

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

ALAN RITCHEY, INC.

and

Case 19-CA-30333

TEAMSTERS LOCAL 117, affiliated with the  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

*Jo Anne P. Howlett, Esq.*, for the General Counsel.

*Tracey Thompson, Esq.*, Senior Staff Attorney,  
for the Union.

*Bryan P. O'Connor and Gina Dawn Wolverton, Esqs.*,  
(*Jackson Lewis, LLP*), of Seattle, Washington,  
for Alan Ritchey.

DECISION

Statement of the Case

**WILLIAM G. KOCOL**, Administrative Law Judge. This case was tried in Seattle, Washington, on January 23-25 and February 16, 2007. The charge and amended charge were filed May 16 and July 7, 2006, respectively<sup>1</sup> and the amended complaint (“complaint”) was issued November 6. The complaint alleges that Alan Ritchey, Inc. (“Alan Ritchey”) violated Section 8(a)(3) and (1) by discharging employees Laraine Loomis and Hong Tu and suspending Shari Yelovich because they engaged in union and protected, concerted activities. The complaint also alleges that Alan Ritchey violated Section 8(a)(5) and (1) when it implemented a new policy under which sharing of completed work became a basis for discipline, which policy was used as a basis for imposing the discipline on Loomis, Tu, and Yelovich. The complaint alleges that Alan Ritchey implemented this new policy without first giving notice and an opportunity to bargain with Teamsters Local 117, affiliated with the International Brotherhood of Teamsters (“Union”). Alan Ritchey filed a timely answer that, as amended at the hearing, denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Alan Ritchey, I make the following.

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<sup>1</sup> All dates are in 2006 unless otherwise indicated.

## Findings of Fact

### I. Jurisdiction

5 Alan Ritchey, a corporation, is in the business of transporting mail and processing mail transport equipment at its facility in Auburn, Washington, where it annually receives gross revenues in excess of \$50,000 from the U.S. Postal Service. Alan Ritchey admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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### II. Alleged Unfair Labor Practices

#### A. Background

15 Alan Ritchey has a contract with the United States Postal Service to inspect, repair, and process mail transport equipment including trays, bags, and sleeves. Alan Ritchey employees inspect those items to assure that no mail remains in them and to determine whether they remain “serviceable.” Mark Pyne is plant manager at the Auburn facility and Leah Rydzewski is human resources director. Sam Griffin is shift supervisor; he supervises the supervisors of three departments. Paul Parmenter supervises the inspection of the items described above.

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Alan Ritchey employs inspectors to process the trays, bags, and sleeves. Inspectors are measured for their efficiency. If they fail to meet minimal standards of efficiency they can be disciplined or fired. At a minimum they will receive a warning. A consequence of receiving a warning is that the employee is removed from the monthly incentive program. That, in turn, could result in the loss of several hundred dollars to the employee. Alan Ritchey strictly enforces its efficiency standards. If an employee meets the standard by 99.99 percent, the employee will still receive the warning and be cut off from the monthly bonus. As a way of measuring efficiency employees must use their employee cards to “labor” into various labor codes. They do so by swiping their cards into any of several computer stations and enter the labor code of the work they are about to perform. Inspectors also spend time attending meetings, taking lunch, and doing other non-inspection tasks. On those occasions inspectors are also required to labor into specific codes for that time; those codes are not nonmeasured. That is, that time is not used by Alan Ritchey in measuring the employee’s efficiency. The importance of being labored into the proper code is obvious. If, for example, an employee labors into a nonmeasured code while actually performing inspection work the employee’s efficiency will be inflated. Efficiency rates are computed daily for each inspector and are posted in the facility. However, employees are expected to meet the efficiency levels on a weekly, and not daily, basis. Partially completed pallets of inspected product are not counted in measuring efficiency. This means that it may be important for employees to complete a full pallet in order to get over the efficiency level. Complicating the process is the fact that inspectors may work on several different products during the course of a week; they are expected to meet the efficiency level for each product inspected. This means that an inspector slightly under an efficiency level on a given product may not have the chance to work on that product later that week to make up the difference and improve the efficiency level.

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The inspection process is as follows. A loader puts product sent from the Postal Service on a 120-foot long conveyer belt that carries the product to an inspection area. An unloader takes the product from the conveyer belt and places it in the bins used by each inspector. Loaders and unloaders do not have their work measured for efficiency. The sleeves, trays, or bags are then inspected by the inspectors for undelivered mail and also to determine whether those products continue to be serviceable according to standards set by the Postal Service.

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Serviceable products are stacked on a pallet. Alan Ritchey measures the work produced by inspectors depending on the product inspected. For sleeves, the product most involved in this proceeding, the quantity is measured by height. When the stack of sleeves on the pallet reaches a certain height, as measured by a material handler, then the pallet is deemed  
 5 complete and the inspector is credited with having inspected a designated number of sleeves. A "traveler" is used to record the employee's number, date, and product number; the traveler is put on top of the pallet and the inspector or inspectors whose product is on the pallet gets credit for the entire pallet or a percentage of a mixed pallet. During the course of a single day an  
 10 inspector may inspect several thousand serviceable sleeves. The sleeves that no longer meet the USPS's standards for continued use, called "condemned" sleeves, are separated from the serviceable ones and placed on a separate pallet. But because an inspector may only find several dozen condemned sleeves during a day's work, the work of several employees must be combined over several days in order to have a full pallet of condemned sleeves. The inspector  
 15 may place a stick-on label called an "opaque" with his or her employee number on the stack of condemned sleeves that he or she has placed on the condemned pallet. Again a material handler measures the height of each employee's contribution to the completed condemned pallet and then using a calculator, the employee is credited with having inspected a certain number of the condemned sleeves. The handling of condemned sleeves is at issue in this case and is discussed in more detail below. The inspection process continues. Quality auditors,  
 20 among other things, examine each pallet of inspected product by randomly selecting a designated number of items from the pallet to assured they have been inspected properly. If the quality auditor determines that the work has not been inspected properly, as designated by the Postal Service, the entire pallet is returned to the inspector for reinspection. If improper inspection is found in a pallet where two or more employees have contributed product, the entire  
 25 pallet must be inspected by the employee who incorrectly performed the inspection. This is particularly troublesome to employees concerning pallets of condemned sleeves where as noted above the work of many employees is used to build a full pallet.

30 On April 22, 2005, the Union won a Board-conducted election to become the collective bargaining representative of the following employees:

35 All full-time and regular part-time maintenance department employees, processing department employees, container repair department employees, and warehouse department employees, yard drivers, and logistics clerks employed by Alan Ritchey at its Auburn, Washington location, excluding all temporary employees, office employees, data analysts, assistant human resources employees, and all other employees, guards, and supervisors as defined by the Act.

40 Thereafter Alan Ritchey and the Union began collective bargaining and agreed to a collective-bargaining contract that was ratified by the membership in September 2006.

#### B. Loomis' Union and Concerted Activity

45 The Section 8(a)(3) and (1) theory of the General Counsel is that Loomis was fired for her union and protected concerted activities and that Tu was fired and Yelovich suspended in order to effectuate Loomis' unlawful termination. Loomis began working for Alan Ritchey on June 1, 1999. By all accounts she was an outstanding employee as she received many awards for high productivity and perfect attendance. In her appraisal dated March 14, less that two  
 50 months before her discharge, Loomis' supervisors described her as "A natural leader; has potential to inspire co-workers by example" and "Laraine is not shy about voicing her opinion, at times can be too harsh. Usually cooperates with the supervisors. She always gives 100% to

any job she is doing.” Loomis had received one warning, but that was rescinded as a result of the settlement agreement described below. Otherwise her work record was spotless.

5           Around Christmas 2004, Alan Ritchey stationed a person outside the restroom who wrote down the name of each employee who used the restroom and how long they used the restroom. Loomis and another employee went to complain to Mark Pyne, plant manager. Loomis asked Pyne if he understood how degrading it was to have the time you used the restroom recorded. Pyne replied by asking Loomis to define degrading.

10           In January 2005, about 20 employees apparently were identified as staying in the lunchroom a minute or two after the bell rang signaling the employees to return to work; some employees were disciplined. The disciplined employees were therefore ineligible to get the monthly bonus. The next day Loomis heard that an employee had received a \$50 gift certificate for being the first employee to leave the lunchroom. Loomis spoke with the recipient of the  
15           award and protested that it was not right for Alan Ritchey to write up so many employees one day and kick them out of the monthly incentive program and yet give a \$50 gift certificate the next day to the employee who was first back on the floor. Loomis advised the award recipient that she intended to raise the matter at the next morning meeting. She asked the recipient if that was okay, that it was nothing personal; the award recipient gave her approval.

20           The next morning at a meeting of the employees Paul Parmenter, a supervisor, told the employees that the efficiency levels were being raised. After some discussion, Parmenter asked if the employees had any questions. Loomis then asked if it was true that an employee got a \$50 gift certificate for being the first employee back on the floor. Parmenter confirmed that  
25           it was true and Loomis asked whose idea was that. After Parmenter indirectly indicated that he was responsible, Loomis asked why he did that, just to piss people off? Loomis said that it was bullshit to write up so many people and then give the gift certificate. Loomis said that with the efficiencies going higher “we are people; we’re not machines.” At that point many of the employees applauded. Employee Mary Ambrose confirmed Loomis’ testimony concerning this  
30           meeting.

          Later that day Parmenter told Loomis that Mark Pyne, plant manager, and Leah Rydzewski, human resources director, wanted to see her. Once there Pyne told Loomis that they liked her and the job she did and knew that she liked her work but something had to be  
35           done. Rydzewski told Loomis that an employee had come to her almost in tears wanting to give the award certificate back. Rydzewski told Loomis that Loomis was a bully and that people did not want to talk to her. Loomis began crying. Loomis explained that she had already spoken with the award recipient who had given her approval to Loomis to raise the matter at the  
40           meeting. Pyne said that they had more respect for people who came to the front office and that if Loomis had any concerns or questions or comments to make about the award system or whatever to come to the front office and talk to them and not be bringing up the matters in front of the group. Pyne also instructed Loomis not to discuss the meeting they were having with  
45           other employees and to make an excuse if Loomis was asked why she had been called in to talk to them. Loomis said that there were a lot of employees who felt the way she did but were afraid to speak out and those employees would come to her or to someone else who was not afraid to speak out. As they were leaving Rydzewski told Loomis “[F]or your own benefit, don’t talk about it.” The foregoing facts are based on Loomis’ credible testimony. I have considered Pyne’s testimony that Loomis’ complaint was that she had not received the \$50 gift certificate. No one else corroborated Pyne on this point. Viewing the relative demeanor of the witnesses  
50           and considering the record as a whole on this point, I conclude that Pyne simply fabricated this testimony in an attempt to portray Loomis in a bad light. I am therefore reluctant to credit Pyne’s testimony in general. The award recipient described in these paragraphs did not testify

at the trial. No one from Alan Ritchey testified directly or with any specificity what the award recipient had said or done following the meeting of employees at which Loomis spoke out. I am unwilling to conclude, based on Rydzewski's hearsay statements made to Loomis, that the award recipient was either "almost in tears" or had described any conduct by Loomis that would justify Rydzewski labeling Loomis as a "bully."

After some initial hesitation Loomis signed a union authorization card and attended union meetings. On March 9, 2005, the employees had a regularly scheduled meeting with Pyne. At this meeting Pyne brought up the Union and said that the employees did not need a union. Pyne said that Alan Ritchey had an open-door policy and that it wasn't going to change anything by getting the Union in there. Pyne said the employees' job might change but his job would stay the same. Pyne said that the employees' wages and benefits would not change; they were non-negotiable. He said that they were set by the Department of Labor and there would be no negotiation about them.

On March 10, 2005, a group of employees, including Loomis, delivered a letter to Pyne's office. The letter notified Alan Ritchey that Loomis was one of 22 employees on the Union's organizing committee. Some time thereafter, while Loomis was unloading a trailer, Pyne approached her and said that Alan Ritchey had an open-door policy. Loomis said yes. Pyne said that Loomis could come in and talk to him anytime she wanted to. Loomis again said yes. Pyne said that he thought Loomis had a personal grudge against him. Loomis asked what? Pyne explained that he thought Loomis had not forgotten the incident with Rydzewski, described above, where Loomis began crying. Loomis replied that apparently she was not the one that hadn't forgotten about that incident since Pyne was the one who brought it up. Pyne asked what Loomis suggested they do with employees who were bullying other employees? Loomis retorted that she had not been bullying other employees. Pyne then asked, "Do you really want a third party in here listening to your troubles?" Loomis replied that during that meeting with Pyne and Rydzewski she felt intimidated and would have liked to have had a third party present to hear what was going on. Pyne said that the employees did not need a union there and the employees did not appreciate what he had done for them. When Pyne repeated that Alan Ritchey had an open-door policy, Loomis brought up the incident, also described above, when she and another complained about the monitoring of bathroom time and Pyne's only response was "define degrading." Loomis said that was Pyne's open-door policy. The buzzer sounded indicating the end of Loomis' workday. Loomis told Pyne that if he wanted to continue the conversation he would have to walk with her to the time clock because she was going home. Pyne did so, repeating things again that he said earlier in their conversation. As indicated in detail below, it was Pyne who made the decision to terminate Loomis.

After the Union won the election, bargaining began in September 2005; Loomis was a member of the Union's bargaining committee.

On April 5, 2006, the Regional Director approved a settlement agreement<sup>2</sup> with Alan Ritchey that resolved a number of allegations made by the Union that Alan Ritchey had violated

<sup>2</sup> In her brief counsel for the General Counsel "excepts" to my ruling sustaining an objection made by Alan Ritchey concerning the substance of the settlement agreement. In the brief, counsel for the General Counsel states the reasons for which the settlement agreement was offered. But at the trial, when I asked counsel for the General Counsel to explain the relevance the response was "well, this is – this was posted early in April and this, basically, announced the remedy for the Settlement Agreement that was very much on the minds – and the General Counsel would argue, effecting the attitudes, including animus of the atmosphere at work."

Continued

the Act. The notice was posted on about April 27, 2006. As part of that settlement agreement Alan Ritchey agreed to abandon a team system for measuring efficiencies for sleeve processing and go back to individual employee efficiency ratings.<sup>3</sup> But instead of having enough unloaders to keep the inspectors busy, the inspectors ran out of work. On about May 5 Loomis asked supervisor Lonnie Petty if she could change her labor code to unloading and do unloading so she would not have down time as an inspector. Petty rejected the request. Loomis asked Petty why Pyne was running the plant that way. She said Pyne was making it impossible for employees to make their numbers on the sleeves. Petty said that he thought Pyne had gone crazy, that when things did not go Pyne's way the supervisors suffer because the supervisors are supposed to be the assholes. Petty said he felt bad treating the employees the way they had been treated. Loomis asked why the supervisors did not stand up to Pyne. Petty answered that Alan Ritchey was behind Pyne and Petty could not afford to lose his job. The next day Loomis noticed Petty near the work area throughout the entire day. She asked Petty whether he was being their babysitter for the day. Petty laughed a bit and then told Loomis to watch her back. These facts are based on Loomis' credible and un rebutted testimony. Petty, an admitted supervisor, was not called as a witness by Alan Ritchey. For his part, Pyne admitted that after the settlement agreement there were a lot of questions and frustration. In fact, Pyne claimed that Adam Hoyt, the Union's steward, uttered the "f" word to him. When Pyne asked Hoyt if he had an issue, Hoyt replied that Pyne was the issue. But Pyne did not discipline Hoyt because he concluded that Hoyt was "a little frustrated and he was blowing off steam" in the aftermath of the settlement.

Except as otherwise indicated, the facts in the preceding paragraphs are based on Loomis' credible testimony. I note that many of these facts are uncontested and I conclude in any event that Loomis was entirely credible. She had good recall for detail and context. She testified comfortably and impressed me as someone who was stating the facts to the best of her ability.

### C. The Terminations and Suspension

For the week of January 20, while the employees were still on the team system described above, Loomis' team failed to meet its efficiency level for processing sleeves. Everyone on the team, including Loomis, received a verbal counseling and therefore could not participate in the monthly bonus.<sup>4</sup> This upset Loomis because in the past she had been one of the top producers. That day Loomis was processing trays which, unlike sleeves, continued on the individual employee efficiency system. Loomis decided to no longer continue to be one of the highest performers. But rather than stay idle she decided to continue inspecting trays but give the excess inspected product to other employees. But first she talked to Sam Griffin, a supervisor. She told Sam Griffin that she had already reached her efficiency level; she asked if she could continue inspecting product but give the additional product to other employees. Griffin replied that he did not care, that Loomis should do what she had always done. Loomis

When I asked for more detail counsel responded: "Okay. So, this is – it's probably for history but this is the Settlement Agreement or this is the notice that was posted." I adhere to my ruling; it was based on the explanation of relevance given at the trial and not the more articulate, and persuasive, reasons given in the brief.

<sup>3</sup> For a period of time Alan Ritchey had groups of inspectors, loaders, and unloaders work as teams in processing sleeves. The team as whole was supposed to meet certain efficiency levels; individual efficiencies did not matter.

<sup>4</sup> As noted above, this warning was later rescinded under the terms of the settlement agreement.

then gave some of her inspected product to employee Tuan Ho. With Ho's agreement, Loomis used Ho's employee number to identify him as the employee who had performed the inspection. So Ho and not Loomis got credit for inspecting those trays. On another occasion Loomis told Sam Griffin that she was tired of going over the high efficiency ratings; that she only wanted to do what she had to do. She was inspecting bags that day. She told Griffin that after she made her efficiency level she continued inspecting bags and had given away over 500 bags that day. Griffin retorted that Loomis should stop working that hard because she might re-injure her hand. These facts are based on Loomis' credible testimony. I note that when Alan Ritchey interviewed Ho later as part of the investigation leading to Loomis' termination as described more fully below, Ho advised Alan Ritchey that Loomis had in fact provided him with inspected product in January which he claimed as his own. So that portion of Loomis' testimony has some corroboration in the record. I also note that Alan Ritchey interviewed Shari Yelovich as part of Loomis' termination process; during that interview Yelovich indicated that Loomis had told her that Sam Griffin had consented to Loomis's plan to give away some of her inspected product, so the remaining portion of Loomis' testimony has some corroboration also. Moreover, as explained below, Parmenter conceded that when he spoke to Loomis immediately upon confronting her about the incident that resulted in her discharge, Loomis asserted that Sam Griffin had authorized her to give inspected product to another employee. I conclude it is highly unlikely that Loomis could have concocted this testimony. I have considered Sam Griffin's testimony that he never authorized Loomis to give away any inspected product to another employee. More specifically, Griffin testified that in January 2006, after Loomis had received the disciplinary warning for low efficiency, Loomis was very upset and told him that she was going to work to her efficiency level and no higher and that he replied that that was all she was required to do. Griffin testified that he first learned that Loomis gave away inspected work in April when Loomis was fired. But I have already concluded that Loomis' testimony is credible and consistent with the record as a whole and as explained below Sam Griffin's testimony was not always believable.

On about April 5, Loomis was unloading trays and she noticed that some inspectors were simply counting the trays instead of inspecting them individually for leftover mail. This upset Loomis. Earlier Pyne had sent all employees a written notice that they had to inspect each piece of product for unprocessed mail, without exception, and if an employee failed to do so the employee could be terminated. Loomis complained to supervisor Cary Griffin that employees were cheating by just counting trays and not inspecting them. Cary Griffin asked Loomis to give him names. Loomis said that it was not her job to give names; it was Griffin's job to watch the employees. Cary Griffin said that if he went out there he would not see anything. Loomis retorted that he could not see anything or would not see anything. Loomis turned around and left. That day Loomis went into a training room where Sam Griffin and Parmenter were sitting. Loomis asked if she could move over to the bag line, that there was cheating going on the tray line and she could not take it any more. Sam Griffin said he needed Loomis out there to focus on her job. Loomis answered that with employees cheating she could not focus on her job; she asked again to move over to the bag line. Sam Griffith again refused. Loomis became upset and asked if she could use some of her available personal time off and go home. Parmenter allowed her to do so.<sup>5</sup>

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<sup>5</sup> At the trial counsel for the General Counsel contended that this incident showed protected concerted activity by Loomis. At the conclusion of the trial I asked the General Counsel to brief the issue of how this incident was concerted activity. Despite my request the General Counsel failed to address this issue in his brief. I conclude that the General Counsel has abandoned his contention that this incident was concerted activity protected by the Act.

On April 26 Hong Tu was working on the mailbag line. Concerned that she would not make her efficiency level for sleeves, Tu asked coworker Shari Yelovich if Yelovich had any inspected condemned sleeves that Tu might have; Yelovich said that she did not, but Loomis might. Tu then asked Yelovich to ask Loomis if Loomis could give Tu some of the condemned sleeves that Loomis had inspected. Yelovich did as asked and Loomis agreed to give Tu her condemned sleeves. Loomis asked Yelovich to get Tu's employee number. Yelovich returned with Tu's number. Near the end of the workday Loomis gathered her condemned sleeves and Yelovich added two or three condemned sleeves that she had processed. Loomis also asked employee Adam Hoyt if she could take his condemned sleeves also; he too agreed. Loomis put the combined sleeves on the pallet of condemned sleeves with Tu's employee number on an opaque used for that purpose. Loomis did this openly and in view of Pyne. Shortly thereafter Parmenter and Cary Griffin called Loomis over to the pallet of condemned sleeves and asked if she put her condemned product on the pallet. Loomis freely admitted that she had done so and that she had not placed her number with the condemned product but instead had used Hong Tu's number. Parmenter said that Loomis should not have done that. Loomis protested that she did not know what the big deal was, that employees did it all the time, and that Sam Griffin had given his approval for her to give some trays to another employee several months earlier. The supervisors indicated that they would look into the matter. Loomis explained that she and other employees had been told never to change information on a traveler, but they had never been told that the same applied to an opaque.

The next day Loomis was summoned to a conference room where Pyne, Parmenter, Rydzewski were present. Loomis requested the presence of a witness and this request was granted. Rydzewski asked Loomis to describe what happened the day before, and Loomis did so as described above. Pyne asked Loomis if she could tell him the difference between fraud and cheating; Loomis said they were the same. Pyne reminded Loomis that she had just been complaining about employees cheating a few days ago; Pyne had a smug look on his face when making this point. Loomis and Pyne then debated whether the two situations were the same. Pyne asked whether a supervisor had ever directly instructed her to give inspected product to other employees. Loomis said yes and identified Cliff Castaneda as the supervisor who had done so. Pyne asked if any supervisor knew that she was helping other employees; Loomis again answered yes and mentioned Sam Griffin; Loomis indicated that she gave employee Tuan Ho the inspected product. Pyne asked if anyone else was present when Sam Griffin assented to this; Loomis answered that there was not. Rydzewski ended the meeting by telling Loomis and her employee witness to keep the contents of the meeting to themselves because it was part of an investigation. Yelovich also was summoned for an interview; Pyne, Rydzewski, and Parmenter again were present. Yelovich explained what had happened concerning the condemned sleeves. Rydzewski asked Yelovich to explain the inspection process and Yelovich did so; Yelovich also explained that she sometimes places her condemned sleeves on the condemned sleeve pallet without identifying them as hers. Yelovich protested that if it was not for the Union getting into the plant they would not even be talking to her about the incident, that it would not be an issue. Yelovich said that everyone gives work and receives work; when she was asked to name employees who did so, Yelovich at first declined on the grounds that she did not want to get employees in trouble, but she finally named Vickie Markle as someone she believed received work. Yelovich confirmed that Loomis had told her that Sam Griffin had consented to Loomis' plan to give away some product that Loomis had inspected. Yelovich also explained that it was a common practice for employees to place a few extra pieces of inspected products on other employees' pallets rather than leave the inspected product for the next day. Pyne, Rydzewski, and Parmenter also interviewed Tuan Ho who confirmed that Loomis gave him her inspected product in January. I comment on the credibility of Pyne and Rydzewski at this point. During the trial Pyne was asked whether Tuan Ho saw the conversation between Loomis and Sam Griffin wherein Griffin gave his approval for Loomis' plan to give away some of

her inspected product. Pyne answered: “I don’t know – [Tuan Ho] said he never heard it so I would say that he probably saw [Loomis] talking to Sam [Griffin], he could have.” Pyne’s demeanor at that point was visibly combative and revealed someone bent on creating a point when none existed. Pyne earlier had shown an ability to be easily confused when it suited him.

5 Loomis never claimed that Ho witnessed her conversation with Sam Griffin. The notes of the interview with Tuan Ho indicate: “Tuan Ho was asked if he ever heard Sam [Griffin] instruct Laraine [Loomis] on that day to help you out. Tuan said no, Sam [Griffin] didn’t instruct Laraine [Loomis] but Laraine [Loomis] did it on her own.” This statement reveals more of Alan Ritchey’s determination to find support to discharge Loomis than it does of Loomis’ misconduct. It does

10 not take judicial training to conclude that Tuan Ho could not have known, as a matter of fact, whether Sam Griffin approved Loomis’ plan to give away her work unless Tuan Ho was present with Loomis during all Loomis’ conversations with Griffin that day. Given the separate work stations of the employees, this is next to impossible. Yet Alan Ritchey’s management included this sentence in its report as if it was meaningful. Moreover, Tuan Ho admitted in the interview

15 that he placed his number on the work that Loomis had inspected, but Rydzewski testified that she did not view that as falsification of a company document because he said he did not need the product to make his efficiency. But of course that response simply begs the question. And as it turned out Hong Tu did not need the condemned sleeves that Loomis had given her to make her efficiency level. Returning to the facts of this case, Alan Ritchey also interviewed

20 Vickie Markle; Markle, like Loomis, was named as a member of the Union’s organizing committee. Markle had been named by Yelovich as someone who had received and taken credit for work inspected by other employees. When Markle was asked whether she had done this she answered “no comment.” Alan Ritchey did not press the matter further. Markle received a verbal warning for not cooperating with the investigation. There is no explanation in the record why Alan Ritchey did not accept Yelovich’s assertion as true in light of Markle’s failure to deny it. Hong Tu was also interviewed by Alan Ritchey and she admitted what had

25 occurred and confessed that it was wrong; neither party called her as a witness at the trial.<sup>6</sup>

On May 15 Loomis and Tu were terminated. Tu’s termination report indicated that on

30 April 26 at the end of the workday Tu was working on the mailbag line and she told Yelovich that she was low on her sleeve efficiency and needed more sleeves to make her numbers. Tu asked Yelovich if Yelovich would ask Loomis if Loomis would give her the condemned sleeves that Loomis had processed that day. Yelovich returned indicating that Loomis had agreed and asked Tu to write down her employee number. Tu did so. The report said that “When asked

35 during the investigation interview about this situation, you acknowledged that it was wrong and that you should not take credit for others work to inflate your own efficiency in order to avoid discipline.” The report indicated that Tu violated the Code of Business Practices and Ethics Policy and unsatisfactory performance, behavior, and conduct policy and states “Falsifying Company records (e.g. time records, expense reports, etc.) and Insubordination (refusal to

40 follow management’s instructions) pg. 42 of the employee handbook.” Loomis’ termination report began with the same recitation of facts as Tu’s but added that Loomis admitted to Cary Griffin that she had used Tu’s number and had admitted that in the past she had regularly given inspected product to other employees so they would not be disciplined. The report indicated that Loomis was terminated for falsifying records and insubordination for refusing to follow

45 management’s instructions as indicated on page 42 of the handbook. Yelovich was suspended for one day for “Deliberately concealing another employee’s misconduct” in violation of page 43 of the handbook and “Insubordination (refusal to follow management’s instructions) in violation

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50 <sup>6</sup> In its brief Alan Ritchey argues that I should draw an adverse inference from the General Counsel’s failure to call Tu as a witness. I decline to do so. Tu was an employee and was not shown to be an agent of any party.

of page 42 of the handbook. Except as indicated, the facts in the preceding paragraphs are largely undisputed.

5 Pyne made the decision to discharge Loomis and Tu and suspend Yelovich. Pyne testified that he decided to terminate the employees because “there was so much that occurred that [Loomis] did. . . You had – we had so many things that came out of this investigation.” This obvious exaggeration again detracts from Pyne’s testimony and again helps explain why I do not believe much of his testimony. In explaining the decision to terminate Tu and Loomis instead of imposing a lower level of discipline, Rydzewski testified that it was because they had engaged in such an egregious act to put a plan in place to inflate Tu’s numbers to circumvent the progressive discipline process. But compared to the conduct of other employees, as describe below, who were not terminated Loomis’ conduct can hardly be described as “egregious.” This exaggeration detracts from Rydzewski’s credibility.

15 Although she did not make the decision, Rydzewski also explained why Alan Ritchey decided to fire Loomis and Tu, as opposed to imposing lesser discipline on them. She testified that the reason was because they had “created a plan to falsify documents” and that Loomis “talked about a system of where employees save each other jobs and who would be disciplined or who wouldn’t be disciplined.” Again, Rydzewski’s demeanor was not convincing, nor was the content of her testimony persuasive. I do not accept this explanation.

25 Rydzewski and Pyne testified that they did not find Loomis’ explanations to be credible in part because Loomis claimed that Sam Griffin had approved her conduct yet Griffin denied that he did so. But this begs the question of why Alan Ritchey chose to believe Sam Griffin over Loomis, especially in the light of the fact that, as mentioned above, Ho and Yelovich provided some corroboration for Loomis’ assertion. Moreover, in denying to Pyne and Rydzewski that he ever allowed Loomis to give inspected product to other employees, Sam Griffin also told them that: “he can’t believe the action of this group and the stories they fabricate to justify their own mistakes and shortcomings.” Sam Griffin never explained what *group* he was referring to, nor did any of the management personnel ask him at the time what he meant. Pyne testified at trial that he thought Sam Griffin was referring to all employees when he mentioned the group. That explanation simply does not make sense in context. I infer in the absence of any other credible explanation that Sam Griffin was referring to the group of employees who were openly supporting the Union.

#### 35 D. Alan Ritchey’s Ethics and Other Policies

40 As indicated, Loomis’ termination report refers to Alan Ritchey’s ethics policy. In this regard, each employee is provided with a copy of Alan Ritchey’s Code of Business Practice and Ethics. The Code states:

45 All report vouchers, bills, payroll and service records, measurements and performance records and other essential data should be prepared with care and honesty. There is no excuse for a deliberately false or misleading report or record.

It also advises employees:

50 Violation of any code provision, whether legal or otherwise, will lead to disciplinary action. Disciplinary action may include dismissal and, if the violation is illegal, prosecution.

That policy statement reminds employees, in bold print: **“REMEMBER – IF IN DOUBT, ASK!”**

Two items pertaining to ethics are also posted on Alan Ritchey’s employee bulletin board. The first is a “Notice to Employees.” That notice begins:

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[Alan Ritchey] conduct their business in accordance with the highest ethical standards. We enjoy and want to sustain our reputation as companies that operate ethically and in strict compliance with all laws and regulations. [Alan Ritchey] are committed to such high ethical standards in all areas of its business, especially with respect to their work for the United States Government.

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The notice provided information concerning how employees could report misconduct and assured employees that there would be no retaliation for doing so. The second item on the bulletin board is dated July 28, 2004 and reads:

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For over 40 years, [Alan Ritchey] has conducted its business with the highest ethical and business standards. . . . Alan Ritchey have been, and continue to be, committed to sustaining their reputation as companies that operate ethically and in strict compliance with all laws and regulations. [Alan Ritchey] demand that these principles be adhered to at all levels of the organization, as well as [Alan Ritchey’s] suppliers, contractors and consultants. Unfortunately, [Alan Ritchey] recently discovered that some employees failed to follow the principles demanded of them. Unbeknownst to [Alan Ritchey], a small number of employees made the decision to cut corners when submitting paperwork to the United States Postal Service (USPS) relating to trailer damage claims. [Alan Ritchey] did not condone that behavior and took immediate steps to correct the problem and implement safeguards for the future.

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Because of [Alan Ritchey’s] long-standing relationship with USPS and [Alan Ritchey’s] willingness to cooperate, [Alan Ritchey] agreed to reimburse USPS for every dollar received for trailer damage claims submitted over the last several years, some of which the USPS did not even question. In addition, [Alan Ritchey] entered into a Corporate Integrity Agreement with USPS, agreed to immediate steps to improve its compliance policies and employee accountability, and agreed to implement an Ethics Awareness Training Program. [Alan Ritchey] also agreed to make periodic reports to USPS outlining the actions taken by [Alan Ritchey] in furtherance of its self-governance programs. It is imperative that every employee adhere to the requirements of the Agreement, all laws and regulations and all policies and procedures of [Alan Ritchey]. That being said, I have the utmost confidence that our employees will continue to maintain the high standards set by [Alan Ritchey] and enjoyed for more than 40 years.

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Around that same time that the second item was posted on the bulletin board Rydzewski, human resources director, held ethics training for all employees. She informed employees of the importance of compliance with contract terms and the need for proper documentation. She warned of possible civil and criminal penalties for failing to follow rules and regulations. She emphasized Alan Ritchey’s commitment to perform at the highest levels of integrity and business ethics. Rydzewski pointed out the need for maintaining the integrity of the paperwork completed by the employees and focused a portion of her presentation on practices for timely and accurate completion of documentation, including time entries, cost collection and controls against inaccurate charges.

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As indicated above the termination reports also refer to page 42 of Alan Ritchey's Handbook. That part of the handbook is entitled "Unsatisfactory Performance, Behavior, and Conduct." It gives examples of violations "for which corrective counseling, or other disciplinary action, including termination, may be taken [.]". Those examples include the two cited in the termination and suspension reports.

#### E. Enforcement of Ethics and Other Policies

Concerning terminations, the record shows that in 1999 employee Linda Brown was allowed to resign in lieu of being fired after she filled out a traveler claiming 75 percent of product on a pallet when in fact she completed only 50 percent of the work. The employee from whom Brown took the work was described as "meek and mild." On November 11, 2004, employee Bart RonsHaugen was terminated. His termination report reveals that one of Alan Ritchey's customers complained that lids were not being inspected or processed before they were placed on a pallet. Alan Ritchey then examined a few pallets that RonsHaugen had done and concluded that he had not inspected over 60 percent of the items on the pallet. RonsHaugen then admitted to cheating since the time he started working a month earlier. According to Rydzewski, this case and the one involving Loomis and Tu are the only instances involving violations of Alan Ritchey's ethics code.

Turning to lesser disciplines, on March 23, 2004, employee Madelene Lim received a written warning for inspecting while in the wrong labor code. The warning indicated, "You were inspecting in the material handling code labor code thus inflating your efficiency." On January 10, 2005, employee Tia Somphet also received a written warning while inspecting in the wrong labor code. It indicated, "You were inspecting in the unload labor code thus inflating your efficiency." On January 13, 2005, employee Yolanda Aguilar received a written warning for inspecting while she was labored into a non-measured code. The warning indicated, "You were inspecting in the unload labor code thus inflating your efficiency." Similarly, on January 19, 2005, employee Dung Ho received a verbal warning for being in a non measured code while inspecting. On January 26, 2005, employee Vicki Marble received a written warning. She had been assigned to inspect mailbags but she labored into meeting time while doing so. The result was the she inflated her efficiency by inspecting while in an unmeasured labor code. On December 7, 2005, employees Hong Tu and Thu Nguyen each received a verbal counseling for processing sleeves after they had clocked out for the day. The verbal counselings indicated that doing so "gives an inaccurate account of the employee's efficiency."

Rydzewski reviews all disciplinary measures before they are finalized even though she does not necessarily take part in the investigation of the incident leading to the discipline. Rydzewski testified that she was unaware of any instance where an employee was in an unmeasured labor code and yet performed inspection work so as to meet the inspection efficiency and thereby avoid discipline. She was presented with the written warning given to employee Vickie Marble. Marble's warning indicates that Marble was assigned to inspect bags yet "you were inspecting in a non measured labor code thus inflating your efficiency." Rydzewski explained that she concluded that Markle had done so mistakenly, although nothing on the face of the warning indicated that Markle's actions were an innocent mistake. Later, however, Rydzewski admitted that in applying discipline for employees who inspect while in an unmeasured labor code, the intent of the employee is not a factor. That is, it does not matter if an employee intentionally labored into an unmeasured code while inspecting to inflate her efficiency level and therefore avoid discipline; that employee receives the same level of discipline as an employee who made an unintentional error. Rydzewski's initial testimony that she was unaware of any instance of intentional inflating of efficiency, except for the Loomis incident, flies in the face of the compelling evidence set forth in the preceding paragraph and

undermines her credibility. Rydzewski testified that even if the foregoing instances were intentional, still they were not comparable to Loomis' conduct. She testified:

5 I – well, this –these individuals were not writing their numbers on travelers and other documents that they didn't produce. They weren't taking somebody else's work. They were not creating a subsystem of like quasi management so – if you will – so that they can decide who is going to stay with the facility and get –or who is going to be disciplined within the facility or who is not going to be disciplined within the facility.

10 It seemed obvious to me as Rydzewski was testifying that she was struggling, unsuccessfully, to magnify the differences. Although the Loomis incident and the instances set forth above are not identical, I do not credit Rydzewski's explanation concerning why they are meaningfully different in terms of the level of discipline meted out.

15 Because the number of condemned sleeves is so small compared to serviceable sleeves they may have little impact on overall efficiency; some employees simply put their condemned sleeves on the condemned pallet without indicating their employee number. For example, employee Shari Yelovich credibly testified that she simply placed her condemned sleeves on the condemned pallet without identifying them as hers. She explained that the numbers were so small that it was not worth the effort to fill out the identification. The next employee may place a blank stick-on label to indicate that an earlier employee failed to identify the preceding stack of sleeve, or, the employee may simply put her condemned sleeves with her employee number on top of the stack. The result is that this employee gets credit for the unidentified employee's product. Alan Ritchey is aware of this practice but has not disciplined anyone for this. For example, on one occasion Mary Ambrose was bringing her condemned sleeves to the pallet where supervisors Paul Parmenter and Cary Griffin happened to be standing. Ambrose complained that there was product on the pallet that did not have the employee's number. Parmenter said that he did not care; that Ambrose should just take credit for the unidentified product. Ambrose questioned whether she was supposed to do that, but Cary Griffin confirmed that it was proper to do so. There are two consequences of this practice. First, an employee may have inflated efficiency, albeit only slightly. And second, the employee who claims the greater number of sleeves may be blamed if further inspection reveals that the sleeves were not properly inspected. Indeed, when an employee is identified as not having properly inspected product, the entire pallet is returned to the employee for reinspection. I have considered Parmenter's denial that he made the comments attributed to him by Ambrose. Although Parmenter was generally credible, his demeanor became more hesitant and less convincing when I asked him about the matter; I do not credit him on this issue.

40 Cliff Castaneda worked as a supervisor at Alan Ritchey until August 2004. At times he would inspect product and then give the inspected product to inspectors so that they could get credit for the inspected product. At times unloaders would temporarily run out of product to unload; Castaneda advised those unloaders to inspect product during that down time and give the inspected product to an inspector. This finding is based on Loomis' testimony. Castaneda admitted and employees Deidra Roe and Shari Yelovich confirmed that when unloaders ran out of product to unload, Castaneda encouraged them to inspect product and give the product to the inspectors instead of waiting for more product to arrive. As indicated above, only full pallets of inspected product are counted for efficiency purposes. So when a pallet was not quite finished Castaneda would call over several employees to help complete the pallet so it could be counted; on some occasions the additional employees gave their inspected product to the employee who was trying to complete the pallet. This finding too is based on Loomis' testimony

and current employees Mary Ambrose and Deborah Miceli confirmed Loomis' testimony on this matter.

5 Similarly, on one occasion less than a year before the hearing in this case Mark Pyne, Alan Ritchey's plant manager, asked employee Shari Yelovich, who did not have work to do at that moment, to inspect bags and add them to the pallets so that the pallets would be full. Yelovich did so and her work was credited to other inspectors.

10 From time to time Alan Ritchey held raffles where employees could win prizes of various types. On one occasion the prize was to give the winning employee the inspected work that another employee had performed. These facts are again based on the credible testimony of Loomis and current employee Ursula Poston. I have considered Cliff Castaneda's testimony in this regard. Generally, Castaneda's testimony was straightforward and credible. But when he  
15 was asked whether raffle prizes ever included giving inspected product to another employee Castaneda answered "No, not to my knowledge, no." His demeanor changed while giving this testimony, and I do not credit it.

20 Parmenter admitted that he heard complaints that employees were palletizing work and putting other employees' identification on the work. Parmenter testified that he warned employees that it was something that was not allowed and employees *could* get fired. He also admitted that he never disciplined anyone for this. But his conclusory explanation that he was never able to find out who was giving away inspected work to other employees rings hollow and I do not credit it.

25 I turn now to events that occurred after Loomis and Tu were fired. One day in about September 2006, employee Oleg Momotok had been inspecting trays but he labored into unloading when the inspectors ran out of trays to inspect. After more trays were unloaded and concerned that he had not met his efficiency level while inspecting and that he therefore would  
30 therefore receive a written warning, Momotok inspected a full pallet of trays while still in the unloading labor code. Sam Griffin asked Momotok what he was doing and Momotok told him that he was inspecting. Sam Griffin told him to take apart the pallet, put the trays on the inspection belt, and not to do that anymore. Momotok was not disciplined. Momotok too is known by management to be a Beck objector. This testimony is based on Momotok's credible  
35 testimony; Sam Griffin did not specifically refute this incident.

40 On December 11, 2006, a number of employees were inspecting bags when a bit of a ruckus occurred. Gayle May, an inspector, came around from her work area and went to the unloader's area. She unloaded some bags and took them over to the work station of Oleg Momotok. Standing opposite of Momotok's work station, May began talking to him and inspecting bags as she did so. After a number of bags had accumulated, Momotok took them  
45 and placed them on his pallet without inspecting them again. This continued as the other employees on the inspection line began talking among themselves about how Loomis had been fired for the same thing. Employee Mary Ambrose noticed Supervisor Sam Griffin nearby and told him what May was doing. Sam Griffin could see what May was doing but he asked Ambrose if she was sure May was inspecting bags and Ambrose answered that she was sure. Sam Griffin then just left the work area and Ambrose returned to work. Later Sam Griffin  
50 returned and again observed May inspecting the bags and giving them to Momotok. This time Griffin spoke to May who then headed toward the front office. As she did so, May commented to employee and union steward Adam Hoyt that she had reached her efficiency level for that day. Alan Ritchey interviewed a number of employees concerning the May/Momotok incident. Ambrose was called into the conference room where Nathan Lubber, Alan Ritchey's quality data manager, and Sam Griffin were waiting. Griffin asked Ambrose what she had observed and

Ambrose gave a description. Griffin asked if she was sure that May and Momotok were not simply combining their inspected product on a single pallet, and Ambrose said she was sure they were not doing that. Thu Trong Nguyen was also inspecting bags that day; he is Hong Tu's husband. The next day he was summoned to tell Sam Griffin and Rydzewski what had occurred the day before. He told them that May was inspecting bags for Momotok: He demonstrated for them what he saw May doing. Nguyen volunteered to Rydzewski that under Castaneda's supervision employees were encouraged to help each other but after Loomis and Tu were fired the employees assumed those rules had changed. Rydzewski asked whether he saw Momotok re-inspect the bags and he said that he did not see that. He also explained that he did not see Momotok place the bags that May had inspected on his pallet; he said only that when he looked that way again the stack of inspected bags were gone. Hoyt also witnessed the incident with Sam Griffin and later spoke with Griffin about it. Sam Griffin claimed that what he saw May and Momotok doing was combining their inspected product on a single pallet. Hoyt protested that this was not how employees combined pallets, that May was standing in the unloader's area and not the area where the pallets are located. I note that there is no evidence from anyone else, including Momotok, that May was placing work that she had inspected on the same pallet that Momotok was using and identifying her work separately from his. Finally, May is well known among the employees and management as being anti-union and a Beck objector; she has actively informed employees of their Beck rights. When she was interviewed she admitted "There were a lot of flat bags in her work station on the other side of the belt, so she brought them over [and] put them in Oleg's bins." There is no explanation as to why the investigators did not clarify whether the bags that May brought from her work station had already been inspected.

The foregoing facts are based on a composite of the credible testimony of employees Mary Ambrose, Thu Trong Nguyen, Deidra Roe, Carol Magalia, Deborah Miceli, and Adam Hoyt. I have considered the testimony of Oleg Momotok that he re-inspected each bag that May put in his bin. I conclude Momotok was not fully credible as he appeared to downplay May's activity near his workstation, especially in initially answering my questions about this incident; his demeanor revealed uneasiness while answering those questions. I also note that none of the other witnesses corroborate Momotok's testimony that he re-inspected the bags. I have considered Sam Griffin's testimony that after he received the complaint that May was inspecting bags for Momotok he observed May and Momotok and concluded that May "was doing like all the rest of the unloaders which was unloading mailbags and flattening them out for the inspectors." He claimed that May was not processing the bags one by one, as the other witnesses had described, but instead was flattening the bags in groups. This is important because individually handling the bags by waving them in the air (my description of what the other witnesses physically demonstrated at the trial) is consistent with inspecting them. But Griffin's testimony in this regards is corroborated by no one. Moreover, conduct such as described by Sam Griffin would not likely cause the turmoil among other employees who viewed May's conduct. I do not credit Griffin's testimony. Moreover, Sam Griffin prepared a summary of the interviews of employees and then submitted the summary to his superiors. Significantly, Nathan Luber added the following sentence to the interviews of Mary Ambrose and Carol Magadia. Those two sentences were: "She said she saw Oleg grab handfuls of bags out of the bin that Gayle had inspected (not individual bags) and put them on the stack of inspected bags without looking at them." I note that Luber had not heretofore been a participant in the investigatory interviews involved in this case. I conclude that this was not a mere inadvertent error on Sam Griffin's part but rather was an effort to sanitize the evidence against May so as to differentiate the May/Momotok case from the Loomis discharge. This seriously undermines Sam Griffin's testimony. Moreover, this incident causes me to examine carefully other investigative notes prepared by Alan Ritchey for fear that they might likewise be tailored to support a position rather than simply contain factual information. Finally, Sam Griffin did not

deny Hoyt's testimony that Griffin originally stated to him that Griffin saw May and Momotok combining pallets; it therefore apparent that Griffin was clutching for an innocent explanation of what he saw May and Momotok doing.

5           On December 15 May received a verbal counseling. That counseling indicated that on December 11 May:

10           [L]eft your workstation on the mailbag line and began to unload bags and talk to another employee while he was inspecting mailbags. You also failed to clock into the proper labor code.

....

All employees are required to get supervisor approval before changing positions on the production floor, and to labor into the correct labor code at all times.

15           Momotok was not disciplined. Rydzewski testified about why Alan Ritchey decided not to fire May and Momotok. She stated Sam Griffin claimed that as he watched them he observed that Momotok inspected the product before he put the product on his pallet:

20           And the individuals that were closest to him, Baby Baljinder, Ros Choun, Thu Nguyen, and that those groups also had agreed that [Momotok] had inspected -- that he had inspected his product and put it on the [pallet] and that [May] was talking and focusing more on talking and not on -- on -- just looking busy.

25           Yet the notes taken by Sam Griffin and reviewed by Rydzewski of the interview with Baljinder indicate that Baljinder simply stated that she "saw [May] unloading bags and that it all she saw. She didn't see [May] inspect any of [Momotok's] bags." Contrary to Rydzewski's testimony, there is no mention that Baljinder affirmatively saw Momotok inspect the product handled by May. Indeed, Rydzewski's own notes of the interview do not record any assertion that Baljinder saw Momotok inspect the product that May had handled. Likewise, the notes Sam Griffin took  
30           of the interview with Ros Choun make no mention that Choun had observed Momotok inspect the product that May had handled. Those same notes of the interview with Thu Nguyen indicate, "When asked if [Momotok] inspected the bags that [May] had inspected, he didn't know." This flatly contradicts Rydzewski's testimony. Indeed, even Sam Griffin, who testified that he observed May and Momotok in action, did not claim that he saw Momotok inspect each  
35           bag that May had processed. I conclude Rydzewski created this testimony in a transparent effort to distinguish the Loomis case from the May/Momotok incident; I do not credit this explanation.

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### III. Analysis

#### A. Section 8(a)(3) and (1) Allegations

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In cases such as this one that involve allegations that employees were terminated for union or other protected, concerted activity the Board and Courts apply the shifting burden analysis described in *Wright Line*, 251 NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied.* 455 U.S. 989 (1982); *NLRB v. Transportation Management*, 462 U.S. 393 (1983). Typically, the General Counsel must prove by a preponderance of the evidence that the employees engaged in union or other protected, concerted activities, the employer knew about those activities, and the employer was hostile toward those activities. Once the General Counsel meets his burden the employer may avoid liability by showing by a preponderance of the evidence that it would have terminated the employees even if they had not engaged in the union and protected concerted activities. I also apply *Meyers Industries*, 268 NLRB 493 (1984), *rev'd. sub nom.* Prill v. NLRB, 755 F. 2d. 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985), *Meyers Industries*, 281 NLRB 882 (1986), *aff'd. sub nom.* Prill v. NLRB, 835 F. 2d. 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) in assessing the protected concerted activities.

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As the facts show in more detail above, Loomis has a history of protected concerted activities and then union activities and Alan Ritchey has reacted with hostility towards those activities. Around Christmas 2004 Loomis concertedly complained to Pyne about how degrading it was for employees to have the time they spent using the restroom recorded by Alan Ritchey. In January 2005 Loomis protested Alan Ritchey's breaktime policy and efficiency levels in front of a group of employees in an effort to gain employee support for her views. Many employees openly applauded Loomis' remarks. This activity is protected by Section 7 of the Act; nothing Loomis did or that Alan Ritchey suspected she did, removed her conduct from the Act's protection. Pyne and Rydzewski reacted by telling Loomis that she should bring her criticisms directly to them instead of voicing them in front of other employees. She was further instructed not to discuss the meeting that they had with other employees. By these remarks Alan Ritchey displayed hostility to Loomis' protected, concerted activity.

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At a meeting on March 9, 2005, Pyne brought up the Union and said that the employees did not need a union. Pyne said that Alan Ritchey had an open-door policy and that it wasn't going to change anything by getting the Union in there. Pyne also said that the employees' wages and benefits would not change; they were non-negotiable. He said that they were set by the Department of Labor and there would be no negotiation about them. The next day Alan Ritchey was notified by letter that Loomis was one of 22 union organizers. By telling employees in effect that their support for the Union would be futile, Alan Ritchey revealed its hostility to the Union activities of its employees. I also consider the fact that Alan Ritchey opposed the unionization of its workforce. This fact is clearly relevant in determining whether an employer's conduct is improperly motivated; an employer that does not oppose unionization is less likely to be motivated by the union activities of its employees than one who opposed unionization. Of course, if the employer conducts its antiunion campaign within the confines of the law the weight of the evidence of antiunion animus is less than if an employer violates the law as part of its antiunion campaign, but that is a matter of the weight to be accorded the evidence and not its relevance. In its brief Alan Ritchey argues:

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In establishing a *prima facie* case, it is legally insufficient for the General Counsel to argue that a respondent demonstrates antiunion motivation simply because it engages in an antiunion campaign. In *Basic Industries, Inc.*, 348 NLRB No. 89 at pg. 1, footnote 5 (2006), the Board rejected this argument because general

animus toward unionization is not unlawful. Instead, “[w]hat is unlawful is an employer’s active animus toward the Section 7 activities of its employees to freely a collective-bargaining representative.

5 But the Board said no such thing. Rather, those comments are clearly attributed to a single Board member, and I am required to follow Board law and not minority opinions. More specifically, the view that the enactment of Section 8(c) of the Act went beyond protecting the First Amendment Rights of employers to express their views on unionization but also forbid the use of those views when otherwise relevant in assessing motivation continues to be a minority view. I therefore also consider the fact that Pyne approached Loomis and reminded her that Alan Ritchey had an open-door policy and that Loomis could come in and talk to him anytime she wanted to. Pyne referred to the incident with Rydzewski, described above, where Loomis began crying. Pyne then asked “do you really want a third party in here listening to your troubles?” Loomis replied that during that meeting with Pyne and Rydzewski she felt intimidated and would have liked to have had a third party present to hear what was going on. Pyne said that the employees did not need a union there and the employees did not appreciate what he had done for them. In sum, in this conversation Pyne referred to both Loomis protected concerted activity and to her support for the Union, support that Loomis reaffirmed despite Pyne pressure to the contrary. Indeed, Pyne followed Loomis to time clock as he continued to attempt to persuade Loomis to abandon her support for the Union. Alan Ritchey therefore knew of Loomis’ support for the Union and, as a recognized leader among the employees targeted her with its antiunion views. The content of those views as well as the manner in which those views were delivered display a measure of hostility towards Loomis’ support for the Union. The fact that Loomis was not persuaded could not have been easily forgotten by Pyne.

25 In her appraisal dated March 14, less that two months before her discharge, Loomis’ supervisors described her as “A natural leader; has potential to inspire co-workers by example” and “Laraine is not shy about voicing her opinion, at times can be too harsh. This shows that Loomis’ superiors had not forgotten Loomis’ leadership ability among the employees and continued to show resentment at the manner in which Loomis voiced her opinion. So far as this record shows, the resentment includes what I have identified as concerted activity by Loomis that is protected from under Section 7 of the Act.

35 During the time immediately preceding Loomis’ termination the operations at the facility were in turmoil as a result of the changes flowing from the settlement of the charges filed by the Union. It was obvious that Pyne was not pleased with the state of affairs that came about as a result of the charges filed by the Union. Alan Ritchey’s supervisor Petty also warned Loomis to watch her back. In context, I conclude Petty meant that something nefarious was being planned by Alan Ritchey for Loomis. Moreover, at the time of the discharges Alan Ritchey and the Union were still bargaining for an initial contract and as a member of the Union’s negotiating team Loomis was continuing to openly support the Union.

45 Based on the foregoing I conclude that the General Counsel has established the elements of union and protected concerted activity, knowledge by the Alan Ritchey of that activity, and animus by Alan Ritchey towards that activity.

50 In addition, as the General Counsel points out in her brief, a finding of disparate treatment would serve to strengthen the case for the unlawful motivation for Loomis’ termination. I turn now to that issue. I have described above how a number of employees received verbal or written warnings for inspecting products while they were labored into a nonmeasured labor code. I have also described how these warnings were meted out regardless of whether the employee had willfully done so. While this conduct is not exactly the

5 same as the conduct for which Loomis was terminated, I have discredited the exaggerated explanation of how they meaningfully differ. To the contrary, employees willfully inspecting in the wrong labor code necessarily entails falsification of records in an effort to inflate efficiency level and thereby possibly escape discipline. Significantly, antiunion employee Momotok was caught doing exactly this but received no discipline whatsoever.

10 It should be recalled that Loomis was fired for giving away condemned sleeves. It is therefore appropriate to examine how Alan Ritchey handles condemned sleeves in particular. In his brief the General Counsel colorfully but aptly describes the importance of condemned sleeves in the Alan Ritchey's efficiency-measuring program:

15 If pallets of serviceable sleeves are like hundred dollar bills, the condemned sleeves are pennies. The relative unimportance of condemned sleeves is clearly reflected by the lack of procedural safeguards attached to the integrity of any data related to them, and the general attitude that tracking condemned sleeves, like pennies, is more trouble than it is worth.

20 As described above, some employees simply place their condemned sleeves on the pallet without claiming credit for them and other employees claimed credit for having processed more condemned sleeves than they really inspected. I have also set forth above how Alan Ritchey encouraged employees to do so. This practice too, while not identical to Loomis' conduct, involves falsification of records and allows employees willing to accept more condemned sleeves to inflate their efficiency level.

25 Supervisor Castaneda inspected product and gave the inspected product to employees. He encouraged idle unloaders to do the same. He encouraged inspectors to do the same in order to complete a pallet; on at least one occasion Pyne did the same. On one occasion Alan Ritchey raffled away the inspected work of one employee to another. Sam Griffin specifically allowed Loomis to give away her work to another employee in January after Loomis did what the Ethics Policy advised: Ask. These all involved falsification of records and inflated efficiency levels.

30 Most revealing is the fact that when May began openly inspecting for Momotok, Alan Ritchey first attempted to redefine the reality of the situation and then handed May only minor discipline; Loomis on the other hand was fired. May and Momotok were antiunion, Loomis was prounion.

40 These instances in totality show clear disparity of how Alan Ritchey's handled Loomis' conduct compared to similar conduct engaged in other employees. This pattern contributes to the General Counsel's case that Loomis was unlawfully terminated.

45 In its brief Alan Ritchey argues that the timing of the discharges undermines a finding that the General Counsel has met his burden of proof. To be sure, much of Loomis' concerted and union activity occurred over a year before her termination; had that been the totality of the evidence the timing of her discharge would have undercut the allegation that it was unlawfully motivated. But the evidence shows that Loomis continued to display her support for the Union, in defiance of Alan Ritchey's effort to persuade her personally otherwise, by serving on the Union's bargaining committee. The impact of the settlement of the charges filed by the Union triggered an angry reaction from Pyne. Loomis' most recent appraisal revealed that Alan Ritchey had neither forgotten nor forgiven Loomis' earlier protected concerted activity. On balance, the timing of the discharge does not undermine the strength of the General Counsel's case. Instead, it contributes, if only meagerly, to that case.

For the foregoing reasons I conclude that the General Counsel has met his initial burden under *Wright Line*.

5 I turn now to examine whether Alan Ritchey has shown it would have fired Loomis even if she had not support the Union or worked in concert with other employees to protest working conditions. My finding of disparate treatment described above largely disposes of this issue. However, other matters warrant discussion. Alan Ritchey points to the 1999 case of Brown, who was allowed to resign in lieu of being fired after she filled out a traveler claiming 75 percent of product on a pallet when in fact she completed only 50 percent of the work. The Brown case was one where an employee “stole” the work of another case. Loomis did not “steal” any work. Alan Ritchey also points to the case of RonsHaugen who was terminated on November 11, 2004, because he had not inspected over 60 percent of the items on the pallet. RonsHaugen then admitted to cheating since the time he started working a month earlier. Loomis, on the other hand, inspected all the work. Alan Ritchey correctly points out that its written policies strictly forbid the falsification of documents. However, as described above in detail the actual practice on the floor is not so strict. Moreover, the written policies themselves indicate that violations *may*, not *will*, result in termination.

20 I conclude that Alan Ritchey has not shown that it would have fired Loomis even if she had not engaged in union and other concerted activity. By discharging Loomis because she engaged in union and protected concerted activity, Alan Ritchey violated Section 8(a)(1) and (3) of the Act.

25 Tu’s discharge and Yelovich’s suspension were part and parcel of Alan Ritchey’s unlawful termination of Loomis. By discharging Tu and suspending Yelovich in an effort to camouflage the unlawful discharge of Loomis, Alan Ritchey violated Section 8(a)(3) and (1). *L.C. Cassidy & Son*, 272 NLRB 123, 131 (1984).

### 30 B. Section 8(a)(5) and (1) Allegations

Citing *NLRB v. Katz*, 369 U.S. 736 (1998), the General Counsel alleges that Alan Ritchey violated Section 8(a)(5) and (1) by implementing a new policy under which sharing work between employees became a basis for termination as shown by the discharges of Loomis and Tu. In his brief, however, the General Counsel narrows the complaint allegation by arguing that before the terminations there was no policy at Alan Ritchey concerning giving away *condemned sleeves*. Indeed, I have pointed out above how Alan Ritchey was indifferent to whether or not the inspectors who inspected condemned sleeves actually got credit for them. But I have also been careful to point out above Alan Ritchey has disciplined, but not discharged, employees in the past for similar conduct. Importantly, there is no evidence that Alan Ritchey has changed its past practice concerning condemned sleeves other than seizing on the exchange of condemned sleeves between Loomis and Tu as a pretext to unlawfully fire them. Simply because some employees are unlawfully fired in a case involving disparate treatment does not mean that an employer has also established a new policy concerning the reasons given for the discharges. Moreover, the record shows that before Alan Ritchey fired Loomis and Tu and suspended Yelovich, it gave notice to the Union of its intent to do so, met and bargaining with the Union about the matter. There is no evidence that the Union requested to bargain over any new policy as opposed to bargaining only over the level of discipline each employee should receive. I shall dismiss this allegation of the complaint.

50

## Conclusions of Law

5 By discharging employees Laraine Loomis and Hong Tu and suspending Shari Yelovich because Loomis engaged in union and protected, concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(3) and (1) and Section 2(6) and (7) of the Act.

## Remedy

10 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged employees Loomis and Tu, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent having discriminatorily suspended Yelovich for one day, it must make her whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

20 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

## ORDER

25 The Respondent, Alan Ritchey, Inc., of Auburn, Washington, its officers, agents, successors, and assigns, shall

- 30 1. Cease and desist from
- 35 (a) Discharging or otherwise discriminating against any employee for supporting Teamsters Local 117, affiliated with International Brotherhood of Teamsters, or any other union.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 40 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 45 (a) Within 14 days from the date of the Board's Order, offer Laraine Loomis and Hong Tu full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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50 <sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Loomis, Tu, and Shari Yelovich whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

5 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and suspension, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and suspension will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Auburn, Washington, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice,<sup>9</sup> on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 2006.

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

Dated, Washington, D.C., April 30, 2007.

35

\_\_\_\_\_  
William G. Kocol  
Administrative Law Judge

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<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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<sup>9</sup> In her brief, counsel for the General Counsel requests that Alan Ritchey be required to post notices in English, Spanish, Vietnamese, Russian, and Cambodian. Although the record shows that Alan Ritchey employs a diverse, multiethnic workforce the record is insufficient to show whether or not the employees are able to read English. I shall leave for resolution in the compliance stage of these proceedings the issue of what other languages, if any, the notice should be posted.

50

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting TEAMSTERS LOCAL 117, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Laraine Loomis and Hong Tu full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Laraine Loomis, Hong Tu, and Shari Yelovich whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Laraine Loomis and Hong Tu, and the suspension of Shari Yelovich and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

Alan Ritchey, Inc.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

915 2nd Avenue, Federal Building, Room 2948  
Seattle, Washington 98174-1078  
Hours: 8:15 a.m. to 4:45 p.m.  
206-220-6300.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.