). Likewise, he cites no legal support for his extraordinary proposition that the "causal connection between the [Company's] disciplines and its original unlawful act" would have been severed had Hooker engaged in "gross misconduct" but not by misconduct "related to how he performed his work."

Moreover, the ALJ's finding that the disciplines and termination violated 8(a)(3) cannot be reconciled with the *facts he credited* proving the Company's legitimate, non-discriminatory

reasons for that discipline. The ALJ acknowledged that Hooker had engaged in a full-on campaign of work avoidance and recognized Hooker's contrived excuses. The ALJ found that Hooker was at "war" with the Company; created excuses not to perform his job duties; and repeatedly threatened to schedule grievance meetings only on the busiest work days.

With respect to each discipline issued, the ALJ credited the testimony of the Company's managers regarding Hooker's misconduct. And the ALJ did *not* credit Hooker's testimony on any of the events that resulted in discipline, and specifically discredited his testimony on several misuse of time issues. These are not credibility issues, but the ALJ's indefensible failure to consider material facts and his misapplication of law. The plain effect of his decision is that Hooker has no accountability for his patently unacceptable conduct.

Hooker was not licensed to refuse to work indefinitely simply to protest the initial decision to put him in the load. His recourse to object was to "work and grieve." He did neither.

Hooker's incessant and unyielding campaign of misusing time and avoiding work over a ten month period severed any causal connection to the initial decision to place him in the load, whether it constituted "gross misconduct" or related to "how he performed his work." His misconduct plainly violated work rules for TFS technicians and constituted just cause for his disciplines and termination, whether or not the Company's initial decision to place him in the load was lawful. The Company's patient, progressive discipline and eventual discharge of Hooker were not motivated by his union activities, and would have occurred in any event absent those activities, and thus did not violate Sections 8(a)(1) or (3), under the *Wright Line* standard.

The ALJ erred further by failing to apply Section 10(c) of the Act to prohibit a remedy of reinstatement and back pay because Hooker was terminated for cause. Extrapolating his invalid "fruit of the poisonous tree" theory, the ALJ held Section 10(c) inapplicable on the same flawed

basis that the decision to place Hooker in the load "caused or contributed" to his subsequent misconduct. This fabricated legal standard directly conflicts with established Board law and the plain language of the Act.

The ALJ also erred in finding the Company violated the Act by requiring Hooker to complete the Union Activity Sheet to account for his paid MXUP time. The ALJ provided no substantive analysis for this conclusion, which is simply a corollary to his finding that the decision to return Hooker to the load was unlawful. Finally, the ALJ also erred in finding the Company violated the Act with respect to its handling of various Union information requests and by maintaining its Reporting Privacy Related Incidents policy. For all of these reasons, and as more fully discussed below, the ALJ's decision must be reversed.

II. QUESTIONS PRESENTED

The Company's Exceptions and Brief in Support present the following questions:[1]

1. Whether the ALJ erred in finding the Company violated Section 8(a)(1), (3), and (5) of the Act by "unilaterally placing Hooker in the load and requiring him to fill out union activity logs." (D 46:38-39).

2. Whether the ALJ erred in finding the Company violated Section 8(a)(1) and (3) of the Act by "issuing disciplines to [Brian] Hooker, culminating in his discharge. (D 46:43).

3. Whether Section 10(C) of the Act prohibits the ALJ's recommended make whole remedy because Hooker indisputably was terminated for cause.

4. Whether the ALJ erred in finding the Company violated Section 8(a)(1) and (5) of the Act by "not providing the Union with relevant and necessary information concerning… Hooker's grievance over his placement in the load and the activity log requirement.'" (D 47:1-3).

5. Whether the ALJ erred in finding the Company violated Section 8(a)(1) and (5) of the Act by "maintaining a confidentiality policy that is unlawful under the test that the Board enunciated in *The Boeing Co.*" (D 47:7-8).

[1] The specific questions argued in this Brief in Support are set forth in the Argument headings and sub-headings contained in Section IV, Argument.

III. STATEMENT OF THE FACTS

A. Background of the Parties

AT&T provides telephone, internet and television services to customers. For years, Communications Workers of America ("CWA") has been the collective bargaining representative for bargaining unit employees in AT&T's Michigan operations. AT&T and affiliated entities have long been parties to collective bargaining agreements with CWA.[2] The parties' most recent agreement, effective April 12, 2015, through April 14, 2018, covers bargaining unit employees in AT&T's network telephone operations in the traditional five-state "Midwest" region – Indiana, Illinois, Michigan, Ohio and Wisconsin. ("CBA")(GC 2). CWA District 4 is a geographical subdivision of CWA. Charging Party, CWA Local 4034 ("Local 4034" or "Union"), represents employees in Grand Rapids and Lansing, Michigan, and in various AT&T Market Business Units, including Technical Field Services ("TFS") and Internet and Entertainment Field Services ("IEFS"). (JX 2).

B. Structure of Network Operations

All relevant events relate to the TFS Market Business Unit. The ALJ's decision erroneously relied on events arising in the separate IEFS organization (formerly SD&A). TFS and IEFS serve different functions, and employ separate technicians, managers, Area Managers, and Directors. (Brash 960, 966).

TFS performs installation and maintenance to the network infrastructure. (Brash 948-949). TFS technicians work on cable from a Central Office ("CO") that runs to distribution points (i.e., Cross Boxes), then to other distribution points, usually pedestals or terminals, then to

[2] As noted on GC 2, page 1, the "Employer" signatories to the CBA are AT&T Teleholdings, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Michigan Bell Telephone Company, AT&T Services, Inc., and Ameritech Services, Inc.

customers. (Brash 961). The Company has restructured its Network organization several times, and the Market Business Units have undergone various structural and name changes.[3]

When NIBS (now TFS) was created in January 2014, George Mrla became Director for all of Michigan, Ohio, and Indiana. He currently manages approximately 1,400 employees. (Mrla 2551). Setting up the new NIBS organization required Mrla to hire, assign, and train managers and technicians to work in locations throughout the Midwest. In April 2015, Mrla promoted Ted Brash to serve as Area Manager for the Lansing and Grand Rapids areas.

TFS technicians generally perform two categories of work: "demand" and "rehab." (Brash 970). Demand work is customer-initiated and typically "service affecting" (e.g., installing new service or repairing existing service). Demand work is an organizational priority based on customer commitments and regulatory obligations. (Brash 972-73). Rehab work is Company-initiated work such as "preventative maintenance," unrelated to a current service problem. Rehab work generally consists of minor repair of "bad plant conditions" (or "BPCs") and larger scale rehab "packages." (Brash 973). During 2015, TFS prioritized rehab work. Due to a reduction in demand work, Mrla communicated to his team in mid-2015 that the organization had a window of opportunity to complete widespread rehab work. (Mrla 2581). In two years, TFS in Michigan went from 53 completed BPC tickets to 32,119. (R 22A). In that period, the number of rehab packages completed in Michigan increased from 37 to 495. (R 22B).

C. CBA Provisions regarding Time Off for "Union Business"

With limited exception, Union representatives actively work for the Company just as other employees. CBA Section 10.10 allows a Union representative to take unpaid leave of absence for "Union business" and be removed from work schedules to work for the Union full-

[3] Joint Exhibit 2 provides additional background on the changes within the network organization.

time. (GC 2). Alternatively, Section 10.08 allows a Union representative to continue working but take up to 1,080 hours of unpaid leave per year to perform Union business (coded as unpaid "MXUU" time). (GC 2). Also, under Sections 10.05-10.07, Union representatives can attend grievance meetings or other meetings approved by management in advance without loss of pay (coded as unpaid "MXUP" time). (GC 2). In rare instances, a manager may temporarily remove a Union representative from a work schedule when scheduling work is too difficult due to MXUU and MXUP. In such cases, management retains full discretion to determine when the technician is required to return to the work schedule. (GC 2, Art. 17.01, 17.03, 17.04).

D. Brian Hooker's Employment With AT&T

At all material times, Brian Hooker was employed as a Customer Service Specialist in the TFS organization at the 36th Street Garage. Hooker was employed from May 12, 1996, until he was terminated on October 13, 2016. (JX 2). At the time of his termination, Hooker reported to Manager Network Services Andrew Sharp, who reported to Area Manager Ted Brash, who reported to Director George Mrla. Mrla, Brash and Sharp only managed TFS technicians. None had any responsibility or supervisory authority over the IEFS organization.

Hooker was a member of CWA Local 4034 and its Administrative Assistant ("AA"). In 2008, he was appointed Chief Steward for the TFS work group. In December 2010, Local 4034 President Ryan Letts appointed Hooker AA. (Hooker 349). Hooker was not a Union officer and not elected to the position, in both respects akin to Union stewards and Chief Stewards. (R 73 at p. 15-16; Letts 78-79). The Local's 2015 LM-2 Report references Hooker as an "employee" along with other stewards, not as an "officer" with elected positions. (R 73 at p. 15-16).

In December 2010, AT&T temporarily removed Hooker from the work load. In 2009-10, acting-Area Manager Mike Jarema had difficultly scheduling Hooker because, as a Chief Steward, he frequently was absent from work, spending nearly all his time on MXUU or MXUP.

(Letts 110-11). As Chief Steward, Hooker spent so much time on Union leave that Jarema reassigned his work truck to another technician. (Letts 110). However, when Hooker was on the load, he would notify his manager when he was taking MXUP time. (D 10:38-39). According to Letts, Jarema decided to remove Hooker from the work and vacation schedules simply as a matter of convenience shortly after Letts appointed him AA. (Letts 110; Hooker 364).

E. TFS' Decision to Return Hooker to the Workload

Mrla considered returning Hooker to the workload in early 2014. Immediately after becoming Director for Michigan (including Grand Rapids) in January 2014, Mrla and Hooker had a phone call, during which Mrla raised his intention to return Hooker to the workload. (D 11:16-23; Hooker 405; Mrla 2571). On March 14, 2014, Mrla had a call with Ryan Letts about returning Hooker to work. (D 11:25-37; Mrla 2574; R 71). At that time, nearly every CWA Local representative in Mrla's organization, elected and appointed, actively worked. Hooker was the *only* non-elected Union representative *not* on the workload. (Mrla 2558-59). On the call, Letts told Mrla that there was no written agreement to keep Hooker off the load. (D 11:25-37). To be fair and consistent to all technicians in his organization, Mrla told Letts they needed to put plans together to put Hooker back to work. (Mrla 2577). That plan was delayed by other priorities, however, because Mrla was consumed throughout 2014 building the newly formed NIBS organization. (D 11:36-37; Mrla 2578).

In September 2015, new Area Manager Ted Brash for the first time began the process of planning technician vacations for 2016. It is undisputed this Brash's first time overseeing the vacation selection process, which is based on seniority. (Brash 1000-01; Mrla 2587). Brash's clerk prepared a spreadsheet listing vacation allotments for each crew. Brash noticed Hooker was not included. Brash "never had a non-elected union steward representative ever be excused from the workload fulltime," and questioned why Hooker was not on the workload or part of the

vacation selection process. (Brash 1001, 1003). Brash discussed returning Hooker to the workload with Mrla and later with Labor Relations Manager Don Stanley. (Brash 1000, 1004).[4]

Brash wanted Hooker returned to the workload to be "fair and consistent with the rest of [his] District" and Mrla's team. (Brash 1008). Hooker took vacation whenever he wanted, while more senior technicians bid on vacation schedules. Mrla also desired consistency and uniformity within TFS. (Mrla 2588). In 2015 Mrla managed some 1400 bargaining unit employees. Indisputably, only 10 CWA Local officers were *not* on the load – *and all were in elected positions*. At least 110 CWA Local representatives *worked* on the load. (R 25).

Brash and Mrla also wanted to take advantage of the limited window to complete rehab work. (Brash 1006; Mrla 2589). Throughout 2015, Mrla directed his TFS managers to put all available resources on rehab work (BPCs and packages). Brash and Mrla corroborated this was an additional factor in their decision. (Mrla 2589; Brash 1006).

On Monday, October 5, Mrla called Hooker and informed him he would be returning to the load. He needed training and would be assigned a Company truck. (D 13:1-2; Hooker 735). On October 7, Mrla informed Letts that Hooker would be returning to the workload, explaining that Hooker was the only appointed Union representative in his organization not working in the load, and that he needed to be working like every other appointed Union representative. (D 13:10-13). Mrla told Letts his three reasons for putting Hooker back on the work schedule: (1) consistency within the TFS organization relative to un-elected Union representatives, (2) fairness to other technicians, and (3) opportunity to complete rehab work. (Mrla 2597, 2602).[5]

[4] Brash initially also considered returning Letts and Prince to the workload, but ultimately decided Hooker's non-elected position to be different from those elected Union officers. (Brash 1000, 1004).

[5] On Tuesday, October 6, Hooker testified in an unrelated NLRB hearing in Grand Rapids (Case 07-CA-150005). As discussed below, neither Brash nor Mrla had any knowledge of that case or of Hooker's testimony until December 2015, after the Union filed the charge in Case 07-CA-150005. Also, Hooker conceded that he did not mention the hearing or his testimony to Mrla during their brief call on October 5. (Hooker 734-35).

Letts responded that Hooker needed a lot of MXUP time because he took a lot of phone calls and meetings. (Mrla 2600). Mrla explained the CBA does not provide MXUP for phone calls, but only for grievance meetings and other meetings agreed to in advance by management. (Mrla 2601-02). Mrla told Letts the Company would need to know when Hooker took MXUP time so they could plan work allocation and verify Hooker's payroll records, just like all other Union stewards. (D 13:18-20; Mrla 2601-02).

F. October 20, 2015: Brash Discusses with Hooker his Return to the Workload

Brash called Hooker on October 20 to discuss returning to the vacation and work schedules. Brash explained he needed to get Hooker re-trained and would provide a truck and tools. Brash told Hooker he would need to request Joint Meeting Time in advance, in accordance with 10.06 and 10.07 of the CBA. (Brash 1023, 1027); (D 13:40-43).

Hooker made clear he did not want to go back to active work, and that he could not give advance notice of MXUP time because he had "confidential" meetings and phone calls with managers daily. (Brash 1027-29). Hooker also claimed his Union business schedule was too busy and chaotic to know in advance when he needed MXUP time. (Brash 1028-29).

Brash explained MXUP did not cover "confidential meetings," but only grievance meetings (10.05) and approved meetings with managers (10.06). (D 14:1-8). If Hooker met with a manager on paid time, Brash needed to know with whom Hooker met and for how long to verify time records. Brash also explained that a few minute call from a manager to set up a meeting was not paid MXUP time, because it was not "agreed to be paid by the Company," and also that Hooker should not charge the Company for 15 minutes for every such call of a few

minutes.[6] Hooker continued to object to reporting his MXUP time in advance, so Brash suggested that he write down with whom he met, when and for how long. (Brash 1028, 1030).

This was the genesis for the "Union Activity Sheet" Brash created for Hooker. On October 21, Brash discussed the issue with Hooker and Union representatives. Hooker plainly stated to Brash that he would "never serve a day in the load." (Hooker 751; Brash 1061). Hooker again claimed he could not request time off in advance. (Brash 1061). Brash told Hooker he would create a spreadsheet so Hooker could document MXUP whenever he would not be able to report it in advance, thus allowing him to report the time *after-the-fact* for payroll verification purposes. (Brash 1062-63). Brash explained that this was an accommodation to Hooker because all other Union stewards were expected to request MXUP time in advance. (D 14:18-19). Although Hooker objected, he said he would "obey and grieve." (Hooker 759).

G. October 23: Mrla and Brash Meet with the Union in Lansing

As of October 2015, Mrla had never met Letts in person. Mrla wanted to meet with Letts and Local officials to attempt to build a constructive working relationship, as he had done with other CWA Locals in Michigan and Ohio. (Brash 1077). Brash and Mrla attended for the Company; Letts and Beach for the Union. (Brash 1077-78; Mrla 2608-09).

Mrla explained his belief in the importance of relationship and open communications. (Mrla 2612). The discussion turned to the Union's comprehensive request for "monitoring" information previously submitted to Brash. (GC 7; Mrla 2615).[7] The request related to pending

[6] The Company's timekeeping system tracks time by quarter-hours. Thus, if Hooker had a very brief call with a manager, the smallest increment of time in which he would code as MXUP would be 15 minutes.

[7] The "Monitoring RFI" was extremely broad, seeking significant volumes of information relating to GPS devices and various Company security and monitoring systems. The RFI included six requests and 43 subparts. The requests were very broad, seeking "a comprehensive list of all methods of electronically monitoring NIBS employees," with subparts seeking information such as "the name of the company or companies which provides the maintenance of the monitoring technology," "a copy of the specifications for each monitoring technology," and "a copy of any service contract, warranty, maintenance agreement, or other such document." (GC 38).

grievances over discipline issued in May 2015 to two TFS technicians for using cell phones while driving a Company vehicle. Mrla and Brash felt the broad request was burdensome and irrelevant because the technicians had admitted using phones while driving, and management did not rely on GPS reports in issuing discipline. (D 14:35-38; Brash 1082-83; GC 36, 37, 38).

They then discussed Hooker being put in the load. Mrla explained there were no appointed (i.e., non-elected) Union representatives in his TFS organization who did not bid on work schedules, and that Hooker would return to the workload to be fair and consistent in his organization. (D 15:5-9); (Brash 1086-88; Mrla 2618, 2621). The Union never refuted the fact that Hooker was the only Union representative who was off the load. (D 15:5-22).

The parties agreed to set another general meeting for November. (Brash 1101). At that November 16 meeting, the parties discussed operational issues and next steps to get Hooker ready to return to work. (Brash 1116; Mrla 2633). On December 16, the parties met again and discussed training and safety goals. (Brash 1169-70; Mrla 2641-42).

H. December 2015: Brian Hooker Returns to the Workload

Hooker "officially" returned to work on Sunday, December 13. Sharp arranged for ride-along training that day with an experienced technician. (Sharp 2198). Hooker also completed ride-along training with an experienced technician on December 20, January 2, 3, 10, 23, and 24. (Sharp 2204, 2207; R 26, p. 13). As expressly noted by the ALJ and discussed below, "[e]arly on, Brash came to believe that Hooker was not paying attention during his ride-alongs, not taking steps to ensure that his vehicle was completely stocked, and creating excuses not to perform tech work. Hooker's conduct at times reinforced these conclusions." (D 17:29-31).

I. December 23: Union RFI for Substantial and Irrelevant Data

On December 23, Hooker grieved his return to the workload and requirement to submit a "Union Activity Log" to account for MXUP time. (GC 51). He also sent Brash an RFI consisting of 60 individual information requests. ("December 23 RFI"). (D 19:8-10; GC 52).

The December 23 RFI sought a significant volume of information (in most cases information as far back as *January 2010*), such as work and vacation schedules for every technician working out of the Alpine Garage, Holland Garage, and 36 St. Garage. (GC 54). Most of the requests were for records that have never existed. Brash provided Hooker with a comprehensive response to his information request on February 5. (GC 55). In addition to written responses, Brash provided training records and weekly work schedules for every technician, from January 2015 through March 2, 2016. (GC 54). Work and vacation schedules prior to January 2015 were not available, as they were not maintained by Brash's clerk or available in the "EASE" scheduling database. (Brash 1188). The Company objected to providing such outdated data and requested clarification as to the relevance. (GC 55).

Brash provided additional responses and documents on March 21, 2016. He provided all available vacation records for the 36th Street, Alpine and Holland Garages, which was limited to 2015 and 2016. (GC 58; Brash 1188). Brash confirmed the Company did not possess any other information requested in the December 23 RFI that was not provided. (Brash 1180-92).

J. March 3: Written Warning for Misuse of Time on February 11, 14, and 21

1. February 7: Hooker performs no work

On February 7, Hooker was scheduled to work from 8:00am to 4:45pm. But, he completed no work or training that day and never even left the garage. (Brash 1263-64 R 28, p.

4, 07-Feb-2016).[8] Hooker claimed he could not find his vehicle registration and was told by the Duty Manager to complete trainings. Hooker failed to complete any training courses that day. (R 31). The next morning, Sharp looked in Hooker's truck and immediately saw the registration, in plain sight. (Sharp 2224). Brash considered issuing discipline for Hooker's work avoidance but he hoped to change Hooker's behavior through dialogue rather than discipline. (Brash 1267).

2. February 11: Hooker works unauthorized overtime, claiming he did not know how to use a flip phone

On February 11, towards the end of his shift, Hooker called Sharp and left a voicemail message that he would not be able to finish his assigned job. (Brash 1274; Sharp 2236). Hooker's message clearly stated he had to leave at the end of his scheduled shift and was not available to work overtime. (D 25:43-44; Brash 1274; Sharp 2237). Sharp made calls and arranged for another technician to complete the job, who had to drive 30 minutes to the worksite and finished the work on overtime. (Brash 1275; Sharp 2239). Sharp called Hooker to let him know another technician was on his way. He also sent Hooker a text. Hooker did not answer his phone, did not respond to the text message and never called Sharp back that afternoon. (Brash 1275-76; Sharp 2238-40). Sharp later learned that Hooker stayed on the job to receive overtime pay, without authorization. (D 26:12-16). When Hooker returned to the garage, he disingenuously told Sharp "*he did not know how to use his cell phone"* because he had not yet read the instruction manual for the simple "flip" phone. (D 26:2-10; Brash 1274, 1276-77; Sharp 2241). Hooker repeated this explanation in a February 22 meeting with Sharp. (D 27:5-6).

Brash and Sharp concluded that Hooker's conduct on February 11 violated Tech Expectations, because he (1) failed to obtain authorization to work overtime; (2) remained on the

[8] R 28 is a compilation of the Job Detail Report (aka "Work Ticket") for Hooker for each of the days on which he worked on the load during 2016. Hereinafter, the citations to "R 28, p. 4, 07-Feb-2016" refers to the page number and date listed in the top left-hand corner of the Work Ticket for the particular day in question.

worksite with another technician without authorization from his supervisor; and (3) remained on the worksite after he was no longer dispatched on that job. (R 5, p. 3-4).

3. February 14: Hooker Wastes 3 Hours on a Job Requiring No Service

On February 14, Hooker violated Tech Expectations when he went AWOL from 8:00 to 11:03am, without accounting for his time or explaining why he was not working. Hooker dispatched on a simple BPC ticket at 8:08am. (Brash 1283-84, 1287; Sharp 2245; R 28, p. 6, 14-Feb-2016). At ***11:03am***, Hooker called Sharp and reported there was nothing to do at the job. (Brash 1286-87; Sharp 2247). Hooker completed no work on that job and never accounted for his time from 8:00 to 11:03am. On February 22 Sharp asked Hooker what he did during that time. Hooker said he "did not really remember." (Sharp 2259; D 27:6-7). Hooker violated Tech Expectations in that he (1) failed to deliberately plan to minimize lost time, and (2) failed to properly close out the job. (R 5, p. 2-3). Staying on a job for three hours with no work to perform is blatant work avoidance and "extremely rare" in the TFS organization. Such misuse of time normally results in discipline on the first occurrence. (Brash 1289, 1293; Sharp 2261).

4. February 18: Mrla and Brash Meet with Letts and Beach in Lansing

On February 18, Brash and Mrla met with Letts and Beach, in Lansing. (Brash 1295; Mrla 2653). Hooker had been working on the load for more than two months, and management saw a troubling pattern of "work avoidance." Although Hooker had pledged to "work and grieve," he instead intentionally avoided work to protest the decision to put him on the load. Mrla and Brash solicited the Union's help to correct Hooker's conduct. They hoped to enlist Letts' and Beach's support to encourage Hooker stop avoiding work to avoid disciplinary consequences. (Brash 1300-01; Mrla 2656-57). Mrla (and Brash) had routinely asked other Locals for similar assistance to avoid discipline when possible. (Mrla 2657; Brash 1303-04).

Mrla explained Hooker's performance problems to Letts and Beach. He expressed that Hooker was "heading down the wrong road." Letts defiantly responded "I wish all of my members were like Brian Hooker." (Mrla 2656-57; Brash 1302; Letts 313). Mrla understood the Union had no interest in developing a constructive working relationship or reversing Hooker's misconduct. He said there was no reason to continue the meeting. (Mrla 2658; Brash 1303).

5. February 21: Hooker Waits 90 Minutes Before Dispatching

On Sunday, February 21, Hooker again violated Non-Management Expectations when he failed to leave the garage until after 9:30am – more than 90 minutes after his shift started. The expectation is to leave within 20 minutes. Hooker avoided work the rest of the day. (Brash 1308-09; Osterberg 2054; R 33). Hooker provided no explanation for dispatching 90 minutes late, and there was no indication he performed any work that day. (Brash 1308, 1317-18). On February 22, Sharp asked Hooker what he did for those 90 minutes. Hooker said he did not want to do administrative work, which made no sense to Sharp. (D 27:8-9). Hooker violated Tech Expectations by (1) failing to deliberately plan to minimize lost time, and (2) failing to be at his reporting location and ready to start work at the beginning of the tour. (R 5, p. 2-3).

6. March 3: Hooker Receives a Written Warning

Hooker received a disciplinary written warning on March 3, 2016, for violating Tech Expectations on February 11, 14, and 21. (GC 26). The Manager's Guide to Corrective Action ("Manager's Guide") sets forth guidelines for issuing discipline. (R 32). It provides that a *single violation* of Tech Expectations (aka "Non-Management Expectations") warrants a written warning and one-day suspension. However, Brash issued only a written warning – with no suspension – notwithstanding that more severe discipline was warranted based on Hooker's multiple violations over a 10-day span. (R 32, p. 9-10).

K. GPS Devices and Hooker's New Vehicle on February 28

The Company installs GPS devices on all technician vehicles, typically under the steering column. The device plugs into an adaptor, which is wired into the vehicle's electronic system. The GPS device transmits data regarding the vehicles' location and movements to two Company systems, "Telogis" and "U-dash." (Brash 1387; GC 2, p. 131).

On February 28, Sharp re-assigned Hooker the work truck previously assigned Caresian Campbell. Sharp allotted Hooker the full day on February 28 to "move into" his new vehicle. (Brash 1382; Sharp 2275). Management later learned that the GPS device last reported a movement on February 27 at 4:45 pm – the moment Campbell last turned off the vehicle. (R67, p. 13) *The GPS unit in Hooker's new vehicle stopped reporting the very morning that Hooker took over the vehicle.* As discussed below, the Company did not discover the issue for another six weeks because it had no reason to monitor the GPS device on Hooker's vehicle.

L. May 10: Hooker Receives Two Final Written Warnings/3-Day Suspensions for Misuse of Work Time and GPS Tampering

1. April 10: Hooker failed to complete any work and disingenuously claimed he was unable to open the locks on his truck

On Sunday, April 10, Hooker was scheduled to work on the load from 8:00am to 4:45pm. He waited more than an hour before dispatching on his first job, and then emailed the Duty Manager claiming he could not access his tools because he did not know the combination to the locks on his truck. The Duty Manager (Sidney Bragg) informed Hooker that morning that the lock combination was the last 4 digits of the vehicle number – the same for all trucks at the 36th St. Garage. (R 40). Hooker also drove this same vehicle on March 6, 20 and 27, without reporting a problem opening the locks on his truck's toolboxes. (Hooker 855-56). At 12:05pm, Bragg left church, went to Hooker's jobsite, and opened the combination lock immediately, using the same combination he given gave Hooker: the last 4 digits of the truck number. (R 40;

Brash 1396). Hooker had no explanation why he was unable to open the lock or why it took so long to report he was having difficulty. The ALJ expressly discredited Hooker's testimony on this issue. (D 30:30-31). It appeared Hooker was merely looking for an excuse to justify wasting the day in his truck without attempting any work on his assigned task. (Brash 1398). Despite working for seven hours, Hooker failed to complete any work tickets on April 10.

2. April 17 and 18: Discovery of Hooker's Disconnected GPS

Hooker's next scheduled day was Sunday, April 17. Duty Manager Jason Bigelow tried to locate his vehicle that morning to conduct a Safety Inspection.[9] Bigelow looked for Hooker's vehicle on Telogis and discovered the GPS device had not reported data since February 28. (R 41, p. 18; R 67, p. 11). Bigelow informed Hooker his GPS was not reporting. (Brash 1403).

At 3:27pm on April 17 – shortly after Bigelow arrived at Hooker's worksite – Hooker submitted a repair ticket to address minor issues with his truck, disingenuously reporting "A strange device is laying in the driver side door storage." (R 41, p. 21, 28). It was the GPS device that had been unplugged for the prior six weeks.

On April 18, Fleet Mechanic Richard Straub completed repairs on the vehicle and sent an email to Hooker, Sharp and John Asaro (Fleet Manager) advising "the electronic item in the door panel is the GPS unit that plugs in under the dash." (R 41, p. 27-28; R 67, p. 36). Straub later informed Asset Protection Investigator Jody Vilk there had been no history of GPS units coming loose, and he thought someone had tampered with it. (Vilk 1953; Brash 1427-28).

[9] While an unrelated grievance was pending, the Company did not update vehicle assignments in Telogis. As a result, the Telogis reports show Hooker's truck (2008133-215) as assigned to Caresian Campbell. (See e.g., R 41, p. 12). It is undisputed, though, that Hooker began driving that vehicle on February 28.

3. Asset Protection Investigation

a. April 19-24

On April 19, Brash reported possible GPS tampering to Mrla, Human Resources, Labor Relations, and the Asset Protection department. The case was assigned to Asset Protection Investigator Jody Vilk. (Brash 1414-15; Vilk 1909). Vilk requested records from Brash to begin her investigation and called Bigelow to discuss how he learned of the GPS issue. (Vilk 1935, 1938). Brash sent Vilk the GPS records from Hooker's truck and relevant time records and work tickets showing when Hooker was in the truck. (Vilk 1935-36; R 42). Vilk gathered and reviewed various other documents as part of her investigation, which is comprehensively addressed in the Asset Protection Report and her notes. (R 41, 67).

b. April 24

Hooker's next scheduled work day was Sunday, April 24. Brash instructed the Duty Manager, Jeff Osterberg, to monitor Hooker's GPS that day to see if it continued to transmit data. (Osterberg 2055). The GPS device again stopped reporting at 10:19 am that morning when Hooker was leaving a worksite. (R 41, p. 9).

At 9:02am, more than an hour after shift start, Hooker dispatched on a BPC ticket to replace a pedestal. (Osterberg 2058, 2064; R 28, p. 18, 24-Apr-2011; R 33a, p. 5). Osterberg used "U-Dash" to find Hooker's jobsite. When Osterberg arrived, he saw Hooker wasting time, sitting his in truck and not making effort to perform the assigned work. (Osterberg 2065-67). At 10:19am, Osterberg saw Hooker drive away from the worksite in his truck. Osterberg checked the Telogis system. It showed Hooker's GPS stopped reporting when Hooker left the worksite. (R43a, p.15; Osterberg 2076-78). Brash spoke with Osterberg again and asked him to visually confirm if the GPS device had been disconnected. (Brash 1429).

At about 1:00pm, Osterberg spoke briefly with Hooker at the site and saw the GPS unit had been unplugged. It again was in the driver-side door pocket, hidden under a booklet. (Osterberg 2084). Osterberg *did not tell Hooker the GPS device stopped reporting*. (Osterberg 2084; R 43b, p. 4-7). Nor did Hooker tell Osterberg the GPS had become disconnected or that he knocked it out. (Osterberg 2085-86; Brash 1747). Osterberg then looked at the pedestal that Hooker was to replace. He had not done any work on it. (D 30:40-42; Osterberg 2086).

Hooker called Osterberg at 4:26pm and reported he did not complete the job. (Osterberg 2087). Hooker returned the job incomplete, with two minor tasks remaining. Hooker simply chose not to complete the job at hand. (Osterberg 2088-89).

c. April 25-26

On April 25, Brash informed Vilk that the GPS on Hooker's vehicle stopped reporting at 10:19am and Osterberg found the unit in the driver's side door pocket of the vehicle. (R 43b, p. 4-7; R 67, p. 5). Later that day, Osterberg provided Vilk (and Brash) with a timeline of the events he observed on April 24 and relevant documents matching his timeline. (Osterberg 2090; Vilk 1965; R. 41, p. 31-32). Brash relayed to Vilk that Hooker had called Fleet Manager John Asaro that day asking if there had been any safety issues with the GPS devices in his vehicle model. This indicated to Vilk that Hooker *knew* his pending interview with Asset Protection was about the GPS device, even though only Vilk and Brash then knew the topic. (Vilk 1967-69).

d. April 27: Vilk's Interview of Hooker

On April 27, Vilk interviewed Hooker and obtained a written statement (contained in the AP Report). (D 28:14-27; Vilk 1978-84; R 41, p. 34-35). Hooker admitted knocking out the GPS on February 28, claiming it happening as he was *setting* the parking brake. (Vilk 1980, 1982). Hooker also admitted a fellow Union rep told had him on *April 12* that the device in his vehicle was the GPS. Thus, his April 17 report of a "strange device" was disingenuous at best. (R 67, p.

38; Vilk 1981). Hooker also admitted knocking out the GPS device on April 24, but claimed it was an accident. (R 67, p. 38). Hooker claimed he knocked the device out as he was *setting* the emergency brake with his *right foot.* Hooker even attempted a demonstration to support his claim of lifting his right foot over his left leg to *set* the brake – a preposterous act. (Vilk 1982; Brash 1448). Hooker also falsely claimed that he had reported the disconnected GPS to Sharp on February 28, and that the manager instructed him to submit a repair ticket to Fleet. After the interview, Hooker was suspended pending the outcome of the investigation.

The following day, Vilk confirmed with Sharp that Hooker had not reported the GPS problem on February 28, and that he (Sharp) never directed Hooker to submit a repair ticket. She also confirmed with Asaro that Fleet had not received any repair tickets for a disconnected GPS on Hooker's vehicle prior to April 17. (Vilk 1984-86).

Brash reasonably concluded that Hooker intentionally tampered with his GPS device on February 28 and April 24. He simply did not believe Hooker's account that he accidently disconnected the GPS device those days. (Brash 1747; D 30:1-13).

Tampering with the GPS device violates the COBC and Tech Expectations, which expressly prohibit tampering with or obstructing an "Intelligent Vehicle Device." (R 5). Demonstrating his tampering was not an accident, Hooker failed to report disconnecting the GPS unit on February 28, but waited more than six weeks to report it – immediately *after* encountering Bigelow on April 17.

4. May 10: Hooker Receives Two Final Written Warnings/3-Day Suspensions for Misuse of Work Time and GPS Tampering

On May 10, Hooker received two Final Written Warnings/3-Day Suspensions, one each for (1) recurring incidents of misusing work time (April 10 and 24), and (2) tampering with the GPS device on his vehicle. Brash initially considered if the severity of Hooker's misconduct

warranted termination, and he discussed that option with Mrla. However, Labor informed Brash that within the past two years, the Company had issued a Final Written Warning and 3-Day Suspension in two Midwest cases involving GPS tampering. As a result, Brash decided to issue the same discipline to Hooker, notwithstanding his *two* tampering incidents and recent disciplinary issues. (Brash 1454-55). When Brash and Sharp issued the discipline, Hooker offered no explanation for misusing work time on April 10 or April 24. Brash concluded that Hooker was again simply avoiding productive work on April 10 and 24.[10] Brash emphasized the seriousness of the situation to Hooker and his Union representative. He warned that these were true final warnings and that he would be terminated if he continued to avoid work and misuse time. Brash bluntly told Hooker to "Get out of your truck and do your job." (Brash 1468).

M. May 2016: Hooker Bids on a Monday-Friday Work Schedule

In May, Hooker bid on a Monday-Friday work schedule for the first time. Letts then claimed he needed Hooker on Union business every weekday for five weeks. Brash denied the request; Hooker's weekday schedule did not excuse him from work full time. Brash told Letts he would accommodate Hooker's work for the Local as much as possible, but that based on business needs, he expected Hooker to work when scheduled unless Union leave was approved in advance. (Brash 1475-76). Although Letts falsely claimed that Brash's position was a "renege" on Mrla's alleged "commitment" in the October and November meetings, the extensive correspondence between the parties since November 2015 refutes Letts' claim that Hooker should be excused from work if he pulled a Monday-Friday shift. (See GC 8; R2, p. 1; R. 2, p. 2; R 24, p. 3; GC 11; GC 10; GC 13; GC 14; GC 17; GC 18 and R 44).

[10] As part of his story for April 24, though, Hooker said he had pulled up on his iPad a program called "Translore," which technicians use to review blueprints of the network plant. Not only did that indicate Hooker was connected to the VPN, but the admission would be noteworthy to Brash relative to Hooker's later misconduct on September 20. (Brash 1466).

The disagreement came to a head on June 9, when Brash sent Letts and Hooker a comprehensive letter explaining his expectations for Hooker. The letter plainly stated, "Mr. Hooker is not excused from reporting to work for his scheduled shift unless the Company approves the request for leave in advance." (R 45, p. 2).

N. June–August 2016: Hooker Fails to Turn in Activity Log and Defies Management's Directives

Since November 2015, Brash had repeatedly instructed Hooker to accurately report his MXUP time (Joint Meeting Time) by submitting the completed "Union Activity Log." ("Activity Log"). As early as December 8, 2015, Letts had agreed Hooker would do so: "Mr. Hooker will submit a special time sheet per your new expectations for him once the applicable week has been concluded." (R 2). Hooker submitted two *incomplete* Activity Logs in December, but consistently failed to comply with this directive again until August 2016. (Brash 1490).

From December 2015 through June 2016, Sharp and Brash regularly reminded Hooker of his requirement to submit the Activity Log to account for the paid Joint Meeting Time. Hooker consistently ignored those directives. Hooker was not turning in the Activity Log, so when he would request time off for Union business, he would input (into GCAS) some of the time as MXUU and some of it as paid MXUP. He was regularly requesting (and being paid for) extensive MXUP hours which were unverified. (Brash 1489).

In June 2016, Hooker began disregarding Article 10 altogether, taking time off without approval and when his supervisor had instructed him to be at work. Monday, June 6 was Hooker's first day scheduled to work a shift of Monday-Friday, 8:00am - 4:45pm. (Brash 1494). Despite being specifically told he was not approved to take Union leave on June 6 and June 10, Hooker failed to report for his scheduled shifts. (R 44; Brash 1491-92; D 21:25-36). He did not report for work at all on Monday, June 6. (Brash 1497). On June 10, Hooker failed to report at

his scheduled 8:00 am start time. At 9:00 am, an hour after his scheduled start, Hooker arrived at the 36th St Garage for a grievance meeting. (D 22:1-7; Brash 1513).

Later on June 10, Hooker submitted a request to take a vacation day on June 18. (R 46). Sharp denied Hooker's request because another technician had already scheduled vacation that day. (Brash 1517; Sharp 2325). On June 18, Hooker called in sick and was absent, which was unexcused. (Brash 1540). Hooker did not work in the load a single day during June. As a result of these incidental absences, Sharp issued two counseling notices (June 6 absence and June 10 tardy) and a written waring (June 18 absence). (D 22:43-46; Sharp 2332; GC 30, 31, 32).

Sharp and Brash continued to remind Hooker that he was required to return the Activity Log, but Hooker simply refused. Specifically, they reminded him on June 23, July 25, and July 28, when Hooker committed to providing the Activity Log to Sharp by August 5. (R 47, 48; Brash 1536-37, 1553; Sharp 2319). By August 11, Hooker still had not returned an Activity Log, so Brash sent him an email to remind Hooker of his commitment. (R 52).

On Friday, August 12, Brash met with Hooker and asked if he had brought the Activity Log with him, per his commitment to do so by August 5. (Brash 1552-53). Hooker contended he had not had time to complete the form. Per his prior notices and specific warning on July 25, Brash gave Hooker a verbal warning for his continued insubordination. (R 52). Hooker responded by again threatening to schedule grievance meetings only on Mondays and Fridays so he would not have to work on the load. (Brash 1553). Hooker ultimately agreed to come to work on Monday, August 15 to fill out the Activity Log. However, he called off the night before and another employee submitted his Activity Log. (GC 46, 47).

O. Hooker Continues to Misuse Time, Resulting in his Termination

1. September 20: Hooker wastes an entire day without completing a single job

The ALJ discredited Hooker's version of events on September 20, describing them as "confusing and contradictory." (D 31: 34-35). Hooker was scheduled to begin working on the load at 8:00am. He dispatched at 8:46am to a POTS (Plain Old Telephone Service) repair after a customer lost service. (Sharp 2384-86; Brash 1600). Hooker waited until 9:28am to leave the garage – one hour and 8 minutes late. (Brash 1601). At 3:30pm, six hours after he dispatched, Hooker called Sharp and requested assistance. Caresian Campbell then took over the job and quickly realized the problem needed to be addressed by reestablishing a connection inside the CO. Because it was late in the day, there were no CO Technicians at the CO. Including his time waiting for a CO tech to arrive to finish that work, Campbell completed the job in about two hours. Hooker was dispatched on the job for more than six hours, yet failed to fix the problem.

Hooker spent the entire day finding reasons not to work. He violated several provisions of Tech Expectations, including: (1) Be at your reporting location and ready to start work at the beginning of the tour, (2) Deliberately Plan Job to Minimize Lost Time, (3) Advise supervisor of any roadblocks or excessive time on job, and (4) If the technician is unable to complete the job prior to taking their meal period, he/she must contact their supervisor for guidance. (R. 5, p. 1-2).

2. September 21: Hooker waited more than two hours to leave the garage and then failed to complete a single job

Hooker offered no testimony on the events of September 21, and the ALJ credited Sharp's unrebutted testimony. (D 32:33-35). Hooker was scheduled to start at 8am (Sharp 2364; Brash 1603). He used his Company iPad to dispatch on a job at 8:53am, a POTS repair to restore service. (Sharp 2364; R 61, 62). Hooker waited until 10:13am to leave the garage. (Sharp 2364; Brash 1603; R 70). Without notifying a manager of his delay, he departed the garage two hours

and 13 minutes after the start of his shift. When Sharp asked why it took so long to start work, Hooker claimed he could not find his iPad charger and spent the morning looking for it. He eventually found the charger *in his truck*. (Sharp 2365-67). Hooker also claimed there were thunderstorms in the area, and he did not want to drive in the storm. (Sharp 2365; Brash 1603). Every other scheduled TFS technician left the garage on time. (Sharp 2371-72; Brash 1603).

Hooker worked on the same job throughout the day. (Sharp 2368). He claimed he ran an "MLT test" at the cross box, which revealed a problem with the "F1" cable (between CO and cross box). (Sharp 2412; R 28, p. 33). Hooker said he then spent time testing the "F2" cable (between cross box and terminal), even though initial testing demonstrated the problem in the F1. (Sharp 2405). Hooker returned the job without completing it. (Sharp 2371).

Without explanation or notice to his manager, Hooker left the jobsite and went to the garage at 2:45p.m. (Sharp 2369). Another technician took over the job and restored service in less than an hour. (D 33:17-19; Sharp 2371). Hooker was assigned to one job, which should have lasted an hour, at most. His conduct violated several provisions of Tech Expectations, including: "Be at your reporting location and ready to start work at the beginning of the tour," "Deliberately Plan Job to Minimize Lost Time," and others. (R. 5, p. 1-5).

On September 22, Sharp interviewed Hooker to see what he did the prior two days and later conferred with Brash. (Brash 1605; Sharp 2373; R 61, 62). Brash and Sharp reached the same tentative conclusion, that Hooker again was misusing time on his assignments to avoid work. (D 34:1-2; Brash 1609, 1616; Sharp 2400). In an abundance of caution, Brash wanted more information about Hooker's conduct on September 21, so he asked Sharp to meet with Hooker again to get additional information. (Brash 1616). On October 5, Sharp met with Hooker again, transcribed his conversation and sent it to Brash. (R 63; Brash 1616; Sharp 2410-11).

3. September 23 and October 3: Hooker wasted 5.75 hours and failed to complete required training

Technicians must complete certain trainings each month on their Company iPads. Each training module has an expected completion time, usually 15-30 minutes. (R 57; Brash 1619-20). Technicians usually complete such trainings in the time allotted on down time during the day.

Through September, Hooker had not completed four scheduled trainings for August or September. (Brash 1619-20). On September 23, Sharp gave Hooker a few hours at the end of his shift to complete the training modules, with a total expected duration of one hour and 45 minutes. (Brash 1621; R 57, 58). Hooker reported 2.75 hours to complete training on his September 23 time sheet, yet did not complete a single training module. (D 34:8-11; Brash 1621; R 26, p. 21; R 29). On October 3, Sharp gave Hooker three more hours at shift end to finish the four trainings. (Brash 1622; R 1, p. 13; R 26, p.22; R 29). Hooker claimed he did not have enough time. (Brash 1624). He reported three hours for training for October 3 *but did not complete any*. (D 34:13-14; Brash 1621; R 26, p. 21; R 29). For those two days, Hooker was paid 5.75 hours to complete trainings having a total estimated duration of 1.75 hours. Yet, he failed to complete any of those training modules. His misuse of time those days violated Tech Expectations by failing to "Deliberately Plan Job to Minimize Lost Time."

Hooker received approval to take leave for Union business (MXUU) on October 4. (Brash 1624). Without discussing the issue with his supervisor, Hooker completed his required trainings at the Union hall on October 4. He entered into GCAS that he spent two hours of working time to complete the trainings. (R 58; R 26, p. 22). Thus, Hooker claimed (and was paid) 7 hours and 45 minutes to complete training that should have taken less than 2 hours.

The Manager's Guide provides that a third violation of Non-Management Expectations should result in a Suspension Pending Dismissal. (R 32, p. 10). Hooker was Suspended Pending

Dismissal on October 10 based on his repeated violations of Tech Expectations and continued pattern of work avoidance, and after prior progressive discipline. The Company terminated Hooker October 13, 2016.

IV. LAW AND ARGUMENT

Based on facts credited by the ALJ and undisputed facts he ignored, there is no probative evidence of discriminatory animus for the Company's decision to place Hooker in the load in 2015 or for his subsequent disciplines and termination. The Company made the rather innocuous decision to place Hooker on the load for legitimate business and operational reasons. Hooker indisputably was the *only* non-elected Union representative in Mrla's jurisdiction *not* working in the load. The decision is no more complicated than Mrla and Brash wanting consistency within TFS and all available manpower working in the load. The decision was consistent with the Company's contractual and legal rights and not precluded by any "local" agreement.

The ALJ ignored undisputed facts that directly contradict his results-oriented finding that the timing of Hooker's return to the workload implied animus. Mrla first considered the move in early 2014, and Brash discovered the anomaly of Hooker not working while managing his first vacation selection process as Area Manager in September 2015. It was not contested that when Brash and Mrla made the decision to return Hooker to the load, they were entirely unaware of Hooker's participation in an unrelated NLRB proceeding and therefore could not have discriminated against him on that basis. The only evidence of alleged animus temporally proximate to that decision was the Monitoring RFI, which is factually and legally insufficient to support an inference of discriminatory motive for the decision to put Hooker in the load.

The progressive discipline of Hooker, culminating in his termination, was for just cause and based on legitimate, non-discriminatory reasons. The ALJ acknowledged Hooker's repeated incidents of misusing time and avoiding work and largely credited the Company's evidence

proving its legitimate bases for Hooker's disciplines and termination. From February 1 through October 5, 2016, Hooker actually worked in the load for *only 21 shifts* (including February 11), totaling 135.5 hours. Of those 21 days, he violated Tech Expectations by misusing time on *eight separate occasions* – and engaged in similar misconduct for which he was not disciplined on other dates. The bizarre excuses he offered for avoiding work prove a deliberate and calculated protest and not a lack of qualifications or training:

- Unable to find his vehicle registration (February 7)
- Unable to use a flip phone (February 11)
- Inadequate truck (February 21)
- Inadequate tools and equipment (multiple dates)
- Unable to find his phone charger (April 10)
- Unable to open locks for tool bins on his truck with the combination (April 10)
- Lack of familiarity with "BPC Protocols" that do not exist (multiple dates)
- Inability to trim a bush without a raincoat (August 13)
- Unable to find his iPad charger (September 21)
- Unwilling to leave the garage during a thunderstorm (September 21)

Hooker's indisputable misconduct plainly violated work rules for TFS technicians and warranted discipline. Despite acknowledging Hooker's continual and inappropriate misuse of time, the ALJ did not hold him accountable for any of it. He ignored Company written work rules, disciplinary guidelines, and comparable discipline issued for similar misconduct.

The ALJ instead relies on paper thin evidence of alleged animus relating to the initial decision, and an exceedingly broad and indefensible "fruit of the poisonous tree" legal theory, concluding that because the decision to place Hooker in the load ostensibly was unlawful, then

Brash's email fuckery whitewash

his subsequent disciplines and termination were inherently unlawful. His decision also is flawed by its principle reliance on contrived and insignificant suspicions of the Company's investigation of Hooker's GPS tampering, which was entirely unrelated to his termination. The ALJ also misapplied Section 10(c) of the Act by recommending a make-whole remedy.

There is no dispute Hooker was an active Union representative who engaged in union activities. His protected conduct, however, did not license him to continually refuse to engage in productive work in violation of Company policy. Even if the Company violated the Act in placing Hooker in the load (which it did not), it does not logically or legally follow that Hooker had carte blanche to violate work rules, disobey reasonable instructions, and refuse to perform his job duties indefinitely. If he disagreed with the initial decision, his recourse was to "work and grieve." He did neither. For all of these reasons, the progressive discipline and discharge of Hooker were not motivated by his union activities and would have occurred in any event absent those activities, and thus did not violate section 8(a)(3), under *Wright Line*.

A. The ALJ Erred in Concluding the Company's Decision to Place Hooker in the Load Violated Section 8(a)(5)
(*Exceptions Nos. 2, 17, 18, and 19)*

The ALJ erred in concluding AT&T violated Section 8(a)(5) by unilaterally deciding to place Hooker in the load. This erroneous finding also fatally undermines the ALJ's corollary finding that Hooker's subsequent disciplines were unlawful as "fruit of the poisonous tree."

The ALJ based his cursory analysis entirely on his finding of a "past practice" that the Local's AA "was on full-time union status and not in the load," which ostensibly required decision bargaining to change. (D 35: 38-39). He relies on a false premise that the operative decision was to "remove [Hooker] from full-time union status." The Company did not decide to remove Hooker from "full-time union status;" it decided to assign him to the work schedule.

During which no union-time would ever be scheduled

There is no inherent right to "full-time union status." An employee's right to time off to perform "union business" is created by the CBA, and employees are permitted such time off only as the CBA allows. The requirement that Union representatives work is the rule, not the exception.

CBA allows 1080 hours annually; thus, "the rule" remains 50/50-ish for "..designated union representatives.."

The ALJ's decision the Company had a duty to bargain over "removing him from full-time union status" is illogical, contravenes the plain language of Articles 10 and 17, and cannot be reconciled with statutory obligations under Section 302 of the Act, 29 U.S.C. §186.

1. The ALJ's Finding of an 8(a)(5) Violation Contravenes the Express Language of Article 17

The ALJ's finding of an 8(a)(5) violation contravenes the plain language of Article 17. That provision accords the Company broad discretion to assign work and to manage work schedules, including removing and returning employees to the work schedule. Hooker's removal from the load in 2010 and return to it in 2015 were consistent with these clear terms.

Section 17.01 provides the Company with broad discretion in creating work schedules:

> Insofar as service requirements and the conditions of the business permit, selection of schedules for tours shall be when practical by seniority. *The responsibility for determining the requirements and conditions rests solely with the Company…* No provision of this Agreement will constitute a guarantee as to the minimum or maximum number of hours of work per week which may be required on the part of any employee.

First time applying that interp to include union-time; in any case, one article of CBA cannot negate another preceding(?)

(GC 2, p. 49)(emphasis added). In addition, Section 17.03 sets forth the general rule that "[a]ssignments will be adhered to unless the Company determines that service requirements and business conditions dictate otherwise." (GC 2, Art. 17, p. 49). These terms accord the Company sole discretion to determine service requirements and conditions of the business. The Company has full discretion to create work schedules based on its determination of service requirements and business needs, and employees select available schedules based on seniority.

Under Section 17.04, changes in work schedules (by employee request or local agreement), are permitted so long as service requirements and business conditions permit, and

the change does not violate the CBA. (GC 2, Art. 17.04). Because the Company retains full discretion to determine "service requirements and conditions of the business," it retains full discretion to grant or deny a requested work schedule change.

The ALJ's decision ignored Hooker's explanation for being removed from the work schedule in December 2010, which aligns with Section 17.01's plain language. Hooker admitted he was removed from the load because the former Area Manager determined service requirements and business conditions permitted it: "[I]t was simply too burdensome on the Company to continuously remove a steward from the workload in order to perform a function." (Hooker 364). This admission demonstrates that removing a Union representative from the workload is an exercise of Company discretion for its own convenience and not an entitlement.

Where contract language expressly addresses an employer's right to make a decision unilaterally, the waiver is clear and unmistakable. *Allison Corp.*, 330 NLRB 1363, 1364-1365 (2000) (language giving company "the exclusive right to manage the business and operation of its facilities" was a clear and unmistakable waiver); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (language permitting employer to pay additional wages clearly and unmistakably waived union's right to bargain over attendance-bonus plan); *Provena Hospitals*, 350 NLRB No. 64 (2007) (lawful implementation of attendance rules where contract permitted employer "to change …reporting practices and procedures and/or introduce new or improved ones," "to make and enforce rules of conduct," and "...to suspend, discipline and discharge employees").

Just fucking wow!

Without even acknowledging the applicable Article 17 language, the ALJ contended the Union did not waive its right to bargain over returning Hooker to the work schedule simply because it asked to bargain when Mrla announced the decision. The ALJ's waiver analysis is misplaced: the CWA's contractual waiver is manifest in the express language of Article 17.

2. The ALJ's Finding of an 8(a)(5) Violation Contravenes the Express Language of Article 10

The ALJ's finding also contravenes plain language in Article 10. That Article expressly provides for various types of time off for Union business, and the right to such leave is limited. The ALJ editorialized and misstated the terms of Article 10, then ignored it. Nothing in the CBA or the Act gives a Union representative the right to remain off the workload permanently.

The language of Sections 10.05 to 10.07 is unambiguous. In order for "Joint Meeting Time" to be compensable, the following conditions must be met:

1) The union representative must be meeting with a Company representative;

2) The union representative must give his or her immediate supervisor "reasonable advance notice" of the intended absence and the probable duration of the absence;

3) The meeting must occur during the employee's "regularly scheduled working hours"; and

4) If the meeting is "for purposes other than the processing of grievances," the time is compensable only if the Company "further agrees to pay for the time involved."

(GC 2, pp. 14). If these conditions are not met, there is no contractual basis for the Company to pay for time in which a technician is engaged in Union business.

Conflation & oversimplification of 10.05-10.07

Sections 10.08 and 10.10 set forth terms for unpaid Union leave. Under 10.08, an employee may be granted up to 1080 hours unpaid Union leave annually, upon reasonable advance notice and "insofar as work schedules permit." If more than 1080 hours annually is needed for Union business, he can take a longer Union leave of absence under Section 10.10. The ALJ completely ignored this section, which would permit an employee to work for the Union full time without being paid by the Company. The ALJ's continued reference to Hooker as being "removed from full-time union status" misapprehends the controlling CBA terms.

In addition, Section 302 of the Act forbids employers from making payments, or providing things of value, to union representatives, subject to a few narrow exceptions. 29 U.S.C.

§186(a). Relevant here, there is an exception that allows an employer to pay a union representative when the payment is "compensation for, or by reason of, [the Union representative's] service as an employee." 29 U.S.C. § 186(c)(1). In addition, the Act provides that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." 29 U.S.C. § 158(a)(2). As such, the Company is prohibited from paying Hooker, or other Union representatives, unless the payments are compensation for his service as an employee, or to confer for Joint Meeting Time.

Without explanation, the ALJ ignored these controlling contractual and statutory requirements and found the Company must allow Hooker to take Union leave on a permanent basis; must allow him to take Joint Meeting Time without providing advance notice; and that the Company is prohibited from verifying the accuracy of his reported MXUP time. That decision cannot be reconciled with the CBA's plain language and imposes extra-contractual obligations on the Company not contained in any agreement and inconsistent with the Act.

B. The ALJ Erred in Concluding the Company's Decision to Place Hooker in the Load was Unlawfully Motivated and Violated Section 8(a)(3)

(*Exceptions Nos. 1, 12, 13, 14, 15, 16, 17, 18)*

The ALJ erred by concluding the decision to place Hooker in the load was unlawfully motivated by his engagement in union activity as the Local's AA. The evidence of "express and implied animus" relied upon by the ALJ lacks temporal or causal nexus for that conclusion. The ALJ patently erred in finding the "timing" of the decision "raises a serious question about the Company's motivation," and that isolated statements by Mrla "demonstrated hostility toward Hooker because of his conduct as a union official." This illogical conclusion cannot rationally be drawn from the evidentiary record, as the ALJ reached it only by *ignoring facts he credited* and by disregarding undisputed facts. His conclusion the Company provided no "legitimate

justification" for the timing of its decision also lacks evidentiary support. Because the Company met its burden under *Wright Line* to show it would have placed Hooker in the load regardless of his union activities as an AA, the ALJ's finding of an 8(a)(3) violation must be rejected.

1. The ALJ erred in concluding the *timing* of the Company's decision evidenced unlawful motivation

The ALJ's finding that the "timing" of the decision to place Hooker in the load "raises a serious question about the Company's motivation" is unfounded. Testimony *credited by the ALJ* and other undisputed facts in the record prove the legitimacy of the timing of that decision.

Hooker's October 5, 2015 phone call with Mrla, coupled with Hooker's testimony the next day in an NLRB hearing, are the linchpin for the ALJ's finding of unlawful motivation:

> Based on the above, I find both express and implied animus. In particular, the timing of Mrla's call to Hooker on October 5, 2015 on the subject – the first since January 2014, and only a day before the NLRB hearing – raises a strong inference of unlawful motivation. (D 38: 1-3)

Based only on the coincidental timing of that call relative to Hooker's testimony the next day, the ALJ concocted a false inference used as the cornerstone for rejecting the Company's *Wright Line* defense. The ALJ's "strong inference of unlawful motive" based on the timing of the Mrla's October 5 call is spun from whole cloth. (D 37: 9-19; D 38:3)

Hooker's testimony in an NLRB hearing on October 6, 2015, is entirely irrelevant *because Brash and Mrla did not know of the hearing or of Hooker's participation when they made their decision*. Their testimony of not knowing of the NLRB hearing or of Hooker's testimony *until December 2015* (when the charge in Case 07-CA-150005 was filed) was unrefuted, despite a broad subpoena into their communications and the full and fair opportunity of the GC and the Local's attorney to challenge their assertions. (Mrla 2606-07; Brash 1019-20). The ALJ did not discredit their testimony or cite conflicting evidence. He simply ignored critical

evidence. Mrla called Hooker on October 5 to communicate the decision to place him in the load – a decision made several weeks earlier. Also, Hooker said nothing of the hearing on that call.

Nor should Brash and Mrla have known of the NLRB case. Hooker filed the underlying ULP charges against the SD&A organization (now IEFS), relating to a request for information made to the SD&A management team. It is undisputed the SD&A organization was separate and autonomous from TFS, with different technicians, managers, Area Managers and Directors. No TFS manager testified or was involved in that case. (See GC 41). Thus, it is unassailable that neither Mrla nor Brash had any knowledge in October 2015 of the NLRB case or that Hooker was scheduled to testify in an NLRB hearing on October 6. The ALJ committed reversible error by ignoring this evidence that fatally undermines his inference of unlawful motivation.

The ALJ ignored other undisputed facts disproving his finding the Company did not provide legitimate justification for the timing of its conduct. (D 38: 15-16). Throughout his analysis, the ALJ repeats the falsehood that the Company placed Hooker in the load in "December 2015," presumably to support his inference of a causal link to Hooker's October 6 testimony. (D36: 1-2, 45; D38: 18, 23). The credited facts prove Brash and Mrla decided to place Hooker in the load *in late September 2015*, and communicated it to the Union the first week of October 2015, thus defeating any causal nexus to the NLRB hearing.[11] The ALJ erred by ignoring the following facts *he credited* which prove the legitimacy of the Company's timing:

- Brash became an Area Manager in April 2015. Area Managers begin building technician vacation schedules in September for the following year.
- In early September 2015, Brash for his first time as an Area Manager began to build vacation selections for the next year. During that process, Brash discovered Hooker did not bid on a vacation schedule. With the understanding that Hooker

[11] Thereafter, Brash discussed logistical issues of Hooker's return with Hooker (October 20) and his Union representatives (October 21), and Mrla and Brash had similar discussions with Letts and Beach at their October 23 and November 16 meetings. In early November 2015, Hooker selected his work schedule. His training ride on December 13 was his first actual day in the load – nearly three months after Brash and Mrla made the decision.

was not an elected Union representative, Brash "never had a non-elected union steward representative ever be excused from the workload fulltime."

- Brash then *individually* considered the issue of placing Hooker in the load and made that suggestion to Mrla.

- Brash discussed returning Hooker to the workload with Mrla, and then with Labor Relations Manager Don Stanley. Brash recommended returning Hooker to the workload, and Mrla agreed. Mrla separately discussed the issue with Stanley, who also approved. These discussions all occurred in September 2015.

- Mrla informed Letts and Hooker of the decision on October 5 and 7, respectively.

(Brash 1001-02, 1004-08; Mrla 2587).

The annual vacation scheduling process plainly and indisputably triggered the Company's decision. The ALJ did not discredit nor dismiss this evidence. He simply ignored facts that did not square with his desired result.

2. The ALJ erred in concluding the Company did not offer a "legitimate justification" for placing Hooker in the load

The ALJ's conclusion the Company "offered no legitimate justification" for its decision to place Hooker in the load also contradicts the record and constitutes manifest error. (D 37: 18-19). Central to the ALJ's conclusion are his false assertions that "Mrla announced the decision to the Union and Hooker before he polled his area managers to determine whether they had any nonelected union officials on full-time union status," and that "at the time Mrla made and announced the decision, he did not know that Hooker was the only union representative in that status." (D 37: 24-29). Both assertions are pure fiction and refuted by the credited testimony.

Again, the ALJ did not discredit or dismiss Mrla's and Brash's testimony on this critical point. He simply ignored it. Brash and Mrla provided consistent, corroborative testimony of their legitimate business reasons for deciding to return Hooker to the workload: (1) fairness to the other technicians (relative to vacation selection); (2) consistency in Mrla's organization

because Hooker was the only appointed Union representative not on the load; and (3) TFS had a rare opportunity to perform large scale rehab work, and Mrla wanted as many technicians as possible performing rehab work. (Brash 1003-05; Mrla 2588).

It is unassailable that during all material times, Mrla had personal knowledge that Hooker was the *only* non-elected Union representative in his organization not in the load. Mrla knew that as early as his initial call with Letts in March 2014. (Mrla 2573). Mrla explained to Letts that "in my experience, anybody in that position with the responsibilities that Brian had was in the work load." (Mrla 2575). Mrla further explained that he equated Hooker's position to that a Chief Steward, who are appointed, and he "had no experience of any appointed person not working in the load." (Mrla 2576). Further, Mrla told Letts that he was seeking to return Hooker to the load in March 2014 because he was not an elected Union officer. (Mrla 2575-76). The ALJ credited Mrla's testimony about this conversation with Letts. (D 11:28-29).

It is equally undisputed that Mrla polled his area managers in mid-October to confirm for Letts his knowledge *only after questioned by Letts,* not to determine whether his belief was accurate. During their discussions in late September 2015, Brash, Mrla and Stanley discussed Hooker's status as the only non-elected Union representative in Mrla's area not in the load. (Mrla 2589-92). That testimony was unrefuted and not discredited by the ALJ. Moreover, the ALJ *credited* Mrla's testimony that he explained Hooker's unique status to Letts during their October 7 call: "Mrla stated [to Letts] that Hooker was the only appointed union official in his entire organization not working in the load and that he was going to be put on the work schedule like every other appointed steward." (D 13:10-13). The ALJ also found that "Letts objected, stating that there was no distinction in the CBA between elected and appointed, and he pointed out that Hooker took phone calls and had meetings." (D 13: 13-15). Again, Mrla and Brash testified

without contradiction that Mrla polled his area managers purely to confirm for Letts what Mrla already knew: Hooker was the only non-elected Union representative working as a full-time union official. (Mrla 2589, 2645-47; Brash 1195, 1206).

Excluding Local 4034, during 2015 there were only eight (8) CWA Local union officers *not* in the workload: six Local Presidents and two Local Vice Presidents, *all of whom were elected*. At least 110 CWA Local representatives *worked* in the load (including elected and non-elected). (R 25). Mrla knew this because he received a weekly "MXUP/MXUU" report that showed which technicians took MXUU and MXUP time each week and how much time in each category. Mrla reviewed that report weekly, looking for outliers, and could easily discern who was working in the load based and hours charged as MXUU and MXUP. (Mrla 2559; RX 23). In addition, Mrla testified that throughout his career he had worked closely with the 15 different CWA Locals in his jurisdiction; talked regularly with Local Presidents and Vice Presidents in the normal course; and routinely talked with all of his managers and Area Managers about the load. (Mrla 2559-61). Mrla's ability to testify from personal knowledge as to the Union representatives identified in Respondent Exhibit 23 who worked and did not work in the load confirmed his veracity and proved conclusively Hooker was the only non-elected Union representative in Mrla's area who did not work in the load.

These unrefuted facts do not raise a credibility dispute. The ALJ's "logical conclusion" that Mrla "did not know" Hooker was the only non-elected union official on full-time union status when he made his decision cannot be rationally drawn from the credited testimony.

The ALJ's corollary assertion that "workload considerations" were not a factor in the decision to place Hooker in the load also misstates the record *and* credited testimony. The ALJ illogically inferred that Brash and Mrla's testimony that "work volume in 2015 vis-à-vis prior

years had no effect on their decision" "fatally undercuts any contention that workload factors were of any major concern." (D6: fn. 3). The *total work volume* in 2015 versus prior years was not a factor in the decision, but that misconstrues their rationale. Brash and Mrla testified extensively that the window of opportunity to complete rehab work was a key factor in their decision. That they "wanted" but did not "need" Hooker in the load does not "fatally undercut" the relevance of the rehab factor in their decision. The total volumes of work performed in any prior year(s) were irrelevant to Mrla's interest in maximizing the manpower available to perform rehab work on the scale that presented itself in 2015 and 2016. (Mrla 2581; Brash 982-83).

It is irrefutable that TFS experienced a substantial increase in rehab work during the period in which Mrla and Brash sought to return Hooker to the workload. Respondent Exhibit 22 substantiates the rehab work opportunity as a factor in their decision. In two years, TFS in Michigan went from completing 53 BPC tickets to completing 32,119, a more than 60,000% increase! (R 22A). During the same period, the number of rehab Packages completed in Michigan increased from 37 to 495, an increase of more than 1,300%. (R 22B).

Number of BPC rehab tickets closed in Michigan, 2014-2016 (R 22A)

Year	Count of BPC
2014	53
2015	1601
2016	32119

Number of rehab Packages tickets closed in Michigan, 2014-2016 (R 22B)

Year	Count of Packages
2014	37
2015	90
2016	495

The ALJ ignored this compelling evidence demonstrating that "workload considerations" were a legitimate non-discriminatory factor in the decision to return Hooker to the load.

3. The ALJ erred in inferring unlawful motivation based on Mrla's isolated and irrelevant statements

The ALJ also erred in drawing an inference of unlawful motivation for placing Hooker on the load based on three isolated statements by Mrla. The temporal and substantive context of those statements lacks probative value for the inference drawn. These statements actually show the dearth of evidence probative of unlawful motivation for a decision made in late September 2015. Indeed, the only credible evidence pre-dating the decision is the August 13 Monitoring RFI. Neither that nor the "statements" relied on by the ALJ rationally support his inference.

The ALJ concluded the following three statements by Mrla "demonstrated hostility toward Hooker because of his conduct as a union official":

- "On August 10, 2015, Mrla called [Hooker] regarding the Flores grievance and started the conversation with, "What the hell is going on with all this crap I'm hearing about your objections to – to making your members safer by making sure they're not driving with cell phones?" (D 37: 31-34);

- "Mrla stated at a management-union meeting on October 23, 2015, that he considered that Hooker had filed a (voluminous) August 13 RFI in connection with the Flores grievance to harass management." (D 37: 34-36); and

- "Furthermore, at the February 18 management-union meeting, Mrla and Brash averred that Hooker's noncompliance in turning in activity logs amounted to insubordination, and the meeting ended with Mrla accusing Letts of condoning Hooker's misconduct and, in essence, walking out." (D 37: 41-44).

None of these statements are probative of unlawful motivation for the decision.

The August 10 call related to the Flores grievance, which contested discipline of a technician for using his cell phone while driving. When Mrla asked about the grievance, Hooker shot back "'if [Mrla] was goddamn in love with keeping employees safe,' [you] should instruct [your] managers not to drive all over the place talking on the phone or texting." (D 4:29-31). Mrla ***agreed*** with Hooker. He responded "[Y]ou know, you raise a very good point. I commit to you today that I will tell my managers to – that they need to immediately pull over or not have

conversations when they're on the phone." (Hooker 379; D 12:18-20). Mrla then had a conference call with his managers and explained they needed to lead by example and should not use cell phones while driving. (Mrla 2610-11). Far from "animus," Mrla's actions showed respect for Hooker and a good faith willingness to work with him to address his concerns.

While Mrla's statements in the October 23 meeting may reflect frustration over a burdensome request for irrelevant information, it is indefensible to infer animus for *a decision already made and announced*. There is no logical support for the ALJ's finding that objecting to the scope and purpose of an information request inherently demonstrates "hostility" sufficient to infer unlawful motivation for the decision to put Hooker on the load. Such logic also turns good faith bargaining on its head. An employer has a duty to assert its objections to information requests, yet the ALJ infers improper animus based solely on Mrla questioning the propriety of a request. Such finding is contrary to applicable law (and to the ALJ's ruling regarding the December 23 RFI). *See NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994) (no duty to provide information where union requests made in bad faith and for purposes of harassment).

The ALJ's inference of unlawful motivation for the decision based on Mrla's statement at the February 18 meeting also is indefensible. That meeting occurred more than *five months after* the Company's decision (late September 2015) and communication of it to Letts (October 7). Thus, Mrla's comment is not probative of unlawful motivation as a matter of law.

This inference also is wrong on the facts. The February 18 meeting was not about Hooker's unwillingness to submit the Union Activity Sheet. It was the fourth monthly meeting between Mrla, Brash and the Local's leadership. (Brash 1295; Mrla 2653). Hooker had been on the load for several months, and it had become obvious to Brash and Mrla that he was intentionally avoiding work. During the meeting, the managers addressed Hooker's work

performance on February 7 (registration issue), February 11 (inability to use a flip phone), and February 14 (misuse of time). (Mrla 2654-55). Mrla and Brash sought the Local's help to correct Hooker's misconduct on a non-disciplinary basis. Mrla expressed that Hooker was "heading down the wrong road," and asked if the Union "condoned this." Letts responded he did not see a problem with Hooker's conduct, and that "I wish all of my members were like Brian Hooker." (Mrla 2657; Brash 1302; Letts 313). Mrla and Brash left the meeting because it was clear the Union had no interest in developing a constructive working relationship. (Mrla 2658; Brash 1303). There is no rational basis to construe this conduct as unlawful animus where Mrla and Brash were trying *to work with the Union and to avoid disciplining Hooker*.

For all of these reasons, the credited facts prove the legitimacy of the timing of the decision to place Hooker in the load and of the legitimate reasons for it. Because the Company met its burden under *Wright Line* to show it would have placed Hooker in the load regardless of his union activities as an AA, the ALJ's finding of an 8(a)(3) violation must be rejected.

C. The ALJ Erred by Finding the Company Violated the Act by Requiring Hooker to Complete the Union Activity Log to Account for his MXUP Time *(Exceptions Nos. 1, 2, 12, 13, 14, 15, 16, 19)*

The ALJ erred by concluding the Company violated the Act by requiring Hooker to complete the Union Activity Log to account for his paid MXUP time. With little substantive analysis, the ALJ reached this conclusion through circular logic: Having found the decision to return Hooker to the load violated Sections 8(a)(1), (3) and (5), the ALJ concluded the Company similarly violated the Act by "imposing on Hooker the requirement that he complete the activity logs for his union activities." (D 39:45; D 40:1).[12] This conclusion is riddled with error.

[12] The ALJ's corollary finding that the August 12 Verbal Warning arising from Hooker's failure to complete the Activity Log was unlawful is addressed in Section D(2), *infra*.

The ALJ's assertion Hooker was required to "complete the activity logs for his union activities" contains a false premise. Hooker was only asked to report hours for which he requested paid MXUP. The Company did not monitor or required Hooker to report his "union activities." The ALJ also erred by failing to analyze Brash's treatment of Hooker relative to other Union representatives who *worked in the load*. For this proper comparator group, the Activity Log was a favorable accommodation for Hooker because *he* claimed he could not request MXUP time off in advance. The ALJ also misstated and ignored the controlling language of Article 10.

1. Requiring the Union Activity Log Was a Favorable Accommodation for Hooker and Not An Unlawful Burden

The ALJ's finding that requiring the Union Activity Log was unlawful misconstrues Brash's stated reasons and motive. By requiring the Activity Log, Brash treated Hooker *more favorably* than every other every other Union representative *working in the load* in his area. In this respect, the ALJ erred by comparing this treatment to "elected union officials" who did *not* work in the load (e.g., Letts and Prince), none of whom do "anything other than enter their MXUP and MXUU, and code the former, in the electronic database." (D 38:30-31).

Every other Chief Steward, Lead Steward or Steward in Brash's area – all of whom *worked in the load* -- was required to request and obtain supervisory approval *in advance* for any MXUP time taken. (Brash 1049; Sharp 2172-73). Because a manager knew in advance when a Union representative would be off on paid MXUP time, he could verify submitted time cards. Hooker alone worked in the load but claimed he could not request approval for MXUP in advance. The calendars comprising Respondent Exhibit 26 show that on the countless days Hooker worked for the Local on MXUU time, he routinely entered MXUP time for many days and hours, none of which the Company could verify. Far from being discriminatory, the Activity Log afforded Hooker a privilege not enjoyed by any other Union representative who worked in

the load. Hooker was excused from obtaining advance approval for MXUP time as long as he submitted a log after the fact from which the Company could verify his claim for paid time.

Brash developed the concept of the log in his discussions with Hooker and the Union on October 20 and 21, and in response to Hooker's objections to requesting time off for Joint Meeting Time in advance. Hooker claimed his schedule was too chaotic to request such time in advance, and he wanted an exemption from Article 10. As an accommodation, and in response to those concerns, Brash created the Activity Log to allow Hooker to account for Joint Meeting Time *after* it occurred, so Brash could verify the time for payroll. Hooker was not required to report any information about the discussions in his meetings with management, and was not required to report meetings with managers under Brash, as he could verify such meetings with his managers. Hooker was simply required to list the managers with whom he met and the date and length of meeting. This was not discriminatory, but an effort to resolve Hooker's concerns.

2. The ALJ's Decision Contravenes Article 10 of the CBA, Which Sets Forth the Prerequisites to Receive Paid Joint Meeting Time

The contractual requirements for a Union representative to receive pay for "Joint Meeting Time" are clear and unequivocal. Sections 10.05, 10.06 and 10.07 provide a limited right to time off for Joint Meeting Time and set forth specific prerequisites for an employee to receive MXUP pay for the time. Section 10.05 addresses pay for *grievance meetings*:

> For purposes of *processing grievances*, the Company agrees for authorized Union representatives to confer with representatives of the Company without loss of pay during such employees' regularly scheduled working hours. In addition, such employees shall suffer no loss in pay for time spent during such regularly scheduled working hours in traveling for grievance meetings….

(GC 2, p. 14)(emphasis added).

Section 10.06 allows a Union representative to be paid for meetings with the Company for reasons *other than* processing grievances, *provided* the Company agrees to pay for such time:

> When the Company meets with a Union representative(s) during such employee's regularly scheduled working hours for purposes other than the processing of grievances and further agrees to pay for the time involved, all time so paid will be at the basic hourly wage rate plus applicable differentials or premium rate…

Section 10.07 requires that employees meeting with Company representatives for "Joint Meeting Time" (under Section 10.05 or 10.06) "shall give their immediate Supervisor reasonable advance notice of the intended absence and of the probable duration of the absence." (*Id*.).

In describing Joint Meeting Time, the ALJ added text not found in the CBA, falsely asserting that Joint Meeting Time includes such meetings as "full committee, joint, disciplinary, and investigatory meetings." (D 9:Fn 5). The ALJ cited Letts' testimony on this point, but Letts never claimed these types of meetings were considered Joint Meeting Time under Article 10. (Letts 257-259). "Joint Meeting Time" means what the CBA language says it means. The ALJ's commentary is an inappropriate and incorrect interpretation of the CBA's plain language.

Unpaid Union Leave under Section 10.08 is limited to 1080 hours per year and is granted only "insofar as work schedules permit." (Id.) Because requests for Joint Meeting Time and requests for unpaid Union Leave are subject to different CBA requirements, employees must be specific as to whether the time off is properly coded MXUU or MXUP.[13]

Hooker routinely requested and scheduled unpaid MXUU time to work for the Local. However, he would then charge some of that time to the Company as MXUP, including time for unscheduled phone calls and "confidential" meetings. Brash's need to verify Hooker's unscheduled MXUP time once he was in the load necessitated the Activity Log. The right to verify such MXUP time entries to confirm compliance with 10.05 and 10.06 is beyond dispute.

[13] The Company did not require Hooker to report his MXUU time on the Activity Log.

D. The ALJ Committed Manifest Error in Concluding the Company's Disciplines and Termination of Hooker Violated Section 8(a)(3)
(*Exceptions Nos. 3-8, 20, 21, 22, 23)*

Three material errors are fatal to the ALJ's application of the *Wright Line* standard and erroneous conclusion that Hooker's disciplines and termination violated Section 8(a)(1) and (3). First, he drew a legally insupportable inference of unlawful motivation based on evidence of alleged animus that bears no causal nexus to the actual disciplinary decisions and also purported to rely on a fact he expressly stated was *not* in the record. Second, the central element of his conclusion – that the disciplines inherently violate 8(a)(3) because the Company cannot be allowed to "benefit from the direct consequence" of its decision to place Hooker in the load – is premised on an exceedingly broad "fruit of the poisonous tree" theory not supported by the precedent he cites. He compounded that error by finding Hooker's misconduct did not break the causal link to the initial decision because it "related to how he performed his work as a tech and not to any allegations of gross misconduct such as violence against others, destruction of company property, malicious maligning of the Company to the public, or the like." (D 39: 43-46). The ALJ provided no legal support for this false distinction. Hooker's obstructive conduct – that the ALJ *credited* – severed even the "direct consequence" test the ALJ mistakenly applied.

Finally, the ALJ erred in ignoring the facts he credited evidencing Hooker's misconduct and the Company's legitimate, non-discriminatory reasons for the disciplines, and by ignoring evidence of comparable discipline issued to other employees. Hooker's indisputable misconduct plainly violated work rules for TFS technicians and warranted discipline, irrespective of whether or not the Company's initial decision to place him in the load was lawful. The Company's patient, progressive discipline and eventual discharge of Hooker were not motivated by his union

activities and would have occurred in any event absent those activities, and thus did not violate Sections 8(a)(1) or (3), under the *Wright Line* standard.

The ultimate question in any Section 8(a)(3) case is employer motivation. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983); *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967). "[E]ven when the record raises 'substantial suspicions' regarding employee discharges, the General Counsel is not relieved of 'the burden of proving that Respondent acted with an illegal motive.'" *Yusuf Mohamed Excavation*, 283 NLRB 961, 962-64 (1979). The ALJ's conclusion of unlawful motive for Hooker's disciplines and discharge is reversible error.

1. The ALJ's Finding of Unlawful Motivation is Not Causally Linked to the Subject Disciplines and Lacks Legal or Factual Support

The alleged "animus" from which the ALJ inferred unlawful motive for Hooker's disciplines and termination was exceedingly sparse and lacked temporal or probative support for his conclusion. The ALJ essentially extrapolated the same alleged animus he found relative to placing Hooker in the load to support his conclusion of unlawful motive for the later disciplines:

> The animus that I found was behind his being put back in the load has to be considered to have continued when he returned to work rather than having been magically extinguished. This is especially so when, after Hooker returned to the load, he continued to have friction with management over the way he conducted union business.

(D 39: 20-24) Careful review of the alleged "animus" the ALJ found "was behind [Hooker] being put back in the load" in September 2015 reveals the illogic of his extrapolation that the same "animus" somehow motivated the subject disciplines issued during 2016.

Recall that the ALJ principally relied on Hooker's October 5, 2015 phone call with Mrla and Hooker's testimony the next day in an NLRB hearing as the centerpiece of his finding of unlawful motive for the decision to place Hooker on the load. Any such causal link has been refuted, though, based on the undisputed fact that Brash and Mrla had no knowledge of Hooker's participation in that NLRB hearing when they made the decision in late September 2015.

The ALJ also reasoned that three isolated statements by Mrla "demonstrated hostility toward Hooker because of his conduct as a union official. As discussed above, none of that generalized and conclusory "evidence" is probative even of unlawful motive for placing Hooker in the load, much less evidence of animus for disciplinary decisions occurring five to 12 months later. To wit: On the August 10 call, Mrla *agreed* with Hooker's position that managers should be held to the same standard of not using cell phones while driving and so instructed his managers. Mrla's comment at the October 23 meeting was a legitimate objection to the Monitoring RFI. His merely objecting to the scope and purpose of the request does not demonstrate "hostility" sufficient to infer unlawful motivation for wholly unrelated disciplinary decisions occurring up to a year later. Finally, at the February 18 meeting, Mrla and Brash solicited the Local's help to correct Hooker's nascent misconduct on a non-disciplinary basis. There is no basis to construe such conduct as animus for subsequent disciplinary decisions where Mrla and Brash were trying *to work with the Union and to avoid disciplining Hooker*.

The ALJ's attempt to piggyback on these events as relevant because after Hooker returned to work "he continued to have friction with management over the way he conducted union business" also is devoid of factual support or logic. He did not cite a single fact to show any "friction" or hostility between management and Hooker over the way he conducted union business. The record is replete with evidence showing that at all material times Brash and Sharp made Herculean efforts to accommodate Hooker's schedule and permit him to continue working for the Local on a regular basis. From January through September 2016, Hooker worked on the load for only 21 shifts, and took Union leave on 137 shifts. Hooker's total MXUU time (unpaid time off for Union business) for 2016 was only marginally less than the comparable 2015 period:

	MXUU Hours
2015	713.5
2016	630.25

The "friction" that concededly occurred following Hooker's return to work was entirely self-induced by Hooker's continued resistance of management directives and incessant failure to work when scheduled. The ALJ expressly acknowledged that, from the outset, Hooker escalated the conflict by fighting with management over scheduling work and training; failing to request MXUP time off in advance; failing to submit the Activity Log; and engaging in a continuous course of wasting time and concocting myriad excuses to *avoid work*. As discussed below, the ALJ credited Brash's and Sharp's testimony with respect to Hooker's misconduct relative to virtually every separate discipline issued. Plainly, any "friction" that ensued after Hooker's return to work was not a function of animus but of his recalcitrance.

The ALJ also opined that "certain conduct of management" occurring well after Hooker returned to the load "gives rise to an inference of continued animus." (D 40: 4-5). Here, too, the referenced conduct does not reasonably support an inference of unlawful motive for the disciplines directly triggered by Hooker's own insubordination and refusals to work.

Most egregiously, the ALJ based this inference, in part, on a "fact" he expressly held was *not* in the record. As purported evidence of "continued animus" after Hooker returned to work, the ALJ opined "Sharp did not take into account Cardesian's [sic] [Campbell's] statement on September 20 that Hooker's mistake in diagnosing a problem on September 20 was an easy one for a tech to make." (D 40: 14-16). In his earlier reciting of the facts, the ALJ noted that while Campbell testified to that at hearing, "there is no evidence that he said this" at the September 22 meeting with Sharp and Hooker. (D 33: 28-29). By basing his "inference of continued animus" on something concededly not in the record, the ALJ reveals his results-based conclusion.

The other three incidents cited by the ALJ – all arising from the Company's AP investigation of Hooker's GPS tampering – are easily dismissed as immaterial and irrelevant.[14] This is principally because the Final Written Warning and 3-day suspension issued to Hooker on May 10, 2016 for GPS tampering was ***not part of the progressive discipline that resulted on his termination***. The ALJ's unfounded suspicions about the AP investigation do not support an inference of unlawful motive for unrelated discipline clearly linked to different misconduct.

Otherwise, the ALJ drew unwarranted conclusions based on the AP investigation. That Brash did not give Vilk the email contained in CP 2 is meaningless. That boilerplate email did not support Hooker's claims. The email stated a GPS unit could become "partially dislodged" when a driver *releases* the parking brake. Hooker admitted he twice completely knocked out the GPS unit while *setting* the parking brake. That Brash did not give this email to Vilk is irrelevant because "Brash was the decision-maker in all of the disciplines that Hooker received." (D 25:17-18). Vilk did not make any decisions on Hooker's disciplines. Importantly, *Brash* knew of the ETech email and "definitely considered it" when making his decision to issue the final warning and suspension for GPS tampering. (Brash 1792). Indeed, the ALJ credited Brash's explanation for not believing Hooker's excuses about the GPS tampering. (D 30:1-6).

The ALJ's musing that "Brash used the GPS investigation as a means of having Osterberg spend a good part of a day observing Hooker to find fault with his conduct wholly unrelated to the GPS matter" also lacks factual support or relevance. (D 40:8-10). The assertion is untrue, and the ALJ cites no testimony to support it. It also is irrelevant. Hooker's pattern of work avoidance for several months would have warranted Brash instructing Osterberg to monitor

[14] The ALJ erroneously found evidence of animus because (1) "Brash did not furnish to Vilik [sic] a document from the GPS contractor that might have lent credence to Hooker's version of the problems that he had with his GPS;" (2) "Brash used the GPS investigation as a means of having Osterberg spend a good part of a day observing Hooker to find fault with his conduct wholly unrelated to the GPS matter;" and (3) Vilk's "failure to include her conversation with Cardesian" [sic] Campbell in the AP report." (D 40:5-14).

Hooker throughout the day (but he did not). The record is clear that Osterberg acted on his own in personally observing Hooker on April 24, 2016.[15]

The ALJ also erroneously found Vilk's "failure to include her conversation with Cardesian [sic]" Campbell in the AP report as evidence of animus. (D 40:11-14). Concluding that Vilk held animus against Hooker demonstrated the ALJ's results-oriented effort to find animus behind every rock and bush, regardless of the facts in the record. First, there is no evidence Vilk was even aware of any of Hooker's protected activity. She merely conducted an investigation and had no role or input into disciplinary decisions. Further, Campbell did not "offer evidence that might have supported Hooker's version" of the GPS tampering. Campbell testified he specifically told Vilk the GPS unit in his former truck never fell out of the bracket, even though he had bumped it. (Campbell 2737). The ALJ even acknowledged that Campbell's statement did not support Hooker's version of events. (D 5:19-21).

In sum, the alleged "animus" on which the ALJ relied fails as a matter of law and logic to support his broad inference of unlawful motivation for Hooker's disciplines and termination.

2. The ALJ's Conclusion that Hooker's Disciplines were a "Direct Consequence" of the Decision to Place him in the Load is Legally Indefensible

The ALJ's conclusion that Hooker's disciplines were a "direct consequence of [the Company's] initial commission of unfair labor practices" is legally and factually indefensible. (D 39: 42-43). He cites no legal support for his proposition that the "causal connection between the [Company's] disciplines and its original unlawful act" would have been severed had Hooker engaged in "gross misconduct" but not by misconduct "related to how he performed his work."

[15] Vilk and Brash testified that they did not ask Osterberg to visually observe Hooker throughout the day. (Vilk 1998; Brash 1429). Osterberg also explained that Brash did not give instructions on how to observe Hooker. (Osterberg 2056, 2097). Once Hooker's GPS stopped reporting, however, it is necessary for Osterberg to visually verify that the GPS unit had been removed from its cradle in Hooker's vehicle. Osterberg had to be on site to do so.

The ALJ spun that false distinction from whole cloth. The two cases he cited do not support his invalid "fruit of the poisonous tree" theory. Nor can his conclusion be squared with the *facts he credited* proving the Company's legitimate, non-discriminatory bases for the discipline.

The ALJ cited two inapposite cases for his exceedingly broad proposition that "an employer may not discipline an employee for conduct that would not have occurred but for the employer's unfair labor practice," "based on the principle that an employer should not be allowed to benefit from its own unlawful actions. (D 39:28-31). In *E.I. Dupont De Nemours & Co*., 362 NLRB No. 98 (2015), an employee returned to work following an occupational injury, and after working a 12-hour shift, was brought into a supervisor's office for an investigative interview. The employer denied a union representative for the interview and continued to question him. About a week later, the employee was interviewed again, and again was denied a union representative. The employee was discharged due to inconsistencies between the first and second interviews. Thus, the employee's termination was a direct consequence of the unlawful interview, with no interceding events. Also, and contrary to the ALJ's assertion, the Board did not order a make-whole remedy but remanded the case for a determination if the unfair labor practice provoked the employee's inconsistencies.

The ALJ also erroneously relied on the inapplicable *Preferred Transportation, Inc.*, 339 NLRB 1 (2003). In that case, the employer was found to have conducted a discriminatory investigation, and then the subject employee was terminated because of alleged misstatements in an interview that was part of the investigation. *Id*. at 3. As in *E.I. Dupont*, the employee's misconduct occurred during an unlawful interview. These cases are inapposite because in each there was a direct causal connection between the employer's unlawful conduct and the resulting discipline. In each case an employee was forced into an unlawful interview and then terminated

for being untruthful in that unlawful interview. These authorities reject an employer's entrapment of an employee based on inconsistent accounts in forced interviews without the support of representation. They plainly do not support a license to misbehave, as permitted by the ALJ's extrapolation of this doctrine to the present case.

The Company did not "benefit from the direct consequence" of its initial decision in September 2015 to place Hooker in the load where his own subsequent, repeated misconduct severed any causal link to that decision. As discussed below, it is indisputable that Hooker's disciplines, culminating in termination in October 2016, were the direct consequence of independent and intentional acts completely within his control. His incessant and unyielding campaign of misusing time and avoiding work over a 10-month period severed any causal connection to the initial decision to place him in the load, irrespective of whether it constituted "gross misconduct" or merely related to "how he performed his work."

3. The ALJ's Conclusion that Hooker's Disciplines Violated Section 8(a)(3) is Irreconcilable with the Facts He Credited Proving the Legitimate, Non-Discriminatory Reasons for the Disciplines

The ALJ's finding that Hooker's disciplines and termination violated Section 8(a)(3) cannot be reconciled with the *facts he credited* proving the Company's legitimate, non-discriminatory bases for its disciplinary decisions. The ALJ acknowledged Hooker's work avoidance and misuse of time, noting "even taking into account Hooker's absence from the workload for many years, he reported to management a suspiciously high number of obstacles that he encountered in performing his work." (D 5:9-12). He also unequivocally found that Brash reasonably believed Hooker was intentionally refusing to perform his duties: "Early on, Brash came to believe that Hooker was not paying full attention during his ride-alongs, not taking steps to ensure that his vehicle was completed stocked, and creating excuses not to perform tech work. Hooker's conduct at times reinforced these conclusions." (D 17:29-31). He

ALJ also noted "Hooker was clearly peeved at being placed back in the load and did not act in a manner that diffused management's negative perceptions." (D 39:13-14).

Also, the ALJ did not credit Hooker's testimony on any of the events that resulted in discipline, including his termination, and specifically discredited Hooker's testimony on several misuse of time issues. (D 5:8-10). With respect to each discipline issued, the ALJ credited the testimony of Company managers Brash, Sharp, and Osterberg regarding Hooker's misconduct, yet refused to hold Hooker accountable for any of his actions. This is not a credibility issue but the ALJ's misapplication of law and indefensible failure to consider material facts.

a. March 3, 2016 Written Warning

Hooker's March 3, 2016 Written Warning was based on legitimate, non-discriminatory reasons and did not violate Sections 8(a)(1) or (3). Hooker received that modest discipline based on three separate incidents of misusing work time: **February 11** (After informing Sharp he could not work overtime, requiring another technician to finish the job, Hooker did not return Sharp's call or text messages, stayed on the job and incurred an hour of overtime without approval, and later claimed he didn't use his flip phone because he "had not read the instructions."); **February 14** (Hooker wasted three hours on a simple BPC job that did not require any work and failed to call the Duty Manager (Sharp) until 11:03 am, three hours after his shift started.); and **February 21** (Hooker failed to leave the garage until more than 90 minutes after the start of his shift, despite the clear expectation to depart the garage within 20 minutes of his start time).

The ALJ credited Sharp's account of the events on February 11, 14 and 21, and of his investigatory interview with Hooker on February 22. He did not credit Hooker's testimony regarding the events on those days. (D 25-26; D 27:3-5). In the interview, Hooker told Sharp he did not respond to Sharp's phone calls or text messages on February 11 because he did not know how to use the flip phone and "had not yet read the instructions." (D 27:5-6). Regarding what he

did for 3 hours on February 14 while supposedly repairing a pedestal, Hooker stated he could not remember. (D 27:6-7). When Sharp asked why Hooker failed to leave the garage until 9:30am on February 21 when his sift started at 8:00am, Hooker responded he did not want to do his assigned work so he stayed at the garage to get stock and supplies. (D 27:7-10).

Hooker's misconduct on these days plainly violated TFS Technician Expectations and justified the Written Warning. Under the Manager's Guide, Brash and Sharp reasonably could have issued separate discipline for each violation or combined them to escalate to a Suspension and/or Final Written Warning. (Brash 1272-73, 1350-52; Sharp 2261-62; R 32, p. 10). Brash gave Hooker the benefit of doubt with a Written Warning for three instances of work avoidance. The ALJ provided no rationale for not holding Hooker accountable for the work rule violations that he found to have occurred and failed to consider Brash's leniency in finding animus.

b. May 10 Final Written Warning/3-Day Suspension

Similarly, the Final Written Warning/3-Day Suspension issued to Hooker on May 10, 2016, arising from his violations of Tech Expectations on April 10 and 24, was based on legitimate business reasons. (R 7). Here, too, the ALJ specifically discredited Hooker's account of his misconduct on April 10 and credited Company managers in all relevant respects. (D 5:8-10). Specifically, the ALJ credited Brash's account of April 10 and of his investigatory interview on May 10. (D 30:27-31, 44-45). The ALJ also credited Jeff Osterberg's account with respect to Hooker's work avoidance on April 24. The ALJ credited the following relevant facts:

- On Sunday, **April 10**, Hooker spent the first five hours of his shift doing no work because he claimed he was unable to open the lock on his work truck (to unlock his tool bins). The combination was the last 4 digits of the truck number, as has been the practice in Grand Rapids for years. (Brash 1393-1398; Sharp 2288). Hooker's antics forced the on-call Duty Manager, Sydney Bragg, to leave church and drive to the site to open the lock, using the last 4 digits of the truck number.

- On Sunday, **April 24** (the day he disconnected his GPS device), Hooker misused time throughout the day and did not complete a single job. Duty Manager Osterberg observed Hooker sitting in and walking around his truck for 30 minutes in the morning, and sitting idly for another 30 minutes in the afternoon. Also, he worked for 8 hours and failed to complete his only job, a simple pedestal replacement. Hooker returned the job at the end of the day. (Osterberg 2087).

Brash questioned Hooker about these incidents on May 10, and *the ALJ credited Brash's account of that meeting*, as follows:

- Hooker offered no explanation for his misuse of work time on April 10.
- Brash reviewed Osterberg's timeline with Hooker. Hooker provided no explanation for wasting time throughout the day on April 24.
- Brash warned Hooker that if his behavior continued, he could be terminated.
- Brash again directed that Hooker needed to request MXUP time off in advance.
- Hooker threatened to "suspend" all of the Local's stewards and to be the only Union representative to file and sit in on grievance meetings, so he would not be available to work in the load.
- Hooker had selected a Monday-Friday late shift (10:00am-6:30pm) and said he would only work from 4:30-6:30, but Brash said that was unacceptable and that Hooker needed to work at least four hours of those shifts.

Brash reasonably concluded Hooker was again simply avoiding work, warranting progressive discipline for violating Tech Expectations. The ALJ's conclusion that such discipline was unlawfully motivated does not align with his factual findings. Plainly, Hooker's discipline was not a "direct consequence" of the decision to place him in the load but of his own recurring misconduct. Having found that Hooker engaged in the misconduct at issue, the ALJ inexplicably excused him from any accountability for it.

c. August 12 Verbal Warning

Brash issued the Verbal Warning to Hooker on August 12, 2016, based on Hooker's continual refusals to turn in a completed Union Activity Log to account for MXUP time.

Without substantive analysis, the ALJ erred by finding the Verbal Warning violated 8(a)(3) on the sole basis it "flowed directly from the activity log requirement." (D 39:2).

Two dispositive facts proving the propriety of the warning are indisputable: First, Letts and Hooker conceded the Company's right to verify employee time records. (Letts 221-22; Hooker 687). Second, Hooker did not submit a completed Activity Log until August 19, 2016, after countless directives and reminders from Brash and Sharp. (See R 2, 45, 47, 48, 50, 52, 53). Brash issued the Verbal Warning only after patiently suffering Hooker's endless protests and excuses for not turning in the completed Activity Sheet. Brash's remarkable patience before finally issuing a simple Verbal Warning rebut any possible inference of discriminatory motive.

d. September 6: Two Counseling Notices and Verbal Warning

It is undisputed Brash and Sharp expressly instructed Hooker to be at work as scheduled on June 6, 10, and 18, and that he failed to comply. Without considering these facts or any analysis, the ALJ erred by finding the Company violated 8(a)(3) by issuing two *non-disciplinary* counseling notices and Verbal Warning to Hooker on September 6 for those absences. (R 15).

Despite his instruction to Hooker to be at work on June 6 and 10, Brash decided not to issue discipline for insubordination or to consider the absences "no call/no show." Demonstrating leniency, he issued non-disciplinary counseling for "incidental absences," even though a verbal warning was justified under the Manager's Guide. (R 32, p. 8). All of these facts belie the ALJ's finding of unlawful motivation.

The ALJ's finding relied entirely on his flawed "fruit of the poisonous tree" theory. (D 39:40-41). However, the ALJ *specifically found that Hooker was not excused from work on June 6, 10, and 18*, and that management had unambiguously instructed him to report to work those days. (D 21:18-23). Thus, it is undisputed that Hooker received the two counseling notices and verbal warning based on his absences and in accordance with the progressive discipline

guidelines. The ALJ's conclusion that Hooker was privileged to refuse to come to work based on his continued disagreement with the decision to put him in the load is insupportable.

e. October 10 Suspension Pending Dismissal and Subsequent Termination

The ALJ manifestly erred by finding that Hooker's October 10 Suspension Pending Dismissal and October 13 termination violated Section 8(a)(3), arising from his continued and repeated violations of Tech Expectations on September 20, 21, 23, and October 3. (GC 33, 34). Hooker's own misconduct plainly severed any plausible causal nexus to the decision *12 months earlier* to place him in the load. Here, too, the ALJ's finding of unlawful motivation for the discipline contravenes facts he credited that prove Hooker's misconduct.

The ALJ affirmatively discredited Hooker's testimony regarding the events of September 20, noting "Hooker's testimony about the chronology of events was confusing and contradictory," and that his "descriptions of his communications with Sharp were sketchy and lacking in detail." (D 31-32). The ALJ also noted that Hooker *offered no testimony* regarding the events of September 21, 23, or October 3, or regarding his investigatory interviews with Sharp on September 22 and October 3, notwithstanding that his misconduct on those specific days resulted in termination. Conversely, the ALJ expressly credited Sharp's testimony regarding the events of September 20 and 21, and credited Brash's testimony regarding the events of September 23 and October 3. (D 32:5-6, 33-35; 34:5-6). By crediting Sharp and Brash's testimony, the ALJ conceded that Hooker misused time on those days and violated Tech Expectations. Nonetheless, he extrapolated an inference of unlawful motivation based on the decision made over a year earlier! In addition to lacking legal support, the ALJ's conclusion is irreconcilable with Sharp and Brash's credited testimony.

The relevant facts of Hooker's persistent misuse of time on the subject dates demonstrate that his pattern of work avoidance continued to be orchestrated and purposeful, resulting in termination: **September 20** (Hooker left the garage nearly 90 minutes after the start of his shift, falsely claiming difficulty connecting to the VPN; spent six hours attempting to diagnose trouble on a POTS repair; and completing no work on the job before Caresian Campbell was called in to complete the job); **September 21** (Without notifying a manager, Hooker left the garage more than two hours after the start of his shift, claiming he was unable to find his iPad charger and that thunderstorms in the area delayed his departure; and failing to complete any work that day, claiming he was unable to diagnose the trouble cable.); **September 23** and **October 3** (Hooker was given a total of 5.75 hours to complete four training modules, with a total expected duration of 1 hour, 45 minutes, but failed to complete any of the training on those two days. (Brash 1621-24; R 26, p. 21-22; R 29).

In addition to crediting Brash's and Sharp's accounts, the ALJ found Union Steward Caresian Campbell's testimony credible regarding September 20. However, Campbell's testimony was neither substantive nor exculpatory, as he conceded having no knowledge of Hooker's misuse of time throughout the day on September 20. (Campbell 2747-48). Further, while the ALJ noted that Campbell testified at hearing that Hooker's mistake in diagnosing a problem on September 20 "was an easy one for a tech to make," he also held that "there is no evidence that he said this" at the September 22 meeting with Sharp and Hooker. (D 40:14-16). Also, Sharp (a top craft technician for 14 years) fully understood the assigned job on September 20 and believed Hooker was qualified to perform it. (Sharp 2393). Irrespective of the job's ease or complexity, it did not justify Hooker leaving the garage 90 minutes late that morning or wasting six hours diagnosing a problem on a POTS repair and completing no productive work.

Finally, the ALJ understated the extent of Hooker's misuse of time on September 23 and October 3. For those days, Hooker claimed to have spent 5.75 hours doing online training that had an estimated duration of 1 hour and 45 minutes. The ALJ erroneously stated "However, the following day, he did complete them, as well as two other courses, when he was on MXUU (unpaid time) (see R. Exh. 58)." (D 34: 13-15). This is incorrect. Hooker requested MXUU on October 4, and then indicated on his timesheet that he was training for two hours and on MXUU for the rest of the day. (R 26, p.22). Thus, Hooker was paid for the two hours of training time on October 4, in addition to the 5.75 hours he wasted on September 23 and October 3. In total, Hooker spent *7.75 hours on training modules that only take 1 hour and 45 minutes*.

The egregiousness of Hooker's misconduct is further manifested by his infrequent work schedule in September 2016. September 20 and 21 were two of *only three days* Hooker worked that month! Although only scheduled to work three days that month, Hooker continued his protest and avoided work on two of them. That the Company had previously denied Hooker's requests to be off for Union business on September 20 and 21 also supports a reasonable inference that his actions those days were a calculated protest of that denial. (R. 56).

Despite having already received a Written Warning (March 3) and Final Written Warning/3-Day Suspension (May 10) for misuse of time, Hooker persisted in the same pattern of wasting time and avoiding work. Even after Brash's blunt final warning on May 10 that he risked termination for continued refusals to work, Hooker did not relent. Thus, the ALJ credited Brash's testimony that he decided to terminate Hooker "because he did not believe that Hooker would change his attitude of fighting the Company despite repeated warnings." (D 31: 31-33).

From February 1 through October 7, 2016, **Hooker worked on the load on only 21 days**. He misused time in violation of Tech Expectations on at least ***nine (9)*** of those 21 shifts –

a truly remarkable achievement of non-performance. Under the Manager's Guide, termination is appropriate after just three violations of Tech Expectations. (R 32, p. 10). The ALJ committed reversible error by making an inference of unlawful motivation that cannot be rationally drawn from the facts he credited and based entirely on a debunked legal theory.

4. The ALJ Erred by Failing to Consider the Undisputed Evidence of Comparable Discipline Issued for Similar Misconduct

The ALJ erred by failing to consider undisputed evidence of comparable discipline issued to other employees who had engaged in similar conduct as Hooker. The comparable discipline issued to various TFS technicians by managers under Brash further refutes any discriminatory animus. In the following instances, TFS technicians in Brash's jurisdiction received comparable discipline for a single violation of Technician Expectations involving misuse of time:

- *November 5, 2015*: Jim Smith received a Written Warning/1-Day Suspension from Sidney Bragg for one incident of misuse of work time, for failing to contact and not being dispatched for five hours (R 38, p. 3).

- *December 16, 2015*: Scott Stewart (Lansing garage) received a Written Warning/1-Day Suspension for violating Tech Expectations (misuse of time) when he took a lunch break that was "almost an hour" when he should only have taken 30 minutes. (R 38, p. 5; Osterberg 2096).

- *April 13, 2016*: Dave Lucchese received a Final Written Warning/3-Day Suspension from Andrew Sharp, for misusing approximately three (3) hours of working time on his first job on April 6, 2016 (R 38, p. 1; Sharp 2414-15).

- *December 15, 2016*: Sharp issued a Written Warning to Durwin Johnson after discovering Johnson had misused 30 minutes to an hour of work time. (R 38, p. 6; Sharp 2416).[16]

Neither General Counsel nor the Union presented evidence of disparate treatment, while Company witnesses corroborated Respondent Exhibit 38 and confirmed the issuance of this

[16] In addition, on May 11, 2015, TFS technician Peter Hobart received a 5-Day Suspension from Manager Michael Wyant for violating Tech Expectations by being "out of route" during the work day (stopping at his residence). This was Hobart's second violation for similar conduct. (R. 38, p. 2)

comparable discipline. The ALJ erred by ignoring this relevant evidence that squarely refutes his flawed inference that Hooker's discipline was discriminatorily motivated.

5. May 10 Final Written Warning/3-Day Suspension for GPS Tampering

The ALJ credited the testimony of Vilk, Brash and Osterberg regarding all *material* facts proving the Company's legitimate reasons for the Final Written Warning/3-Day Suspension issued to Hooker on May 10, 2016, for tampering with the GPS device. (D 27-30). The Judge erred, however, in relying on that discipline to support his inference of unlawful motive for Hooker's termination for misuse of time. This is because the Final Written Warning/3-day suspension issued to Hooker for GPS tampering was *not part of the progressive discipline that resulted on his termination*. Hooker was terminated for misusing time and avoiding work, in violation of Technician Expectations, and following progressive discipline for similar misconduct. The Company's issuance of this *separate* final warning is powerful proof of its *lack* of discriminatory motive. Brash imposed the same final warning and three-day suspension commensurate with comparable discipline issued to two other employees in the Midwest who had engaged in similar misconduct. (Brash 1454). The credited testimony and these undisputed facts refute the ALJ's inference this discipline was motivated by Hooker's union activities.

Importantly, the ALJ did not credit any portion of Hooker's testimony with respect to the GPS tampering. And he did *not find* that Hooker's GPS device was innocently or accidently removed on February 28 and April 24.

Ultimately, the ALJ credited Brash's explanation as to why he believed Hooker tampered with the GPS device and did not believe Hooker's account of accidentally disconnecting the GPS device on those days (D 30:8-13), for the following reasons (Brash 1747):

- Hooker falsely claimed he had reported to Sharp in February the GPS was disconnected and that Sharp directed him to submit a work ticket.

- On April 17, when Bigelow told Hooker the GPS had not been reporting since February, Hooker never mentioned to Bigelow he knocked it out. Hooker submitted a repair ticket at 3:27 pm that day regarding the "strange device."

- Hooker admitted to Vilk he had learned on April 12 the device was a GPS device, yet submitted a work ticket on April 17 claiming a "strange device" in the truck.

- On April 24, after Hooker removed the device for the second time, Hooker failed to report it to Osterberg, even when Osterberg visited him at the work site. Nor did Hooker report the disconnected GPS to Sharp on the morning of April 25.

- Hooker claimed he disconnected the unit when he was *setting* the parking brake, but it stopped reporting when he left the worksite (at 10:19 am). He would not have been *setting* the parking brake when he was leaving, but releasing it.

- Hooker claimed he used his right foot to set the parking brake, which caused him to knock out the GPS. When he demonstrated how the GPS was removed, he crossed his right foot over his left and stepped down like he would be able to get his foot past his left leg and try and kick across to set it.

The overwhelming weight of the evidence demonstrated that Hooker intentionally removed the GPS device – twice. He was dishonest throughout the investigation and twice failed to report knocking out the GPS. Hooker's misconduct violated the COBC and Tech Expectations and warranted discipline. (R 5, p. 4; R 64, p. 3-4; R 32, p. 10). Hooker's own egregious misconduct severed any possible causal connection to the initial decision to put him in the load.

E. Section 10(c) of the Act Prohibits Reinstatement and Back Pay because Hooker was Terminated for Cause

(Exception No. 23)

Compounding the error of his unsupportable finding that the disciplines violated Section 8(a)(3) under his invalid "fruit of the poisonous tree" theory, the ALJ erred further by failing to apply Section 10(c) of the Act to prohibit a remedy of reinstatement and back pay because Hooker was terminated for cause. Without substantive analysis, the ALJ erroneously held Section 10(c) inapplicable on the flawed basis that the unilateral change (placing Hooker in the

load) "caused or contributed" to Hooker's subsequent misconduct. Thus, he concluded this case fell within the exception recognized in the controlling case of *Anheuser-Busch, Inc*., 351 NLRB 644 (2007). That finding is in error. Without citation, the ALJ essentially fabricated a legal standard that directly conflicts with established Board law and the plain language of the Act.

Section 10(c) of the Act provides

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Because Hooker indisputably was terminated for cause, Section 10(c) prohibits reinstatement or back pay remedies. Thus, even assuming, *arguendo*, the Company violated the Act by failing to bargain over Hooker's return to the work load, those remedies are precluded as a matter of law.

Section 10(c) prohibits the Board from granting a make-whole remedy to employees disciplined "for cause." In *Anheuser-Busch, Inc*., 351 NLRB 644 (2007), the Board explained:

> Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act: "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids." Id. at 647; citing *Taracorp Industries*, 273 NLRB [221,] at 222 fn. 8 [(1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956))].

The ALJ misapplied this "qualification." As thoroughly discussed above, Hooker's progressive discipline and termination *throughout 2016* for repeated instances of misusing time were *not* the direct consequence of the *September 2015* decision to place him in the load, but a direct and immediate result of his misconduct over a sustained period. Also, the ALJ failed to cite any probative evidence of animus causally linked to the specific disciplinary decisions, instead basing his inference of unlawful motivation on generalized and anecdotal evidence of the ongoing tension between the parties, to which Hooker's recalcitrance contributed mightily.

Also, the ALJ's suggestion that 10(c) may have precluded a make-whole remedy had Hooker engaged in "gross misconduct such as violence against others, destruction of company property, malicious maligning of the Company to the public, or the like," but not to misconduct arising from "how he performed his work as a tech" finds no support in the law. (D 39:43-46).

The Supreme Court discussed the purpose of Section 10(c) in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), finding "[t]he legislative history of [Section 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." The Court in *Fibreboard* quoted at length from that legislative history (id. at 217 fn. 11), which, almost prophetically, addressed the impropriety of employees engaging in work avoidance following an unrelated unfair labor practice:

> The House Report states that [Section 10(c)] was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a ***license to loaf, wander about the plants, refuse to work, waste time, break rules,*** and engage in incivilities and other disorders and misconduct. " H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). (emphasis added).

Likewise, Hooker's continued protest over the decision to put him in the load did not license him to loaf and refuse to work. His recourse was to work and grieve, which he and Letts conceded.[17] The ALJ badly misapplied the 10(c) doctrine by finding that Hooker's union activities shielded him indefinitely from obeying legitimate directives and expectations to work.

In *Anheuser-Busch*, the Board found that reinstatement is barred by Section 10(c) where an employee engages in misconduct, even if that misconduct is connected to a unilateral change.

[17] See *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1986)(finding that an employee's "insubordinate refusal to obey an order to return to work … was not privileged by the protected activity in which he was engaged at that moment"); *Mead Corp.*, 331 NLRB 509, 513 (2000)("The usual and long-recognized rule is that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must obey now; grieve later. And part and parcel of that rule is a steward's obligation to adhere to the grievance process rather than to 'advise employees not to comply with a legitimate directive of the Company."); *B.C. Lawson Drayage*, 299 NLRB 810, 810 n. 1 (1990) (finding no violation where employer discharged union steward because of his adamant, recurring defiance of management's order that he check in with the dispatcher; this was unprotected insubordination notwithstanding the steward's view that the new rule was an improper unilateral change).

In that case, the employer installed surveillance cameras without notifying or bargaining with the union, and then disciplined 16 employees for misconduct detected by the hidden cameras. 351 NLRB at 644. Although the Board found the employer violated Section 8(a)(1) and (5) by unilaterally installing the cameras, it denied a make-whole remedy for the 16 disciplined employees. The Board held that because the discipline was based on misconduct, a make-whole remedy would be "inconsistent with the policies of the Act, and public policy generally, [and would] reward parties who engaged in unprotected conduct." 362 NLRB at 644.

Similarly, in *Taracorp Industries,* the employer discharged an employee for misconduct based on information obtained during an investigatory interview in which the employer unlawfully denied the employee's request for union assistance. 273 NLRB 221, 222 (1984). The Board nevertheless denied a make-whole remedy to the discharged employee because there was an insufficient nexus between the unfair labor practices committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct).

The Company indisputably terminated Hooker for cause based on his repeated and defiant misuse of work time over a sustained period. Hooker was terminated after repeatedly violating legitimate, uniformly enforced work rules, and nearly a year after he was returned to the load. Even if the Company ostensibly had "failed to bargain" over its decision to place Hooker in the load, that did not license him to refuse to work for the next ten months. Because Hooker's termination was for cause and based on his own misconduct, a make-whole remedy would be "inconsistent with the policies of the Act, and public policy generally, [and would] reward parties who engaged in unprotected conduct." Because the Company terminated Hooker for cause, Section 10(c) prohibits reinstatement and back pay remedies as a matter of law.

F. The ALJ Erred by Finding the Company's Response to the December 23 Information Request Violated Section 8(a)(5)

(*Exception Nos. 9, 24, 25, 26, 27)*

The ALJ erred by finding the Company's response to the Union's December 23, 2015, information request ("December 23 RFI") violated Section 8(a)(5). The ALJ erred in finding the Company unlawfully failed to provide all work and vacation schedules for technicians in the Grand Rapids FAA from January 2010 to December 2014 (D 41), because such information was irrelevant to the associated grievance, and the Company provided all records in its possession. The ALJ also erred finding the Company failed to provide all training records for technicians in the Grand Rapids FAA for that period, because that historical data was irrelevant to the underlying grievance. (D 42). The Company timely asserted its objections to these requests and provided the information it had available. (GC 55).

Hooker attempted to establish relevance by fabricating a false premise for the RFI:

> This RFI was tailored in response to statements by Company agents Ted Brash and George Mrla regarding the scope of the Company's policy e.g. '..this is the way it is in the whole Midwest..'; ' ..this has always been our policy.. '; '..we need Hooker in the load.. ' etc. Though these statements are demonstrably false, the Company has continued with its unilateral abandonment of previously negotiated changes in practice regarding its application of certain articles of the CBA. Thus, the Company has defined for itself the scope and purpose of the Union's need to determine the veracity of the Company agents' statements.

(GC 57, 58, 60). On cross-exam Hooker admitted these assertions were false. He admitted no one from management ever told him "this is the way it is in the whole Midwest," "this has always been our policy," or "we need Hooker on the load." (Hooker 824). Thus, his only basis for claiming relevance was a fabrication. (GC 54). The Union's relevance claim fails as a matter of law because it is based on an avowed need to determine the "veracity" of statements that admittedly were never made. The Company nonetheless produced all responsive information available, covering more than a year, and asserted the rest was not relevant or available.

Inexplicably, the ALJ held the Company failed to "comply" with the request for historical work schedules, vacation schedules, and training information. The ALJ acknowledged the information was not relevant, and that the Company asserted irrelevance. He found a violation, however, because it did not specifically state the "documents were irrelevant because workload needs played no part in its decision to place [Hooker] back in the load in 2015." (D 42:18-19). Of course, the Union never asserted relevance because the information "played a part" in returning Hooker to the load, but to verify "fact statements" that Hooker admitted were not made. Further, the historical work volumes data had no probative value into the Company's decision to place Hooker in the load because work volumes in prior years had nothing to do with the rehab opportunity that presented itself in 2015 and 2016. Also, the significant changes to the TFS/NIBS/BSIM organization in prior years nullified any value of the historical data.

The ALJ also erroneously found the Company failed to provide information in response to requests not alleged in the Complaint or litigated. Ignoring the Complaint allegations, the ALJ found the Company failed to provide "(1) list of all designated CWA representatives in Mrla's organization, including names and titles, reporting unit, union title, whether appointed or elected, and whether required to fill out a special timesheet; and (2) the genesis of the 'special timesheet,' the company policy that mandated it, how it would be stored, the length of retention, and who would have access to it." (D 19:24-28). There is no corresponding allegation in the Complaint.

Complaint Paragraph 17, subsections (a)(6) and (a)(7), allege a failure to produce "Lists of all 'designated representatives' of the Local who were required to fill out the 'special time sheet' which Hooker ostensibly was required to fill out, including job titles, applicable business unit, title as a Union representative, status as appointed or elected, copies of the 'special time sheets' submitted, and all other time reports of Union activity submitted to the Local"; and "The

Company's policy which mandates the use of the 'special time sheet' and the length of retention of the 'special time sheet.'" In a meeting with Hooker in February 2016, Brash confirmed that Hooker was the only person asked to fill out the Activity Log (satisfying subsection (a)(6)), and that Brash created the document (satisfying subsection (a)(7)). (Brash 1186-87). Further, Hooker and Letts were told repeatedly that the Activity Log was an accommodation to the requirements of Article 10 of the CBA, and they were well aware there was no specific policy on the Activity Log. The Union also was fully aware Hooker was the only Union rep working on the load who did not request MXUP in advance and that Brash developed the Activity Log as an accommodation for Hooker. Letts testified that on November 17, 2015, he asked Mrla if other technicians complete an Activity Log, and Mrla explained they did not. (Letts 146-47). Letts also explained in an email to Brash on March 17, 2016, "[i]t was [Brash] and George [Mrla] that came up with Mr. Hooker reporting his paid activity after the fact based on a conversation with myself." (GC 10). For these reasons, the Company lawfully responded to the December 23 RFI.

G. The ALJ Erred in Finding the Reporting Privacy Related Incidents Policy is Unlawfully Overbroad
(*Exception Nos. 10, 11)*

AT&T's Reporting Privacy Related Incidents policy is a *data breach* reporting policy developed to comply with the Company's legal and ethical obligations to protect sensitive and confidential customer and employee information, and to report unauthorized access, use and disclosure of such information under the Telecommunications Act, its supporting regulations, and state law. (GC 35; R 66). Erroneously referring to the policy as a "confidentiality policy," the ALJ found the policy to be unlawfully overbroad notwithstanding that the policy does not prohibit *any* activities, much less Section 7 activity. (D 45:6). Indeed, the ALJ found the Company "has a strong and legitimate interest in protecting such information from disclosure;

even a legal obligation to do so," yet inexplicably found the policy to be unlawful because it referenced "other customer or employee privacy-related issues or incidents." (D 46:12-16).

Facially neutral work rules are no longer analyzed under *Lutheran Heritage*, 343 NLRB 646 (2004), which was expressly and retroactively overturned by *Boeing Co*. 365 NLRB No. 154 (Dec. 14, 2017). Where a policy, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing Co.* 365 NLRB No. 154, slip op. 3 (Dec. 14, 2017). Even if a rule would potentially interfere with Section 7 rights, there is no violation where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." Id slip op. 3-4.

Although the ALJ cited *Boeing Co.*, he plainly applied the overturned *Lutheran Heritage* standard. Under *Boeing Co.*, the Reporting Privacy Related Incidents policy is lawful in light of AT&T's compelling interests and legal obligations to protect sensitive and confidential customer and employee information. Nothing in the policy restricts Section 7 activity, and there is no evidence that the policy has any potential impact on Section 7 activity.

1. The Policy Does Not Interfere with Section 7 Rights

The ALJ took issue with only one phrase in the policy, which is taken out of context and listed at the bottom of the page, following the policy's stated purpose and a section defining the type of privacy related issues that the policy is intended to protect. He excepted to one example of a reportable data breach, which included: "other customer or employee privacy-related issues or incidents that may negatively impact employees or customers or result in negative financial and/or reputational consequences to AT&T." (D 46:13-16). Ignoring the record evidence, the ALJ opined that the phrase "tends to undermine a reasonable reading of the rule as applying only to CPNI, PI/PII, and SPI and might well lead employees to believe that sharing each other's

wages and benefits might run afoul of the policy and subject them to discipline for engaging in protected activity." (D 46:16-19). Employees' wages and benefits are set forth in the parties' CBA, and therefore no reasonable employee would construe a "privacy related issue or incident" to mean wages and benefits as the ALJ illogically suggests.

Further, the ALJ finds this language overbroad because an employee "might well" read the policy to prohibit Section 7 activity. (D 46:17-19). *Boeing Co*. makes clear that the applicable standard is whether a reasonable employee *would* interpret the policy to prohibit Section 7 activity, not whether they *could* or "might well" do so. 365 NLRB No. 154, at slip op. 3. In overturning *Lutheran Heritage*, the Board in *Boeing Co.* explained that employers are not required to "eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity," and work rules do not require "linguistic perfection." *Id*. at slip 9. That is exactly what the ALJ has done in this case.

A strained reading of the policy is required to find any ambiguity. A primary reason the Board overturned *Lutheran Heritage* was to prevent facially neutral policies from being stricken because the rule "can be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity." *Boeing Co*. at slip op. 9. There is no evidence that this policy has ever restricted an employee from exercising Section 7 rights, and the Company simply is not required to "anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities." *Id*. The policy's purpose is clearly to protect against data breaches of customer and employee information. In *Boeing Co.*, the Board found a broad prohibition on photography to be lawful because of the policy's insignificant impact on Section 7 rights. The same is true for the Reporting Privacy Related Incidents.

2. The Company's Compelling Interest in Protecting Privacy of Customer and Employee Information Outweighs any Potential Impact on Section 7 Rights

The Company's paramount business interest and core responsibility to protect the privacy of customer and employee information are unassailable. The Reporting Privacy Related Incidents policy was implemented in furtherance of this interest to protect such confidential and sensitive information, and to comply with its obligations in the event of a data breach. (Smith 1893). AT&T has affirmative obligations to implement restrictions and controls on the access, use, and disclosure of records containing Customer Proprietary Network Information ("CPNI"), Sensitive Personal Information ("SPI"), and the content of customer communications. (R 66). The ALJ found the Company "has a strong and legitimate interest in protecting such information from disclosure; even a legal obligation to do so," but grossly unstated the significance of the Company's obligations and the potential consequences of a data breach. (D 46:12-14).

In addition to federal law obligations to protect sensitive personal information, 33 states have data security laws requiring AT&T to take reasonable measures to protect against unauthorized access or use of confidential personal information. Also, 47 states and D.C. have data breach laws, which require AT&T to notify affected individuals and appropriate government agencies if it determines sensitive personal information has been improperly disclosed or used. (See MCL 445.72 (Michigan's Identity Theft Protection Act)). These laws do not distinguish between employee and customer information. AT&T is required to protect the privacy of that information and if it determines the information is improperly accessed or used, it must notify the individuals and/or appropriate government agency. (Smith 1887-88).

AT&T's interest in protecting the privacy of its customer and employee information and complying with state and federal law in the event of a data breach significantly outweighs any potential impact on the exercise of Section 7 rights.

V. CONCLUSION

Neither Hooker's engagement in union activities nor his protest of the Company's decision to return him to the work load privileged him to consistently and repeatedly misuse time over a period of nearly 10 months in egregious violation of Company policy. If the Union or Hooker believed the Company's decision to put him on the work load violated a purported "local agreement" or "past practice," his obligation was to "work and grieve," i.e., work in compliance with Company policy and grieve and arbitrate the alleged breach. The Union grieved every discipline at issue, yet Hooker chose a path of defiantly avoiding work and baiting discipline.

The ALJ plainly acknowledged Hooker's demonstrated unwillingness to perform his job duties, yet inexplicably gave him impunity at every turn. The ALJ's conclusions do not rest on credibility resolutions, as he credited Company managers on nearly all pertinent events and with respect to the material facts underlying Hooker's progressive discipline and termination. The ALJ simply ignored undisputed facts which contradicted his results-oriented conclusion.

For all of the reasons detailed above, the Company's decision to place Hooker in the load and requiring him to accurately report his time did not violate Sections 8(a)(1), (3), or (5) of the Act. Moreover, the progressive discipline and termination of Hooker were not motivated by his union activities and would have occurred in any event, and thus did not violate section 8(a)(3), under W*right Line*. Also, because Hooker indisputably was terminated for cause, Section 10(c) prohibits reinstatement and back pay remedies. Finally, the Company did not violate the Act with respect to its handling of the December 23 RFI or by maintaining its Reporting Privacy Related Incidents policy. Accordingly, and for all of the above reasons, the ALJ's findings and conclusions are without merit and must be reversed, and the Complaint dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2018, a copy of the foregoing was served via e-mail upon:

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