JD(ATL)–35–07
Huntsville, AL

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

MESKER DOOR, INC.

and **CASES 10–CA–35863**
10–CA–36270
UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC **10–CA–36422**

and **10–CA–35938**
10–CA–36284
10–CA–36372

ROLLIE POWELL, AN INDIVIDUAL

and **10–CA–36363**

CECIL HERREN, AN INDIVIDUAL

John D. Doyle, Jr., Esq., for the General Counsel
Mr. Morris Anderson, for the Charging Party
William F. Kaspers, Esq., for the Respondent

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: In this case, the General Counsel alleges that Respondent violated Section 8(a)(5) by withdrawing recognition from the Union after committing unremedied unfair labor practices. Although the record proves that Respondent committed some of the violations alleged, it fails to provide specific proof of a causal relationship between the unfair labor practices and the Union's loss of majority status. Therefore, I conclude that Respondent lawfully withdrew recognition.

Procedural History

This case began on September 9, 2005, when the United Steelworkers of America, AFL–CIO–CLC (the "Union") filed an unfair labor practice charge against Mesker Door, Inc. (the

"Respondent"). The National Labor Relations Board (the "Board") docketed this charge as Case 10–CA–35863.

On October 24, 2005, Rollie Powell, an Individual ("Charging Party Powell") filed the initial charge in Case 10–CA–35938. Powell amended this charge on December 12, 2005.

On November 30, 2005, the Regional Director for Region 10 of the Board issued a Complaint and Notice of Hearing in Case 10–CA–35863. In doing so, the Regional Director acted for, and with authority delegated by, the Board's General Counsel (the "General Counsel" or the "government").

On December 15, 2005, the Regional Director issued an Order Consolidating Cases (10–CA–35863 and 10–CA–35938) and Consolidated Complaint. On December 29, 2005, the Board received Respondent's timely Answer. Also on December 29, 2005, the Regional Director issued a Notice of Hearing scheduling this matter for hearing on February 6, 2006. However, by Order dated January 26, 2006, the Regional Director postponed the hearing indefinitely.

On May 16, 2006, the Union filed a charge against Respondent in Case 10–CA–36270.

On May 26, 2006, Charging Party Powell filed a charge against Respondent in Case 10–CA–36284.

On July 14, 2006, Cecil Herren, an Individual ("Charging Party Herren") filed a charge against Respondent in Case 10–CA–36363. Herren amended this charge on September 15, 2006.

On July 19, 2006, Charging Party Powell filed a charge against Respondent in Case 10–CA–36372.

On August 18, 2006, the Union filed a charge against Respondent in Case 10–CA–36422.

On September 21, 2006, the Regional Director issued an Order Consolidating Cases and Amended Consolidated Complaint in Cases 10–CA–35863, 10–CA–35938, 10–CA–36372 and 10–CA–36363. Respondent filed a timely Answer.

On November 22, 2006, the Acting Regional Director issued an Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing in Cases 10–CA–35863, 10–CA–35938, 10–CA–36284, 10–CA–36363, 10–CA–36372, 10–CA–36270, and 10–CA–36422.

On December 6, 2006, the Regional Director issued an Order Consolidating Cases and Third Amended Consolidated Complaint and Notice of Hearing in Cases 10–CA–35863, 10–CA–35938, 10–CA–36284, 10–CA–36363, 10–CA–36372, 10–CA–36270, and 10–CA–36422. For brevity, this pleading will be referred to as the "Complaint." Respondent filed a timely Answer (the "Answer") dated December 14, 2006.

On January 3, 2007, the hearing in this matter opened before me in Huntsville, Alabama. The parties presented evidence on that date on January 4 and 5, 2007, and on January 8 through 12, 2007.

On February 20, 2007, counsel presented oral argument.

Admitted Allegations

Based on admissions in Respondent's Answer and on stipulations received during the hearing, I make the findings of fact discussed in this section of the Decision.

Respondent has admitted it received the various unfair labor practice charges as alleged in the Complaint but, for lack of knowledge, has not admitted when the charging parties filed those charges with the Board. Based on the presumption of administrative regularity, and in the absence of any evidence to the contrary, I find that the charging parties filed the charges on the dates alleged. Further, I find that the General Counsel has proven the allegations set forth in Complaint paragraphs 1(a) through 1(i).

Based on Respondent's admission, I find that at all material times Respondent, an Oklahoma corporation with an office and facility located in Huntsville, Alabama, has been engaged in the manufacture of metal doors, frames and accessories, as alleged in Complaint paragraph 2.

Based on Respondent's admission, I find that during the 12–month period preceding issuance of the Complaint, Respondent sold and shipped finished goods valued in excess of $50,000 directly to customers located outside the State of Alabama, as alleged in Complaint paragraph 3.

Although Respondent denied the legal conclusion alleged in Complaint paragraph 4, its Answer stated that "Respondent is willing to admit all of the facts upon which the legal conclusion could be based." Moreover, as described above, Respondent has admitted the facts alleged in Complaint paragraphs 2 and 3. Based on these facts, I conclude that at all material times, Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Moreover, based on Respondent's Answer and a stipulation during the hearing, I find that the following persons were, during the material time period, Respondent's supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act, respectively: Steven C. Frates, Vice President; Michael Torres, both in his present capacity of marketing and customer relations manager and in his former capacity as plant manager; George Roth, Plant Manager; James Smith, Accounting Manager; Karen Temple, Assistant to the Comptroller; Raymond Duncan, Frame Line Supervisor.

Although Respondent's Answer denied the legal conclusion that the Union was a labor organization, it further stated that "Respondent is willing to admit all of the facts necessary to

draw the legal conclusion alleged in paragraph 5." Moreover, Respondent's Answer admitted that pursuant to a secret ballot election conducted March 10, 2005, under the supervision of the Regional Director of Region 10 of the National Labor Relations Board, in Case 10–RC–15502, the Union was certified by the Board on March 22, 2005 as the exclusive collective bargaining representative of the employees in a unit described in Complaint paragraph 7. Accordingly, I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent's Answer admitted "all of the facts upon which a conclusion could be drawn" that the unit described in Complaint paragraph 7 was an appropriate unit for collective bargaining, within the meaning of Section 9(b), during the time period March 10, 2005 (the date of the Board–conducted election) to May 8, 2006 (the date Respondent withdrew recognition). Although Respondent has asserted that the Union had lost the support of a majority of unit employees on or before May 8, 2006, such a loss of majority support would not, in itself, make the unit inappropriate.

Based on the Board's certification in Case 10–RC–15502, as well as the admissions in Respondent's Answer, I conclude that at all material times, the following unit of Respondent's employees constituted an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full–time and regular part–time production and maintenance employees employed by the Employer at its Huntsville, Alabama facility, including all welding employees, quality assurance employees, shipping and receiving employees and warehouse employees, but excluding all office clerical employees, technical employees, professional employees, guards, and supervisors as defined by the Act.

Based upon the admissions in Respondent's Answer, I further find that during the time period March 22, 2005 to May 8, 2006, the Union was the exclusive representative, within the meaning of Section 9(a) of the Act, of the employees in the unit described above. Whether the Union continued to enjoy that status after May 8, 2006, as alleged in Complaint paragraph 8, is a contested issue which will be examined later in this Decision.

Respondent has admitted, and I find, that it withdrew recognition from the Union on May 8, 2006, as alleged in Complaint paragraph 20.

Based upon Respondent's admission, I find that on June 8, 2005, it suspended employee Anthony Lyles for one day, as alleged in Complaint paragraph 16(a). Also based upon Respondent's admission, I find that on October 13, 2005, it imposed on employee Rollie Powell a one–day suspension, as alleged in Complaint paragraph 16(c).

Additionally, based on Respondent's Answer, I find that on June 21, 2006, it discharged employee Cecil Herren, as alleged in Complaint paragraph 16(d).

Further, based on Respondent's Answer I find that on July 12, 2006, it imposed a 2–day suspension on employee Rollie Powell, as alleged in Complaint paragraph 16(e); that on July 14, 2006, it reassigned Rollie Powell to different duties, as alleged in Complaint paragraph 16(f); resulting in a pay cut, as alleged in Complaint paragraph 16(g).

Respondent objected that the allegations in Complaint paragraph 21 were irrelevant, but nonetheless admitted them. Based on Respondent's admissions, I find that on about May 15, 2006, Respondent implemented certain changes to the wage rates of employees in the bargaining unit described above.

Respondent similarly objected to the relevance of the allegations raised by Complaint paragraph 22, but admitted them. Accordingly, I find that on or about June 5, 2006, the Respondent implemented certain changes in its points and attendance system applicable to employees in the bargaining unit, and that such changes pertained to the method and rate by which employees "earned back" attendance points assessed to them, the number of allowable points, and the cap on the number of points that could be "earned back" under the system.

Complaint paragraph 23 alleged that in about July 2006, Respondent implemented a change to the rules pursuant to which it calculated and determined whether to pay incentive bonuses to bargaining unit employees. Respondent's Answer objected to the relevance of this allegation, but subject to that objection, admitted that "around August 2006, the Respondent changed its incentive bonus system so that eligibility for a bonus now depends upon productivity and profitability." Based on this admission, I find that Respondent did change its rules regarding the payment of incentive bonuses to bargaining unit employees, but did so in August 2006 rather than in July 2006.

Complaint paragraph 25 alleges that Respondent unilaterally engaged in the acts and conduct described in Complaint paragraphs 21 through 23, inclusive, without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and the effects of such acts and conduct. Respondent objected to the relevance of this allegation on the basis that it had lawfully withdrawn recognition from the Union. Its Answer further stated as follows: "Subject to the Respondent's irrelevancy objection, Respondent admits that it unilaterally implemented any changes made to the wages, hours, and working conditions of its production, maintenance and warehouse employees since the Respondent withdrew recognition of the Union on May 8, 2006. However, the Respondent denies the allegations set forth in paragraph 25. . .since prior notice to the Union and an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees was afforded to the Union between March 22, 2005 and May 8, 2006, with respect to changes in wage rates, the attendance point system, and modification of the incentive bonus system to a bonus system based upon productivity and profitability."

Based on Respondent's admission, I find that it unilaterally implemented the changes described in Complaint paragraphs 21 through 23. Whether it breached a duty to bargain in good faith with the Union depends on whether it acted lawfully when it withdrew recognition from the Union. That issue will be discussed later in this Decision.

Disputed Issues

Section 8(a)(1) Allegations

Complaint Paragraphs 10 and 11

Complaint paragraph 10 alleges that on about March 9, 2005, Respondent, by Michael Torres, at Respondent's facility, reiterated an overly broad verbal admonition to employees not to discuss the Respondent's handling of requests for leave under the Family and Medical Leave Act, the charging of vacation days in such circumstances, and other terms and conditions of employment. Complaint paragraph 26 alleges that this conduct violated Section 8(a)(1) of the Act. Respondent has denied both allegations.

Complaint paragraph 11 alleges that on or about March 9, 2005, Respondent, by Michael Torres, at Respondent's facility, threatened to discipline its employees if they tracked absences or engaged in discussions regarding the Family and Medical Leave Act, vacations, and other terms and conditions of employment. Complaint paragraph 26 alleges that this conduct violated Section 8(a)(1) of the Act. Respondent has denied both allegations.

The conduct described in Complaint paragraphs 10 and 11 allegedly took place the day before the Board conducted the secret ballot election which the Union won. Michael Torres, who was plant manager at the time, testified about a conversation he had on that date with employee Janice Medlock.

Torres explained that previously, he had received complaints that Medlock was "keeping up with people's absences in the plant." On one occasion before March 9, 2005, Torres had spoken with Medlock about this matter telling her that other people's absences really were not her concern and that she "ought to keep working."

After receiving another similar complaint, Torres spoke again with Medlock, this time on March 9, 2005. Although Medlock's immediate supervisor, Billy Ray McFall, was present during this discussion, neither McFall nor Medlock testified. Torres gave the only testimony concerning this matter, but the record also includes a note describing the conversation.

(Procedurally, this exhibit came into the record in a somewhat unusual manner. Although the General Counsel offered this document while presenting the government's case in chief, it is marked Respondent's Exhibit 2. Both the General Counsel and Respondent agreed to its admission on this basis and I received it without objection. It already was in evidence when, after the General Counsel rested, Respondent moved to dismiss the allegations raised by Complaint paragraphs 10 and 11 for want of proof. Based in part on this evidence, I denied the motion.)

The date "3/9/05" appears at the top of Respondent's Exhibit 2 and the name "Mike Torres" appears at the bottom. It states, in its entirety, as follows:

> Pat Schnitzmeir heard Janice talking to Charlotte Washington about keeping up with everyone's days missed. Pat was upset about it and brought it to Karen Temple's attention. Karen told me about it.
>
> On the previous Friday (March 4th), I had talked to Janice about keeping up with everyone's absences. She said she was doing it for herself. I told [her] that it wasn't necessary and we treated everyone equally. I told her that going around talking to people about FMLA, vacations, etc. could jeopardize her job. She assured me that she wasn't talking to anyone.
>
> I then talked to Janice Medlock with Billy Ray McFall present. I told her once again that I wasn't sure why she was doing this. I also told her that last week she had said that this was something that she was keeping for her own personal use. I told her that this was the last time I wanted to hear from another employee that she was keeping records on them. If it happened again she would be disciplined and receive up to a 1–day suspension.

Although Torres testified that during this conversation with Medlock, there was no mention either of the Family Medical Leave Act (FMLA) or of employees' vacations, the March 9, 2005 note, quoted above, specifically refers to both. Based on the note, I conclude that Torres did mention both.

To support its argument that Torres' comments to Medlock violated Section 8(a)(1) of the Act, the government cites *Triana Industries, Inc.*, 245 NLRB 1258 (1979), *Scientific–Atlanta, Inc.*, 278 NLRB 622 (1986), and *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). In these case, the Board found that the respondents had committed unfair labor practices by prohibiting their employees from discussing their wages. In *Triana Industries*, the Board stated

> Section 7, which grants employees the unfettered right to engage in concerted activities for mutual aid and protection, encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment. Respondent's statement, by directing employees not to engage in such activity (and thus implying that the Employer does not look with favor upon employees who engage in such activity) clearly tends to inhibit employees in the exercise of their Section 7 rights.

245 NLRB at 1258. Just as wage rates constitute terms and conditions of employment, so do vacation days and FMLA leave. More precisely, the way an employer handles employee requests for such leave significantly affects working conditions. Logically, a rule restricting the discussion of these terms of employment interferes with the exercise of Section 7 rights just as much as a rule forbidding employees from talking about wages.

In determining whether a statement unlawfully interferes with the exercise of Section 7 rights, the Board does not consider the intent of the speaker or the reaction of the particular listener. Rather, the Board "applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights." *Scripps Memorial Hospital Encinitas*, 347

NLRB No. 4 (May 15, 2006), citing *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). Therefore, although I find that Torres did not intend to interfere with the exercise of Section 7 rights, that innocence does not immunize his remarks.

Torres had received complaints from employees made uncomfortable by Medlock's unexplained watchfulness. Following up on those complaints, Torres necessarily would focus on Medlock's reported practice of placing other workers under a kind of "surveillance," rather than on any communication Medlock might have with other employees concerning the way Respondent administered its leave policy.

Moreover, the record does not indicate that Medlock did or said anything to indicate she was keeping track of employees' leave so that she could discuss this working condition with them. To the contrary, Medlock told Torres that she wasn't talking to anyone about this matter. Thus, Torres had little reason to view the warning he gave Medlock as a restraint on employee discussions about working conditions.

Therefore, if establishing an 8(a)(1) violation required evidence of unlawful intent, I would recommend dismissal of these allegations. However, Torres' statements to Medlock must be judged not on their intended purpose but rather on the effect these statements likely would have on the exercise of Section 7 rights. By analogy, a rock slide is innocent of intent, yet it impedes traffic just as much as a roadblock.

However, in one limited respect, Torres' intent does have some relevance. In determining whether a particular statement interferes with the exercise of Section 7 rights, the Board considers the statement in its total context. When a speaker's unlawful intent reasonably would be obvious to the listener, the presence of such animus certainly affects the message communicated by the words. Ambiguous words may take on a chilling meaning when spoken by someone openly hostile to protected activities. Here, the converse may be argued, that Torres' motive was so obvious that a listener reasonably would not understand his words to prohibit discussion protected by Section 7.

Whatever force such an argument might have in other circumstances, it must be rejected here. Torres told Medlock "that going around talking to people about FMLA, vacations, etc. could jeopardize her job." That statement is not ambiguous. On its face, Torres' warning forbids an employee from discussing certain terms and conditions of employment. An employee reasonably would conclude that *any* discussion of these working conditions could result in discipline.

In these circumstances, I conclude that Torres' remarks did interfere with, restrain and coerce employees in the exercise of Section 7 rights. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in Complaint paragraphs 10 and 11.

It isn't entirely clear whether Respondent is asserting that the 6–month "statute of limitations" in Section 10(b) of the Act bars these allegations. Respondent does note that Manager Torres first cautioned Medlock before March 9, and that this earlier discussion took

place outside the 10(b) period. However, the Complaint does not allege that Torres committed an unfair labor practice during this earlier conversation.

In oral argument, Respondent stated that the conduct alleged in Complaint paragraphs 10 and 11 took place "six months to the day before the September 9 charge was filed." Thus, Respondent appears to recognize that these allegations are, in fact, timely and it appears that Respondent is not raising a Section 10(b) defense with respect to them. However, even if Respondent does assert such a defense, I conclude that Section 10(b) does not bar the litigation of the allegations in Complaint paragraphs 10 and 11.

The Union filed the first charge in this proceeding on September 9, 2005. This charge, docketed as Case 10–CA–35863, raised a number of allegations, including the following:

> On an occasion in about April 2005, the Employer, by Mike Torres, at the Employer's facility, directed employees not to discuss with one another the Employer's practices with respect to its handling of absences by unit employees, a term and condition of employment.

Notwithstanding that the charge alleges that the incident occurred "in about April 2005," this language clearly describes Torres' warning to Medlock on March 9, 2005. Alleging an incorrect date does not change the determinative fact, that the conduct took place within 6 months of the filing of the charge. Since the conduct itself fell within the 10(b) period, I conclude that the allegations may be litigated.

Respondent also argues that on March 16, 2005, it reached an agreement with the Union "not to pursue any allegations predating the [March 10, 2005] election except [the allegations] involving the termination of Nathan Vereen." However, Respondent does not assert that the General Counsel entered into such an agreement.

The record does not indicate that the Charging Party ever withdrew, or requested to withdraw, the charge in Case 10–CA–35863. The record also does not establish that the Charging Party ever amended this charge to delete the language quoted above. Accordingly, it remained within the General Counsel's discretion to proceed on this allegation. In these circumstances, I reject Respondent's argument and adhere to my recommendation that the Board find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in Complaint paragraphs 10 and 11.

Complaint Paragraph 12

Complaint paragraph 12 alleges that on occasions in mid–September 2005 and mid–October 2005, the Respondent, by its agent, at a Hampton Inn hotel in Huntsville, Alabama, threatened employees that the Respondent would withhold pay raises from employees because the Union and employees had pursued charges and given testimony pursuant to the National Labor Relations Act. Complaint paragraph 26 alleges that this conduct violated Section 8(a)(1) of the Act. Respondent has denied these allegations.

The individual identified in the Complaint as "Respondent's agent" is its attorney, William Kaspers. The record clearly establishes his role as Respondent's spokesperson during negotiations with the Union and the statements he made during the course of the bargaining are attributable to Respondent. Credible evidence clearly shows that Kaspers possessed both actual and apparent authority to speak on behalf of Respondent, and I conclude that he was Respondent's agent within the meaning of Section 2(13) of the Act.

The Union's bargaining committee consisted of Union representative Morris Anderson and three employees, Rollie Powell, Anthony Johnson, and Regan Long. As noted above, William Kaspers served as Respondent's chief negotiator. Michael Torres, who held the positions of plant manager and, subsequently, customer relations manager, also participated.

Based upon my observations of the witnesses, I conclude that Regan Long provided the most accurate testimony. Long's demeanor, especially on cross–examination, persuades me that his testimony is more reliable than that of other witnesses. To the extent that the testimony of other witnesses conflicts with that of Long, I do not credit it.

Rollie Powell's demeanor also impressed me as that of a sincere and honest witness. At times during his testimony, Powell appeared to become indignant, but I discerned no artifice or lack of sincerity. Additionally, based upon my observations, I conclude that the third employee member of the Union's negotiating committee, Anthony Johnson, also brought to the witness stand an earnest intent to testify accurately. At times, Johnson's memory of events lacked detail, but the want of specifics did not lead to confabulation. In sum, I conclude that the testimony of Long, Powell and Johnson concerning the negotiating sessions should be credited, and I rely on it.

The Charging Parties in the present cases filed a number of unfair labor practice charges against the Respondent. From the outset of collective bargaining, Respondent protested that the parties should address through the negotiating process the issues raised by the charges, rather than taking those issues to the Board.

Manager Torres testified that at "[p]retty much every bargaining session, starting with the first session, there were charges pending with the NLRB and we asked that we try to resolve these issues at the table rather than going to the NLRB." Torres also testified that he remembered "comments being made" during the September and October 2005 bargaining sessions "that basically the company didn't have unlimited resources, the lawyer didn't work for free."

Torres' testimony considerably downplays how greatly the unfair labor practice charges vexed Respondent. Respondent's Attorney Kaspers returned to this subject repeatedly during negotiations, even though the filing of unfair labor practice charges is not a mandatory subject of bargaining. Torres' vague recollection about "comments being made" that "the company didn't have unlimited resources" does not capture either Kaspers' words or their gravamen, but the three employee members of the Union's bargaining committee provide a consistent picture.

Long testified that during a bargaining session in mid–September 2005, Kaspers said "I hope you all know for keeping on this NLRB on these charges all the time and us having the cost of litigating, you just done away with any raises you was going to get." My observations lead me to conclude that Long was a reliable witness and the fact that he may have paraphrased some of Kaspers' words does not diminish his credibility. Based on Long's testimony, which I credit, I find that Kaspers referred to the unfair labor practice charges and then told the employees that they had done away with any raises they were going to get.

Another member of the Union's negotiating committee, Rollie Powell, testified that during the mid–September 2005 bargaining session, Kaspers said that "you people" would not get a 35–cents per hour pay raise "because of these charges. The Company will have to pay money to defend against these charges. It is a distraction. And you have to drop the charges so we can move these negotiations along." Based on Powell's credited testimony, I find that Kaspers did tell the employees on the Union's negotiating committee that they would not receive the raise because of the unfair labor practice charges.

Further, I find that Kaspers told them that they would have to drop the charges to move the negotiations along. The Complaint does not allege this statement, linking progress in negotiations to dropping the unfair labor practice charges, to be a separate violation. However, it constitutes part of the overall context and thus should be considered in determining what Kaspers' words about the unfair labor practice charges reasonably would convey to employees.

Kaspers' words about "moving the negotiations along" acquire additional significance in light of the parties' bargaining framework. The parties had deferred the negotiation of economic terms until after reaching agreement on non-economic items. Thus, a statement that the Charging Parties would have to drop their unfair labor practice charges to "move these negotiations along" implies that the Union might not even reach the point of *discussing* a pay raise so long as the unfair labor practice charges remained pending.

The third employee member of the Union's negotiating committee, Anthony Johnson, testified that, during a bargaining session in October 2005, Kaspers said words to the effect of "thank you for paying me," explaining that Respondent paid him because of the charges being filed. According to Johnson, Kaspers added, "you're talking yourself out of raises, you know."

Union Representative Morris Anderson testified that Kaspers discussed the filing of charges, but Anderson could not recall clearly what Kaspers said. "I believe," Anderson testified, "he was indicating that he felt those charges were frivolous and asked us to attempt to resolve whatever issues occur, at the bargaining table." When the General Counsel directed Anderson's attention to the September 2005 bargaining session, Anderson testified that he believed Kaspers had raised the subject of unfair labor practice charges at this meeting: "I think he had mentioned to the committee and myself again that our guys was filing charges that he believed were frivolous and I believe he also mentioned that these – I think he indicated these charges were expensive and would have an effect on economics."

Anderson's testimony, although vague, does not contradict that of Long, Powell and Johnson. To summarize, based on the credited testimony of these three employee witnesses, I

find that during the September 2005 bargaining session, Kaspers said that because of the unfair labor practice charges, the employees had "done away with any raises they were going to get." At this September 2005 meeting, Kaspers also told the Union negotiators that because of the charges, employees would not receive a 35 cent raise, and that they would have to drop the charges to "move things along."

Further, I find that at a negotiating session in October 2005, Kaspers referred to the unfair labor practice charges and told the employees that they were talking themselves out of raises.

Respondent argues that when Kaspers indicated that the unfair labor practice charges would have an adverse effect on raises, he was not making a threat, but instead was making an obvious commonsense observation. Respondent reasons that because of the unfair labor practice charges, it had to spend money on legal counsel, and that this expenditure necessarily diminished the funds available to raise employees' pay.

However, even assuming that Respondent articulated this reasoning as clearly at the bargaining table as it did in this proceeding, I do not judge the words for the soundness of their logic as a syllogism. Rather, applying an objective standard, and considering the entire context, I must determine what message those words would communicate to employees. Then, I must weigh what effect that message reasonably would have on employees' willingness to exercise their statutory rights, including, notably, the right to file unfair labor practice charges with the Board.

Board precedent distinguishes between a lawful prediction and an unlawful threat. Like a prediction, a threat makes a kind of "prophecy" about the consequences of a particular action. However, the threat carries the additional connotation that the speaker, through some action, is going to bring about the predicted result.

Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), a lawful prediction must be based on "objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Kaspers' words, communicating that the existence of the unfair labor practice charges prevented the employees from receiving a pay raise, do not concern a demonstrably probable consequence beyond the Respondent's control.

Obviously, Respondent does not have an unlimited amount of money. No one does. But recognition that Respondent's bank account can be exhausted says nothing about the amount of money actually in that account. There is no reason to believe that the bank account either is, or is not, large enough to pay both the attorney's fee and raise the employees' pay.

Respondent did not tell the employees, for example, "we have 'x' dollars to spend and our attorney is billing us more than that for his services in connection with the unfair labor practice charges." Here, I need not speculate regarding whether such a statement would have satisfied the requirement that the prediction be based on objective facts. Respondent did not make such a statement. Further, the record provides no factual basis for reaching any conclusion about Respondent's ability to pay its lawyer and also increase employees' wages.

Similarly, the record does not demonstrate that filing the unfair labor practice charges depleted all money available for a pay raise through some mechanism or foreseeable chain of events outside of the Respondent's control. To reach such a conclusion would require resort to an unjustified presumption. Therefore, I conclude that Kaspers' words reasonably would communicate to employees the message that Respondent, of its own volition, would deny a pay raise – indeed, that Respondent would deny a *contemplated* pay raise – because of employees' protected activities.

In sum, I conclude that Kaspers' words at the September and October 2005 bargaining sessions, linking the existence of the unfair labor practice charges to the absence of a wage increase, constitute a threat of adverse consequences for engaging in protected activity. See *Chinese Daily News*, 346 NLRB No. 81 (April 17, 2006).

Accordingly, I further conclude that Respondent violated Section 8(a)(1) of the Act by engaging in the conduct alleged in Complaint paragraph 12, and recommend that the Board so find.

Complaint Paragraphs 13 and 14

Complaint paragraphs 13, 14 and 15 concern a speech which Plant Manager George Roth made to employees at a meeting on May 4, 2006. Complaint paragraph 26 alleges that the statements described in those three Complaint paragraphs violated Section 8(a)(1) of the Act. Respondent denies all of these allegations.

More specifically, Complaint paragraph 13 alleges that on or about May 4, 2006, the Respondent, by George Roth, at Respondent's facility, interfered with employees' Section 7 rights by telling them that filing charges with the National Labor Relations Board was futile. Complaint paragraph 14 alleges that on this date, Respondent, by Roth, "interfered with employees' Section 7 rights by telling employees that the filing of charges under the National Labor Relations Act and employees' protected activities was costing the Respondent money that would had [sic] otherwise benefited the employees."

Complaint paragraph 15 alleges that on this date, Respondent, by Roth, "interfered with employees' Section 7 rights by inviting and requesting employees to quit their employment because they had engaged in Union and protected activities." Although this allegation also concerns Roth's May 4, 2006 speech, it will be discussed under a separate subheading below.

The record clearly establishes the content of Plant Manager Roth's May 4, 2006 speech to bargaining unit employees. The exhibits include the text of this speech, which consists of 5 typed pages with some modifications in handwriting. Based on the credited evidence, I find that Roth delivered this speech substantially as it appears in written form, and that any deviations from the text were inconsequential.

The first part of Roth's speech concerned the collective bargaining between Respondent and the Union. Roth told the employees that 20 negotiating sessions should have been sufficient to reach a contract and he blamed some employees on the Union's bargaining committee.

According to Roth, who did not identify the employees by name, they had allowed "personal self–interest [to] predominate over what's in the best interests of all employees and the Company."

Roth further criticized two of the Union's negotiators for resigning from the bargaining committee right "when it's time to negotiate the terms that really matter—wages, profit–sharing, and other cost issues. . ." Although Roth did not name the two negotiators who resigned, only three employees served on the Union's bargaining committee and, I infer, most of the workforce knew that the resigning committee members were Regan Long and Rollie Powell.

The Complaint does not allege that Roth's criticisms of the negotiations and the negotiators violated the Act. Therefore, I do not consider whether Roth's statements, described above, interfered with, restrained or coerced employees in the exercise of their statutory rights. However, Roth's speech then shifted focus to the unfair labor practice charges. It stated, in pertinent part:

> [W]hen the contract negotiations finally got to [the] point where it's time to negotiate the terms that really matter. . .two of the three employees that we gave 20 days off to negotiate a contract suddenly decide to resign from the Union's negotiating committee apparently so that they can dedicate their time and efforts to filing and pursuing allegations with the National Labor Relations Board. That's nuts. Since interest in the Steelworkers [Union] surfaced a little more than a year ago, they have either filed or supported the filing of dozens of allegations with the National Labor Relations Board. The NLRB has yet to find the Company guilty of any of the alleged violations. Admittedly, several of the charges were settled last August – not because the Company had done anything wrong, but instead because it would have cost more to proceed with the defense than it cost to pay 2–time convicted felony child abuser a few thousand bucks to end those proceedings.
>
> The only person who wins when charges are filed with the NLRB is the Company's lawyer. Personally, I think William Shakespeare was right when he suggested killing all the lawyers. Some of you have probably heard the joke, "What do you call 500 lawyers at the bottom of the ocean? ... A good start."
>
> With all of the charges and allegations that they and others have filed with the NLRB, the Company has had to have a lawyer present at all 20 of the bargaining sessions to insure that we're not inadvertently doing something that they might turn into yet another NLRB charge.
>
> Since the Steelworkers came in a year ago, the Company has paid the Company's lawyer over $200,000 to protect the Company's interests against the charges that they and others have made or threatened to make. $200,000 that otherwise could have gone into improving life here in the plant. That's nuts.
>
> The only thing that filing charges with the NLRB does, other than make the Company's lawyer rich, is continue to foster an adversarial us–versus–them attitude. Personally, I don't really care whether we operate under a union contract or not. We've

> operated under a union contract and made money sometimes and not made money other times, and we've operated without a union and made money sometimes and not made money other times.
>
> What doesn't work, however, and never will, particularly in competitive times when we're competing against doors made in China, is the adversarial us–versus–them environment that they are attempting to foster with all of the charges they file with the NLRB. That old saying, "a house divided cannot stand" certainly applies to an industrial setting. I'm not saying that the union or the employees who supported it are solely to blame for the adversarial us–versus–them environment. However, it all has to stop, because it's negative, counterproductive, and very detrimental to the long term viability of this operation and this Company.
>
> I have been told that early on in the negotiations, one man said that he didn't care whether the Company went out of business, and another has very recently said that if he didn't get his way, he'd put the Company out of business. Well, too many of us have worked too long and too hard for anyone to seriously consider putting this Company out of business or even talking about it. If that's where they are today, then they should find another job elsewhere and stop infecting the rest of us with all of their negativity.
>
> I expect that as soon as I finish talking, they will say that I'm all wet and that they know what's best. My idea of what's best is when we can leave the us–versus–them attitude on the sideline and be productive enough that we can share monthly bonus checks of over $300. We're all in this to make a living and feed our families. We don't show up for work in the morning to put this Company out of business. And, anyone who's so unhappy here that you think you need to put this Company out of business needs to move on, find another job, and leave the rest of us the hell alone. I will give you a good letter of reference. It is not in the best interest of you or the company to stay in a job you don't like where you are not happy. Life is too short.

In addition to the text quoted above, Roth's speech did make one additional, passing reference to unfair labor practice charges. When Roth began speaking, he apologized for reading the speech, explaining that "it seems like every time we turn around or say anything, somebody files another charge about it with the NLRB." However, the Complaint does not allege that statement to be violative and I make no finding concerning it.

Rather, I must determine whether any part of Roth's speech told employees that filing unfair labor practice charges was futile and, if so, whether such a statement violated Section 8(a)(1). Nowhere in the speech did Roth state explicitly that filing an unfair labor practice charge was futile and, indeed, he did not use the word "futile" at all.

Roth did tell the employees that since the arrival of the Union, "they have either filed or supported the filing of dozens of allegations with the National Labor Relations Board. The NLRB has yet to find the Company guilty of any of the alleged violations." Roth did not state specifically who "they" were. Based on the entire record, it appears that Roth was referring to Regan Long and Rollie Powell, two employees serving on the Union's negotiating team.

Roth's statement – that "they" filed or supported the filing of "allegations" with the Board – does not communicate a message that filing an unfair labor practice charge is futile. Indeed, what Roth said next conveys the opposite message, that filing a charge could result in a benefit to the charging party *even if the charge was meritless*. Thus, Roth informed the employees that Respondent had settled "several of the charges" but "not because the Company had done anything wrong." Rather, Respondent determined it would cost more to defend against the charges than to pay a settlement.

Applying an objective standard, I conclude that this message reasonably would not discourage an employee from filing a charge. If Roth's words had any effect on the willingness of an employee to file a charge, they reasonably would make an employee more likely to do so. A typical employee, without much knowledge of the Act, might hesitate before filing a charge, suspecting that it would be a waste of his time, or, in other words, futile. However, Roth's words, indicating Respondent's willingness to settle even a meritless charge because of its "nuisance value," reasonably would increase the employee's expectation of deriving a benefit.

It is true that Roth said that the "only person who wins when charges are filed with the NLRB is the Company's lawyer." Standing alone, those words do imply that the person filing the charge does not "win," or benefit from that action. Arguably, an employee could infer that, since a person filing a charge could not "win," filing a charge was "futile."

Such reasoning requires drawing an inference from an implication and is thus quite tenuous. Moreover, Section 8(c) protects an employer's right to express an opinion, including the opinion that only the lawyer benefits when a charge is filed. This protection doesn't depend on whether the particular opinion is correct. Rather, it extends to all expressions of opinion which do not carry a threat of reprisal or force or a promise of benefit. No such threat or promise taints Roth's statement here.

Complaint paragraph 13 alleges that parts of Roth's speech unlawfully communicated that filing charges with the Board was futile. For the reasons discussed above, applying an objective standard, I conclude that Roth's words reasonably would not convey that message. Therefore, I recommend that the Board dismiss the allegations associated with Complaint paragraph 13.

Complaint paragraph 14 alleges, in effect, that Roth interfered with the exercise of Section 7 rights by telling employees that filing charges and engaging in other protected activity was costing Respondent money which otherwise would have been used to benefit the employees. Roth's speech, quoted above, includes the statement that Respondent had paid legal fees exceeding $200,000 to defend against the unfair labor practice charges and also had paid an undisclosed amount to settle an unfair labor practice charge.

An employer's simple announcement of how much it had paid a lawyer would not, by itself, constitute a threat or promise which interfered with the exercise of Section 7 rights. However, Complaint paragraph 14 further alleges that Roth said that the unfair labor practice charges were costing money which otherwise would have benefited the employees.

The record does not establish that Roth specifically said that the money Respondent paid in legal feels otherwise would have benefited employees. Based on the credited evidence, I find that Roth actually told the employees that Respondent had paid a lawyer "$200,000 that otherwise could have gone into improving life here in the plant." However, employees reasonably would understand Roth to mean that Respondent would have used the $200,000 to improve their working conditions in some unspecified way.

In analyzing whether such comments amount to an unlawful threat, I apply the same principles discussed above in connection with Complaint paragraph 12. However, the statements which Roth made to employees on May 4, 2006 differ significantly from the remarks of Respondent's attorney at the September and October 2005 bargaining sessions.

Attorney Kaspers' remarks at the bargaining table clearly conveyed that because of the unfair labor practice charges the employees would not receive a raise. Additionally, he communicated that negotiations would not progress unless the charges were withdrawn. From Kaspers' statements and the total context, employees reasonably would conclude that the detriment he predicted would not happen automatically as a natural consequence of charge filing. Instead, the potential harm would flow from Respondent's decision not to allow negotiations to progress and not to agree to a wage increase.

When Roth told employees that Respondent had paid a lawyer $200,000 to defend against the charges, he did not say that management had made a conscious decision to take money earmarked to improve working conditions and spend it instead on legal representation. It may be argued that paying legal fees is not a "demonstrably probable consequence" of being the recipient of an unfair labor practice charge and, likewise, such payments did not turn on events beyond the Respondent's control.

Arguably, the decision to retain counsel falls within a charged party's control. Certainly, one can say that a person accused of unlawful conduct can decide not to consult an attorney. One also can say that a person with fever and abdominal pain can decide not to call a doctor. In practice, the complexity of federal employment law has made the retention of counsel a normal, legitimate and expected business practice.

Essentially, Roth lamented that the unfair labor practice charges had resulted in Respondent paying a lawyer money which could better have been spent for other things. Expressing such an opinion did not communicate to employees either a threat of reprisal or a promise of benefits.

Freedom of speech is the rule rather than the exception. The government bears the burden of proving that a particular statement carries a threat of reprisal or force, or a promise of benefit, sufficient to remove it from the protection of Section 8(c). Here, the credited evidence does not establish the existence of such a threat or promise.

In *Children's Center for Behavioral Development*, 347 NLRB No. 3 (May 15, 2006), the Board considered a respondent's memo to its employees with content not unlike Roth's speech.

The memo accused the employees' union of "doing everything in its power" to harm the respondent, including interfering with the respondent's relationship with a funding source, United Way. The Board, reversing the administrative law judge, found that this memo was "a lawful expression of the Respondent's opinion about the Union and does not violate the Act." 347 NLRB No. 3, slip op. at 1. Similarly, I conclude that Roth's speech constituted a lawful expression of opinion.

As the Board held in *Children's Center for Behavioral Development*, "an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1) provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." Roth's speech falls within the bounds of lawful criticism. (For accuracy, it should be noted that Roth did not direct much criticism at the Union. Instead, his speech excoriated two of the three employees on the Union's bargaining committee.)

Accordingly, I conclude that Respondent did not violate the Act in the manner alleged in Complaint paragraphs 13 and 14. Therefore, I recommend that the Board dismiss these allegations. My conclusion that Respondent did not violate the Act makes it unnecessary to consider Respondent's affirmative defense that Section 10(b) of the Act bars certain of the allegations.

Complaint Paragraph 15

Complaint paragraph 15 raises one other allegation related to Roth's May 4, 2006 speech. This paragraph alleges that Respondent interfered with employees' Section 7 rights by "inviting and requesting employees to quit their employment because they had engaged in Union and protected activities."

The 6–month time limitation in Section 10(b) of the Act clearly does not bar this allegation. The charge in Case 10–CA–36284, filed May 26, 2006 specifically described the conduct which forms the basis for Complaint paragraph 15.

During his May 4, 2006 speech, Roth quoted one employee as saying that he didn't care whether Respondent went out of business. Roth added that another employee had "very recently said that if he didn't get his way, he'd put the Company out of business." Roth then said:

> [A]nyone who's so unhappy here that you think you need to put this Company out of business needs to move on, find another job, and leave the rest of us the hell alone. I will give you a good letter of reference. It is not in the best interest of you or the company to stay in a job you don't like where you are not happy. Life is too short.

The General Counsel argues that this statement violated Section 8(a)(1) of the Act. For the following reasons, I agree.

In *Jupiter Medical Center Pavilion*, 346 NLRB No. 61 (March 13, 2006), the respondent conducted a number of employee meetings in response to a union organizing campaign. At one such meeting, an employee criticized the way management treated its workers. A supervisor replied "Maybe this isn't the place for you . . . there are a lot of jobs out there." Reversing the

administrative law judge, the Board held that the statement, suggesting that the employee seek work elsewhere, violated Section 8(a)(1) of the Act:

> The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with continued employment. *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.
>
> As discussed above, Section 8(c) recognizes and protects an employer's right to express an opinion, so long as the expression does not convey a threat or a promise. Thus, an employer does not violate the Act merely by voicing the sentiment that an unhappy employee should look for work elsewhere. Considered in a "vacuum" – free of context – such a statement does not implicate an employee's protected activities.
>
> However, context can shape the same words into a less benign message. As the Board observed in *Jupiter Medical Center Pavillion*, when an employer makes such a statement "either to union advocates or in the context of discussions about the union," the words communicate that "support for the union is incompatible with continued employment."
>
> Stated another way, when the words are considered in this particular context, the message becomes that the employee must choose between supporting a union and continuing to hold his job. Presenting an employee with such a choice obviously interferes with the exercise of Section 7 rights. It amounts to conditioning further employment on forsaking protected activity.
>
> So, I must determine what effect the context of Roth's May 6, 2006 speech has on the message conveyed. Applying an objective standard and considering the entire context, I must decide whether an employee reasonably would understand Roth to be saying that engaging in protected activity was "incompatible with continued employment."
>
> Early in the speech, which Roth gave to bargaining unit employees, he discussed the status of Respondent's negotiations with the Union. He vigorously criticized two employee members of the Union's negotiating committee and blamed them for the absence of a collective–bargaining agreement. Clearly, Roth made the statement "in the context of discussions about the union," as the Board used that term in *Jupiter Medical Center Pavillion*.
>
> Moreover, Roth strongly criticized those who had filed charges with the Board, and claimed that, because of the charges, Respondent had spent more than $200,000 in legal fees. Roth also said that Respondent had spent money to settle a case, "not because the Company had done anything wrong, but instead because it would have cost more to proceed with the defense..." These words clearly imply that the filing of unfair labor practice charges had resulted in Respondent paying money for something it did not do.
>
> After criticizing employees for filing charges and after stating how much defending against those charges had cost Respondent, Roth mentioned an employee who reportedly had

said that he didn't care whether Respondent went out of business. Roth then referred to a second employee who "recently said that if he didn't get his way, he'd put the Company out of business." In this context, employees reasonably would believe that Roth was making a connection between the filing of unfair labor practice charges and an intent to put Respondent out of business.

Roth's further statement, that "they should find another job elsewhere and stop infecting the rest of us with all of their negativity," clearly implies that engaging in protected activity – filing charges with the Board – was incompatible with continued employment. In effect, Roth's words require employees to chose between engaging in protected activity and holding a job. In this context, the words interfere with, restrain and coerce employees in the exercise of their Section 7 rights.

Roth's speech referred not only to employees filing charges but also to the conduct of employee members of the Union's bargaining committee. Roth questioned their motives and criticized their performance. However, Section 7 of the Act protects an employee's right to serve on a union's negotiating committee, and this protection does not depend on how well that person represented the bargaining unit's interest. Thus, Roth's words about finding work elsewhere not only interfered with an employee's right to file charges with the Board, but also interfered with an employee's right to engage in union activities, such as serving on the Union's bargaining committee.

In sum, I conclude that, by the conduct described in Complaint paragraph 15, Respondent violated Section 8(a)(1) of the Act. I recommend that the Board so find.

Complaint Paragraph 16(a)

Respondent has admitted that on June 8, 2005, it suspended employee Anthony Lyles for one day, as alleged in Complaint paragraph 16(a). However, Respondent denies that it did so because employees engaged in concerted activity for mutual aid and protection, as alleged in Complaint paragraph 17.

Complaint paragraph 26 alleges that the June 8, 2005 suspension of Lyles violated Section 8(a)(1) of the Act, which Respondent denies. (It may be noted that the Complaint does not allege the suspension to violate Section 8(a)(3). Complaint paragraph 27, which alleges that certain other conduct violated Section 8(a)(3), does not refer to Complaint paragraph 16(a).)

The events relevant to Complaint paragraph 16(a) involve three of Respondent's welders: Kenneth Small, Anthony Lyles and Robert Bowser. Work flowed in assembly–line fashion, from welder to welder. The slowest employee's pace would determine how quickly the work moved from employee to employee and thus affect the productivity of the group.

On June 8, 2005, Small made an "informal" (oral) complaint to assistant plant manager James Smith. Based on Smith's testimony, which I credit, I find that Small told Smith that employees Anthony Lyles and Robert Bowser were "talking about union business on company time" and that this discussion was slowing the work.

Smith later had Lyles and Bowser come to his office, where he spoke to them outside Small's presence. Smith told the two welders that someone had complained about them "slowing down from their work" because they were "talking about union business." Smith said that talking about union business was not permitted on company time, although doing so on break time and dinner time was all right.

The Complaint doesn't allege that this statement violated that Act, although the General Counsel does argue that it constitutes evidence of animus. Its evidentiary import will be addressed below, but at this point, it may be noted that when Smith made the remark, the Union had been the certified bargaining representative for about two and one–half months.

Lyles asked Smith if Kenneth Small was the employee who had complained. Smith declined to say. Lyles and Bowser returned to work.

Smith's testimony indicates that he did not consider his discussion with Lyles and Bowser to be a disciplinary action. Bowser, however, testified that Smith told them he was giving them an oral warning. Based upon my observations of the witnesses, I credit Smith's testimony rather than Bowser's, and find that Smith did not give either Lyles or Bowser a "warning," as that term is used to signify disciplinary action.

Later that same day, Small made a "formal" (written) complaint to Smith. It stated (with grammar and spelling uncorrected) as follows:

> I, Kenneth Small Life has been threaten and property meaning truck. Now I am suppose to be sucking James Smith Dick and also Robert Parker supposing to be sucking James Dick – was close enough to hear them. Now the whole plants shing away from me. Know one wants to work with me.

At the time Smith received this complaint, he was mindful of news reports about a violent incident at an unrelated employer's facility. Smith credibly testified that he took Small's complaint seriously and conducted an investigation, which included interviewing Lyles and Bowser. They denied threatening Small in any way.

Based on that investigation, management issued an "Employee Disciplinary Report" dated 6/9/05. This report informed Lyles that he was being "suspended for 1–day for making threatening remarks to Kenneth Small's person and vehicle." Lyles refused to sign it. Respondent did not impose any discipline on Bowser because, management concluded, only Lyles threatened Small and Bowser did not.

In evaluating the evidence, I will follow the framework set out by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a

link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc*, 346 NLRB No. 96 (April 28, 2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The General Counsel has established that Lyles engaged in protected activity, namely, discussing "union business" with fellow employee Bowser. Therefore, I conclude that the government has proven the first *Wright Line* element.

Un-contradicted evidence also establishes the second *Wright Line* element. Assistant Plant Manager Smith testified that he told Lyles and Bowser that he had received a complaint about their discussing "union business" while on working time. Thus, management was aware of the protected activity.

The General Counsel also has proven the third *Wright Line* element. The one–day suspension certainly is an adverse employment action. However, I conclude that the government has not established the fourth *Wright Line* requirement, a link between the protected activity and the adverse employment action.

To demonstrate such a connection, the General Counsel notes that Lyles' suspension came soon after Smith had learned about their discussion of "union business" and that this proximity in time suggests a causal connection. The General Counsel also argues that when Smith told Lyles and Bowser that they could not discuss "union business" while on work time, this instruction manifested Respondent's hostility towards the Union.

The General Counsel correctly notes that a supervisor's remark can provide evidence of antiunion animus even if the complaint does not allege that the statement violated Section 8(a)(1). Accordingly, if Smith's statement to Lyles and Bowser – that they could not discuss "union business" while on working time – afforded evidence of unlawful motivation, I certainly would consider it. However, a careful assessment of Smith's comment leads me to conclude that it does not provide evidence of unlawful motivation.

The Complaint does not require me to decide whether Smith's remark violated Section 8(a)(1) and I reach no conclusions on that point. However, solely for the sake of analysis, I will assume here that the statement would indeed constitute an 8(a)(1) violation. That finding of a violation would not relieve me of the duty of evaluating how much weight to give this conduct in considering Respondent's motivation for suspending Lyles.

Typically, if an employer commits an 8(a)(1) violation and later disciplines an employee, the 8(a)(1) conduct provides some evidence relevant to the employer's motivation for imposing discipline. However, the weight properly attached to this evidence can vary widely, depending on specific circumstances. For example, an 8(a)(1) violation which preceded the discipline by only a small time period probably would weigh heavier on the scales than a similar violation which was remote in time. On the other hand, an 8(a)(1) violation committed at another location by a supervisor totally uninvolved in the later disciplinary decision would carry much less weight.

Thus, a judge must avoid a "cookie cutter" approach which automatically attaches the same probative weight to every 8(a)(1) violation. That would turn the issue of motivation into a conclusion of law when, in reality, it presents questions of fact which must be answered through a careful examination of the evidence. To assess how much any prior act reveals motivation for a subsequent act, the trier of fact must draw upon logic, common sense, and at least a smattering of familiarity with human nature.

As noted above, I assume for the sake of analysis that Assistant Plant Manager Smith violated Section 8(a)(1) when he told Lyles and Bowser that they could not discuss "union business" during working time. That would be true regardless of Smith's motivation for making the statement, because in general, proof of an 8(a)(1) violation does not require evidence of motivation. The lawfulness of a statement depends not on why a supervisor said it but what effect it reasonably would have on employees' exercise of protected rights.

Logic and common sense urge that, should a supervisor prohibit employee discussion of a union during an organizing campaign, that action probably reflects some hostility towards the union. In the present case, Smith did not make such a statement during an organizing campaign, but two and a half months after the Union had won that campaign, in fact, after the Respondent had recognized the Union and begun bargaining with it. Even in these circumstances, Smith's remark still might suggest the presence of animus, but to determine its exact significance, the remark must be considered in its total context.

Undisputed evidence establishes that when Smith told Lyles and Bowser that they could not discuss "union business" during working time, he also made clear that the prohibition was to prevent a slowdown in production. That explanation, of course would not prevent the rule itself from failing the lawfulness test because the reasonable effect, not intent, determines whether a work rule violates Section 8(a)(1), and this rule singled out protected activity for discriminatory treatment.

However, Smith's motivation in announcing the rule is relevant to another issue, the extent to which the rule evinces an intent to discriminate unlawfully against union adherents. Evidence which shows not only a hostile attitude towards the Union but also a reason or inclination to act on it provides persuasive evidence of a link between the protected activities and the adverse employment action. An absence of such evidence makes a nexus less likely.

In considering this issue, I may take into account Bowser's testimony that when Smith told them that they could not discuss "union business" on working time, he explained, in Bowser's words, that "our discussions were disrupting our work production." Other testimony corroborates Bowser on this point and I find that Smith did give this explanation for the rule. Based on un-contradicted testimony, I also find that Smith told Bowser and Lyles that they could discuss "union business" during break time and dinner time. Although this statement would not render the rule itself any more lawful, it does make me a bit more reluctant to infer animus simply from the rule's existence.

Moreover, other evidence supports the conclusion that concerns about production, not hostility towards the Union, motivated Smith. The record establishes that Respondent was indeed having production problems, and that these problems became so serious that Respondent ultimately replaced the plant manager with another. Thus, the rule owed its existence, at least in part, to a legitimate business–related reason.

Another factor also must be considered. Smith knew that both Lyles and Bowser had been discussing "union business" during working time. However, Respondent only disciplined Lyles. If Respondent really was, in fact, hostile to union activity, it likely would have disciplined both of the employees who had been talking about union business while production slowed.

In these circumstances, I conclude that Smith's rule prohibiting the discussion of union business during working time does not establish that antiunion animus was a substantial motivating factor in the decision to suspend Lyles. Therefore, to satisfy the fourth *Wright Line* requirement, the government must present additional persuasive evidence of animus.

The General Counsel contends that animus may be inferred from Respondent's failure to call its vice president, Steve Frates, to testify. Citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987), the General Counsel argues that "Where a witness to a disputed event is favorably disposed toward one party or another and that party does not call the witness, the Board infers that had the witness testified his accounts would have been adverse to the party with whom he is associated."

Certainly, in some instances a judge appropriately may draw an inference from a respondent's unexplained failure to call one of its managers when that person has relevant knowledge concerning a disputed fact. However, the judge must be careful not to apply this principle in a way which improperly shifts the burden of proof. Additionally, prudence favors caution in using an absence of evidence to prove an affirmative fact.

If the General Counsel had presented evidence which Respondent manifestly had needed to rebut, and if Frates clearly appeared to be the one who could do the rebutting, Respondent's failure to call him would raise an eyebrow, or a suspicion, or perhaps even justify drawing an adverse inference. Such circumstances do not appear in this case.

Respondent did not have to decide which witnesses to call until after the government rested its case. Based on the evidence presented by the General Counsel, I cannot conclude that Respondent would consider it essential to call Frates, a member of senior management, rather than rely on the testimony of the managers at the plant level. Respondent's counsel had cross–examined the government's witnesses and could make a judgment concerning their credibility. That assessment, in turn, could lead to the conclusion that rebuttal testimony by Frates was not necessary.

My observations of the witnesses lead me to conclude that the testimony of Bowser and Lyles should be viewed with some skepticism. In particular, I have concerns about the reliability of Lyles' testimony. Lyles, who suspected that Small had complained about him to Manager Smith, initially denied doing anything to retaliate. However, on cross–examination, he admitted a retaliatory motive for redirecting a fan away from Small and, when Small protested, saying "we're doing it now."

Although he did not admit doing anything to Small other than turning the fan away from him, Lyles' acknowledgement that he had a retaliatory intent indicates a significant level of interpersonal conflict in the workplace. The existence of this tension increases the plausibility that management acted quickly to prevent its escalation. The presence of legitimate reasons for management's action does not rule out the possibility that an unlawful motive also affected the decision to discipline, but such a motive should not simply be assumed without credible evidence.

Absent the adverse inference which the General Counsel seeks because Frates did not testify – an inference I conclude is unwarranted and which I will not draw – the credible evidence is insufficient to establish the requisite nexus between the protected activities of Lyles and Bowser and the suspension which Lyles received. Accordingly, I further conclude that the government has not satisfied all four *Wright Line* requirements. In these circumstances, I recommend that the Board dismiss the allegations related to Complaint paragraph 16(a). In case the Board should disagree with my conclusion that the General Counsel did not make what sometimes has been called a "prima facie case," I will continue the *Wright Line* analysis. Should the burden shift to Respondent to rebut the government's case, I would conclude that Respondent's evidence does not carry the rebuttal burden.

In general, rebutting the General Counsel's case requires a respondent to demonstrate that it would have taken the same action even if the employee receiving the discipline had not engaged in protected activities. A respondent typically offers proof, in the form of testimony and personnel records, showing that it had accorded the same treatment to similarly situated employees who were not union adherents.

When a respondent has relatively few employees, it may not be possible to find another employee who engaged in the same type of conduct. In that circumstance, how the respondent dealt with a somewhat similar but not identical situation still may provide a basis for comparison.

Respondent pointed to an instance in which it discharged an employee who had threatened another employee with a knife. Obviously, a threat with a weapon may warrant a different response than a threat solely with words. Although Respondent's decision to discharge the knife–wielding employee is not patently inconsistent with its decision only to suspend Lyles for a day, the two situations are not similar enough to allow a meaningful comparison.

In September 2004, as a practical joke, employee Don Larson had placed "chocks" (pieces of wood) behind the tires of another employee's vehicle so that when the driver backed up, he would be surprised by a bump. This attempted joke caused little hazard, but nonetheless, Respondent suspended Larson for a day. Here, again, the factual differences prevent the drawing of any firm conclusions.

The situation factually closest to the suspension of Lyles for threatening Small involved, ironically, the contemplated suspension of Small for threatening another employee, Gary Bailey. Respondent issued Lyles the suspension notice in early June. About a month later, during a negotiating session, Union committeeman Rollie Powell informed management that Kenneth Small had threatened to hit another employee with some frame material. The record does not offer a definitive account of what happened, but it suggests that Bailey had come up to where Small was working and made a remark which reasonably would be considered insulting. Reportedly, Small reacted by saying that if Bailey didn't get "out of my face with that stuff," Small would pick up one of the frames and hit Bailey "up the side of the head."

Manager Torres met with Small, who admitted threatening Bailey. Union bargaining committee member Rollie Powell also attended the meeting in a capacity similar to shop steward. According to Torres, initially he intended to suspend Small but, after discussing the matter with Powell, decided instead to issue a written warning.

It is easy to imagine – particularly for someone familiar with labor relations – the shop steward pleading and imploring on the employee's behalf and the resolute manager gradually yielding to the steward's continued entreaties. However, a careful examination of Torres' testimony reveals a rather different picture.

From Torres' testimony, which I credit, I infer that Torres, not Powell, advanced the proposal to reduce Small's discipline from a suspension to a written warning. Torres testified that he remembered talking to Rollie [Powell] and telling Rollie that "I was prepared to give Kenneth [Small] a day off, because that is what we had done to Anthony Lyles, for making the threat. But since the – some time had passed, I was willing to either give him the one–day suspension or give him a written write up. And Rollie asked that I give him a written write up."

The options which Torres offered Powell – suspending Small or simply warning him – provided as much real choice as asking someone whether he would rather have a bowl of honey or be stung by the bees. No union official is going to choose the harsher discipline for an employee the union represents. Respondent, not the Union, bears responsibility for deciding to impose a milder discipline on Small than Lyles received.

After Respondent issued the written warning to Small, the Union then requested that management reduce the discipline imposed on Lyles from a suspension to a warning. It also asked Respondent to pay Lyles for the day he didn't work. Respondent would not agree to pay Lyles for this time, but it did agree to reduce Lyles' discipline from a suspension to a written warning.

Thus, although Respondent disciplined both Lyles and Small for similar conduct – threatening another employee – Lyles received significantly harsher discipline than Small. Lyles lost a day's pay. Small did not. The evidence therefore does not show that Respondent treated the union adherent the same way it treated another similarly situated employee. Accordingly, if the General Counsel had established the initial four elements, thus placing a rebuttal burden on Respondent, I would conclude that Respondent had not carried that burden. However, for the reasons stated above, I have concluded that the credited evidence does not prove the fourth *Wright Line* requirement. Therefore, I recommend that the Board dismiss the allegations associated with Complaint paragraph 16(a).

Complaint Paragraph 16(b)

Complaint paragraph 16(b) alleges that on October 13, 2005, Respondent imposed a one–day suspension on employee Rollie Powell. Respondent admits doing so. However, Respondent denies that it suspended Powell because of employees' union activities and concerted protected activities and because employees filed charges and gave testimony pursuant to the National Labor Relations Act, as alleged in Complaint paragraph 18. It also denies that its conduct violated Section 8(a)(1), (3) and (4) of the Act, as alleged in Complaint paragraphs 27 and 28.

Based on my observations of the witnesses, I conclude that Rollie Powell gave the most reliable testimony concerning the events relevant to these allegations. I resolve any conflicts in the testimony by crediting Powell.

As noted above, Powell was a member of the Union's negotiating committee. The Union and Respondent had scheduled a bargaining session for October 12, 2005. However, a Board agent investigating an unfair labor practice charge against Respondent arranged to interview witnesses on this same date. The agent scheduled interviews with Respondent's witnesses in the morning on October 12, with other interviews set later in the day.

Bargaining sessions typically began, or were scheduled to begin, at 8:00 a.m., but the Board agent's visit on the morning of October 12 necessitated a change in plans. On October 10, 2005, Plant Manager Torres told Powell that they were moving the starting time of the October 12 meeting to 1:00 p.m. because of the Board agent's visit. Powell suggested that they postpone the bargaining session rather than begin in the afternoon and Torres replied "I'll get back to you."

The next day, October 11, Torres informed Powell that the bargaining session would remain scheduled to begin at 1:00 p.m. the next day. Torres said, "We talked about it. We want you to come into work at 6:00 in the morning," which was Powell's usual starting time, and work until 11:00, time when Powell usually began his lunch break. Torres told Powell he could

go home at that time and then go to the Hampton Inn, where the bargaining session would be held.

On October 12, Powell left at 11, as Torres had instructed, went home, changed clothes, and arrived at the Hampton Inn at 12:50, that is, ten minutes before the bargaining session was scheduled to begin. The remaining members of the Union's bargaining committee arrived and then went into the negotiating room at 1:00 p.m., discovering that no one on the Respondent's bargaining team was there.

When Respondent's negotiators still had not arrived by 1:15 p.m., Union Representative Anderson tried unsuccessfully to reach the Respondent's chief negotiator, Attorney Kaspers. Anderson then phoned Plant Manager Torres, but again got no answer.

The Union negotiators continued to wait. Powell had mentioned to Anderson that he needed to be at the Union hall by 3:00 p.m. to meet with the Board investigator, and that he intended to explain his situation to the Respondent's representatives when they arrived and then leave. However, when Respondent's negotiators still had not arrived by 1:50 p.m., he said "I have to go. I don't even know if these other people are going to show up. I have to go." He then left.

Respondent's negotiators arrived somewhat later. Based on Regan Long's testimony, which I credit, I find that the members of Respondent's bargaining committee arrived some time around 2:30. Long further testified that Attorney Kaspers said "I guess a thanks should be in order to you guys for tying us up all morning with the NLRB Charges." Long quoted Kaspers as adding "the cost of all this litigation...whatever raises you was going to get, you're not going to get."

Kaspers, who represented Respondent at the hearing, was present when Long gave the testimony quoted above. Later, Kaspers took the witness stand and thus had an opportunity to deny the words which Long attributed to him. Kaspers did not. Accordingly, I find that Kaspers did make the statement quoted above.

For the reasons discussed above in connection with Complaint paragraph 12, I have concluded that Kaspers' statement violated Section 8(a)(1) of the Act. Additionally, Kaspers' words on this occasion are consistent with other evidence indicating that the unfair labor practice charges vexed Respondent considerably.

When Kaspers asked about Powell's whereabouts, Long replied that he had an appointment. The record does not indicate that any member of the Union's negotiating committee revealed that Powell's appointment was with a Board investigator.

The negotiators met again the next day, October 13. Kaspers asked Powell where he had been the previous day. Powell replied that he was "taking some people out for an NLRB investigation." According to Powell, Kaspers said, "The Company doesn't pay you to investigate. You are suspended for a day. That will be tomorrow. Enjoy your day off. You are going to lose a day from your attendance." Kaspers added, "You lied. You weren't here."

At this point, Long interjected that Powell had been at the bargaining location. Powell confirmed that he had been present. "Yes, I was here," he told Kaspers. "You weren't here."

Union Representative Anderson then told Kaspers "We tried to get hold of you twice."

Powell told Kaspers that he had not lied and hadn't done anything he felt was wrong. Kaspers replied, "No, you lied. That's it. And you are going to get your day off."

In general, other witnesses corroborate Powell's testimony. Although there are some differences between Powell's account and those of other witnesses, that is not surprising considering the amount of time which elapsed between the event and the hearing. Minor differences commonly appear in the testimony of various witnesses to the same event, except, of course, in the rare instances of collusion.

Accordingly, it doesn't damage the credibility of either Powell or Long that, for example, Powell quoted Kaspers as saying that the "Company doesn't pay you to investigate" but Long quoted him as saying ""we let you off work to come to negotiations, not to go to the NLRB agent." Well more than a year had elapsed between the event and the testimony about it. It is not surprising that, although both witnesses recalled the gist of Kaspers' remark, they differed as to his exact words.

It also is not surprising that Powell provided more detail. Kaspers' announcement that Powell would be suspended, and his refusal to back down even after hearing the circumstances, harmed Powell directly in a way it did not harm the other witnesses. Typically, the most vivid memories concern events which evoke strong emotion. Powell, more than anyone else, had reason to react emotionally to the announcement that he would be suspended. But even more significantly, Kaspers insisted that Powell had lied. Almost always, calling someone a liar will prompt an emotional response in that person.

Moreover, Kaspers was present during the hearing when Powell gave the testimony quoted above. Later, Kaspers took the stand as a witness for Respondent. Most certainly, it would have been in Kaspers' interest, and in his client's interest, to deny making the statements which Powell had attributed him. However, Kaspers did not.

Although Kaspers, as a witness, did not deny making the statements quoted above, Kaspers, as the Respondent's attorney, did assail Powell's credibility during oral argument. Kaspers pointed to a seeming inconsistency between Powell's testimony on direct and cross–examination.

Kaspers noted that on direct examination, Powell had testified that, at the beginning of the October 13 bargaining session, Kaspers asked Powell where he had been the previous day and Powell replied that he had been taking some people out for an NLRB investigation. However, at one point during cross–examination, Powell stated that Kaspers had announced the

suspension without asking Powell where he had been. Here is the specific testimony to which Kaspers referred:

> **Q.** Mr. Powell, when the Company went to bed on the evening of October 12th, all it had was knowing that you left at 11:00 in the morning to attend bargaining, and no further communication that your absence was for any other reason than attending bargaining.
>
> MR. DOYLE: I object, Your Honor, to the —— to counsel calling for Mr. Powell to advise what information the Company had.
>
> JUDGE LOCKE: Rephrase the question, please.
>
> * * *
>
> BY MR. KASPERS:
>
> **Q.** As far as you know, the only information that the Company had when it went to bed on the evening of October 12 , was that you had taken off work at 11:00 to attend the bargaining, and that you —— and no other communication was made as to any reason other than attending bargaining, that you missed the second half of the day.
>
> **A.** If you had asked me, I would have told you when I came in the next day. You didn't ask me. You just arbitrarily said, "You're a liar. You're suspended."

Clearly, Respondent has identified an inconsistency between Powell's testimony on direct and cross–examination. Potentially, the testimony on cross–examination, quoted above, could cause significant damage to Powell's credibility, because it appears to amount to an admission which was not in Powell's interest to make.

The Complaint alleges that Respondent's suspension of Powell violated both Section 8(a)(3) and 8(a)(4) of the Act, the latter making it unlawful to discriminate against an employee because he had filed charges or given testimony under the Act. If Respondent did not know about Powell's activities with the Board agent at the time management decided to suspend him, that lack of knowledge would undercut the 8(a)(4) allegation. Powell's testimony on cross–examination, that Kaspers hadn't asked him where he had been, supports a finding that management did not know about Powell's participation in the NLRB investigation.

However, three other witnesses – Morris Anderson, Regan Long and Anthony Johnson – gave testimony supporting the conclusion that Powell had disclosed his October 12 protected activities before Respondent suspended him. In light of this testimony, I believe Powell's inconsistent answer, quoted above, resulted from confusion.

Mr. Kaspers' initial question did not concern what Powell told Respondent on October 13, but rather what he told Respondent on October 12. After an objection, I asked Respondent's counsel to rephrase the question. In doing so, Respondent's counsel again focused on the knowledge Respondent possessed on October 12. It is quite possible that by this point, the witness had become confused. Respondent also pointed to the following testimony which Union Representative Anderson gave on cross–examination:

> **Q.** Do you remember the first substantive thing I said on October 13 when that day started, I asked Rollie Powell a question, I said, Rollie, did you obtain

authorization from the company to leave work at 11:00 o'clock yesterday so you could attend bargaining? And he responded, yes.

[A] Yes, he did.

Q. And I responded by saying, then I've got good news and bad news. The good news is you are not fired the way Ray Brooks was fired when he falsified the reason that he was absent from work. The bad news is for not giving the company a straight reason why you were absent after 11:00 o'clock yesterday, you brought yourself a one–day suspension which will be served tomorrow because we are not negotiating tomorrow and if we suspend you today that would interfere with the bargaining.

A. I remember that verbatim. You just let exactly the way you said it.

At first glance, this testimony may seem to be at odds with Anderson's testimony on direct examination. Specifically, Anderson had testified that Attorney Kaspers and Manager Torres had asked Powell about his whereabouts and what he was doing on October 12, "and after he answered them the company took a short break. They took a recess and I believe after the recess they came back to the room where we were negotiating the contract and I believe at that time [was] when the company counsel informed Mr. Powell that he was going to be suspended one day for giving the company — I believe he said false information."

During cross–examination, Respondent did not ask Anderson specifically whether Kaspers and Torres had inquired about Powell's whereabouts and activities the previous afternoon. Respondent also didn't ask Anderson if Powell had disclosed his involvement in the Board's investigation. Accordingly, I do not conclude that Anderson's testimony on cross–examination necessarily is inconsistent with his testimony on direct examination.

As discussed above, the testimony of another witness, Regan Long, leaves no doubt that Respondent knew about Powell's participation in the Board investigation before it informed him he had been suspended. The testimony of the third employee on the Union's bargaining committee is equally convincing. During the Respondent's cross–examination of Anthony Johnson, Mr. Kaspers sought to elicit testimony similar to Anderson's testimony on cross–examination, excerpted above. Johnson balked:

Q. — the first thing I said when I sat down at that table was asking Rollie Powell did you get company authorization to be absent to leave work at eleven o'clock yesterday to attend the bargaining, and he said yes.

A. Huh uh. No. Seemed like what you did first thing was ask him where he was. You didn't — you asked him where he was because — and then he told you where he went.

Plant Manager Torres did not testify that Powell disclosed his protected activity before Kaspers announced the suspension on October 13. However, it doesn't squarely exclude that possibility. Significantly, one portion of Torres' testimony casts doubt on the sequence of events propounded by Respondent's counsel. In that scenario, Mr. Kaspers simply asked Powell if he had obtained authorization to leave work at 11 o'clock to attend bargaining and then, when Powell answered affirmatively, then and there told Powell that he was being suspended for a day.

Such a fast–paced chain of events would indicate that Kaspers made the decision, on the spot and without consulting his client, to suspend Powell for a day. However, when asked who made the decision to suspend Powell, Torres testified "I believe that was my decision."

For still another reason, I reject the argument that Mr. Kaspers, on October 13, simply asked Powell if he had received permission to leave work at 11 a.m. to attend bargaining, received an affirmative answer and then, without further inquiry, told Powell he was being suspended. Such a brusk and precipitous action would be out of character.

During the nine days of hearing, Mr. Kaspers consistently impressed me with his intellect, his meticulous attention to detail, and his civility and professionalism. A lawyer of his intellect certainly would recognize that Powell's absence from the bargaining table on October 12 did not, by itself, indicate that Powell had intended to deceive his supervisor when he received permission to leave work early. A lawyer of Mr. Kaspers' meticulousness would not jump to a hasty conclusion about Powell without first ascertaining all the facts, including what Powell was doing on the afternoon of October 12 and why he wasn't at the bargaining session. A lawyer of Mr. Kaspers' civility and professionalism would not accuse Powell of lying without first inviting him to present his side of the story and considering it.

In sum, it would be quite out of character for Mr. Kaspers to impose discipline summarily on Powell without at least asking what Powell had been doing the previous afternoon and why he wasn't at the bargaining table. Moreover, Mr. Kaspers took the witness stand after having heard other witnesses testify that he *had* asked Powell about his activities the previous afternoon and that Powell *had* revealed his participation in the Board's investigation. If this testimony had not been true, Kaspers would have contradicted it when he took the witness stand. However, he did not. For all these reasons, I conclude that, before informing Powell that he was suspended, Mr. Kaspers learned that Powell had been participating in the Board's investigation.

It may be noted that even if I assumed, for the sake of analysis, that Respondent had *not* known about Powell's protected activity before Kaspers announced the suspension, the immediate objections plainly placed Respondent on notice that Powell had been engaging in protected activity. The suspension was not to take effect until the next day, so Respondent had time to rescind it. However, notwithstanding its knowledge of Powell's protected activities, it proceeded with the suspension.

Before deciding which analytical framework should be used in evaluating the facts, some further discussion may be warranted concerning the exact reason that Respondent disciplined Powell. Based on Powell's credited testimony, I have found that when Kaspers announced the suspension, he told Powell "The Company doesn't pay you to investigate. You are suspended for a day...You lied. You weren't here." This remark indicates that Respondent suspended Powell for supposedly telling a falsehood. It is important to ascertain, as exactly as possible, the nature of the claimed "falsehood."

Although Kaspers told Powell that the "Company doesn't pay you to investigate," Respondent did not pay Powell or any of the Union's negotiating committee members for the

time they spent in negotiations. Rather, the Union paid them. While at the bargaining table, they were off Respondent's clock and on the Union's. Accordingly, I cannot conclude that Respondent disciplined Powell for taking money to perform a task and then failing to do it.

Instead, Kaspers' claim that Powell lied appears to mean that Powell gave a false reason for requesting to leave work early. In fact, Powell did not *request* to leave work early but instead was following Torres' instruction. But even assuming for the sake of analysis that Powell had, in fact, said "I'm leaving work early to attend the bargaining session," that statement would not have been a lie. Powell indeed had been present at the negotiating site at the appointed time, a fact Respondent knew when it imposed the discipline. Powell's presence at the bargaining table clearly negates any inference that he falsely stated his intentions when leaving work.

Nonetheless, Respondent either is claiming that Powell gave one reason for leaving work early while actually intending to do something else, or else that he *later* gave Respondent a false explanation concerning where he had been. Thus, Respondent issued Powell an "Employee Disciplinary Report" which stated, in part:

> On 10/12/05 Rollie Powell left Mesker Door at 11:00 a.m. for the stated purpose of attending a bargaining session between the United Steelworkers Union and Mesker Door scheduled for that afternoon. While the commencement of the scheduled bargaining session was somewhat delayed, the bargaining session lasted more than 2–1/2 hours on 10/12. Rollie Powell was not present for and did not participate in any part of the more than 1–1/2 hour bargaining session. Mr. Powell's absence during the last half of the workday on 10/12 was, therefore, not only unexcused, but the reason he provided to the Company prior to leaving work on 10/12 proved to be a false reason. While providing the Company with a false reason for being absent from work is a serious offense for which immediate termination may be appropriate (see, for example, the 2004 termination of Roy Brooks for falsifying the reason for his absence from work), in the interest of reducing the negative effect that Mr. Powell's absence from the 2–1/2 hour bargaining session on the afternoon of 10/12 had on the progress that the Union and the Company have been making at the bargaining table, the decision was made not to terminate Mr. Powell's employment but to instead give him only a one day suspension without pay for falsifying the reason for his absence from work on the afternoon of 10/12.

The phrase "providing the Company with a false reason for being absent from work" reasonably could imply either that an employee lied to obtain permission to leave or, after returning from an absence, lied about what he had been doing or where he had been. The record establishes that Powell had done neither.

The credited evidence convincingly establishes that Powell did not falsify the reason for his absence from work at *any* time. Even assuming that Powell had said he was leaving work to go to the bargaining session, that is precisely what he did. Moreover, he later explained to Respondent's negotiators exactly where he had been, namely, with the Board agent. Respondent therefore had no reason to accuse him of any kind of falsehood.

The process of applying the law to the facts must begin with a determination of what analytical framework should be used to evaluate the evidence. In general, the Board does not perform a *Wright Line* analysis when an employer ostensibly disciplines an employee for

misconduct committed while the employee was engaged in protected activity. In that circumstance, the appropriate inquiry focuses on whether the claimed misconduct is so egregious that it removes the employee from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB No. 111 (May 8, 2006). Sometimes, this method of analyze is called the *Burnup & Sims* framework because of the Supreme Court decision which informed its development. See *Labor Board v. Burnup & Sims*, 379 U.S. 21 (1964).

Under the *Burnup & Sims* framework, the General Counsel bears the threshold burden of establishing that an employee had engaged in protected activity and that the disciplinary action resulted from conduct associated with that activity. Once the General Counsel has carried this burden, the respondent may rebut the government's case by showing that it held an honest belief that the employee had engaged in misconduct during the course of that protected activity. Proof that the respondent held such an honest belief defeats the government's case unless the General Counsel then can prove that the employee actually did not engage in the misconduct. See, e.g., *Pratt Towers, Inc.*, 338 NLRB No. 8 (September 30, 2002).

However, this analytical framework should not be used where the respondent did not hold an honest, good faith belief that the disciplined employee had engaged in misconduct. If such a belief does not exist, then the Board analyzes the facts using the *Wright Line* framework. See *Primo Electric,* 345 NLRB No. 99 (October 24, 2005).

Accordingly, whether the *Burnup & Sims* or the *Wright Line* framework should be used in this case turns on whether Respondent held an honest, good faith belief that Powell had engaged in misconduct. The credited evidence compels a conclusion that Respondent did not hold such a good faith, honest belief.

Respondent's assertion that Powell lied assumes that Powell asked management for permission to leave work at 11:00 a.m. on October 12 and, to support that request, falsely represented that he needed to leave at that time to participate in the negotiations. However, Powell's credited testimony establishes that he did not initiate such a request. Rather, Plant Manager Torres informed Powell of the change in meeting time and instructed Powell to leave work at 11 o'clock.

Thus, Respondent's argument that Powell lied is not based on anything Powell said to Plant Manager Torres. Rather, he supposedly misled management by what he did *not* say. Thus, Respondent elicited this testimony from Plant Manager Torres:

> **Q.** At any point on October 12, did Rollie Powell communicate to you or to your knowledge to anyone in the company that he needed to be absent from work for any reason other than to attend the bargaining?
>
> **A.** No, he did not.

Powell's supposed failure to request time off for another reason becomes, in Respondent's argument, a lie. However, this argument not only is disingenuous but transparently so.

Credited evidence establishes that the management negotiators did not arrive at the meeting place until about an hour and a half after the scheduled time. The Union tried unsuccessfully twice to contact them but could not get through. Moreover, it should have been easy for the Respondent's negotiators to get a message to the Union's bargaining team by calling the front desk of the hotel where they were going to meet. Instead, the Union negotiators waited without knowing when their counterparts would arrive, if at all.

On October 13, Powell made it clear to Kaspers and Torres that he had indeed been present at the meeting site, where he waited for nearly an hour before deciding to leave. Others on the Union's team confirmed to Kaspers and Torres that Powell had been present and Union Representative Anderson told them that he had tried unsuccessfully, twice, to contact them by telephone.

Both Kaspers and Torres testified, but neither offered any reason to disbelieve the information the Union negotiators had provided. If Respondent had a reason to doubt that Powell had been present at the meeting site on October 12, surely Kaspers and Torres would have described such a reason in their testimony. Likewise, if Respondent had any reason to doubt that the Union negotiators had tried to contact the management team, Kaspers and Torres would have made this reason clear when they took the witness stand.

Respondent has cited no basis for an honest belief that Powell had tried to deceive management or otherwise had told a lie. Moreover, the information provided by the Union's negotiators, including Powell himself, gave Respondent good reasons to believe that Powell had not been deceptive. Respondent adhered to its claim – that Powell had lied – even in the absence of evidence to support that claim and in the presence of evidence which contradicted it. More than that, Respondent offered no explanation for doing so. Accordingly, Respondent has failed to establish that it held an honest, good faith belief that Powell had engaged in misconduct.

Were I to conclude that Respondent held an honest belief that Powell had lied, or otherwise engaged in misconduct, I would then examine whether such misconduct was so egregious as to deprive him of the protection of the Act. Here, Powell's only possible "misconduct" was to leave the bargaining site before the management negotiators arrived. Therefore, were I to analyze this case under the *Burnup & Sims* framework, I would conclude that this "misconduct" – if it can even be called misconduct – wasn't so egregious. After waiting long past the scheduled starting time, and after attempts to contact the Respondent's negotiators had been unsuccessful, Powell left. As noted above, Respondent wasn't paying Powell for this time it kept him waiting without explanation. Powell had no duty to continue waiting, on his own time, for Respondent's tardy negotiators. At that point, leaving was not misconduct.

However, I do not analyze the facts using the *Burnup & Sims* framework. Because Respondent did not hold an honest belief that Powell had engaged in misconduct, use of the *Burnup & Sims* framework isn't appropriate. *Primo Electric*, above. Therefore, I will examine the facts using the *Wright Line* procedure described earlier in this decision.

The General Counsel has satisfied the first *Wright Line* requirement by proving that Rollie Powell engaged in activities protected by the Act. Powell's service as a member of the Union's negotiating committee certainly enjoys the Act's protection.

Moreover, on September 9. 2005, Powell filed an unfair labor practice charge against Respondent. This charge, docketed as Case 10–CA–35863, actually identifies the Charging Party as the United Steelworkers of America, AFL–CIO/CLC. However, Powell signed the charge, which listed his title as "Negotiating Committee Member." Filing this charge, of course, constituted protected activity. Powell also engaged in protected activity on October 12, 2005, when he met with the Board agent investigating the charge.

The record also establishes the second *Wright Line* element by proving that the Respondent knew about Powell's protected activities. Powell's service as a member of the Union's bargaining committee brought him into contact with management and identified him with the Union.

Respondent also had notice of Powell's protected activity filing the unfair labor practice charge. As discussed above, Powell's name and signature appear at the bottom of it. Respondent also knew that Powell had met with the Board investigator on October 12, 2005 because the next day, Powell told Respondent's attorney and plant manager. Powell made this disclose in explaining why he had not participated in the October 12 bargaining session.

The government also has proven the third *Wright Line* element. Respondent suspended Powell for one day and this suspension certainly constituted an adverse employment action.

Finally, the General Counsel has satisfied the fourth *Wright Line* requirement by proving a connection between Powell's protected activities and the adverse employment action. Ample persuasive evidence demonstrates that Respondent's hostility to Powell's protected activities was a substantial and motivating factor in the decision to suspend him.

The evidence leaves no doubt that Powell's filing an unfair labor practice charge annoyed Respondent's management. Indeed, the Respondent's attorney's ire flared the very day before he suspended Powell.

Based on the testimony of Regan Long, whom I credit, I find that when Attorney Kaspers arrived at the bargaining session on October 12, 2005, told the Union negotiators, "I guess a thanks should be in order to you guys for tying us up all morning with the NLRB Charges..." Kaspers then referred to the "cost of all this litigation" and told the employees that they would not be receiving the raises they expected.

The next day, when Kaspers learned that Powell had been meeting with the Board agent the previous afternoon, he suspended Powell. This sequence establishes a nexus between Powell's protected activity and the adverse employment action.

In sum, the General Counsel has proven all four of the *Wright Line* elements. At this point, the burden of going forward normally would shift to the Respondent, to present evidence that it would have taken the same action even in the absence of protected activity. However, when a respondent has asserted a pretextual reason for taking an adverse employment action, that resort to pretext forfeits the respondent's right to present rebuttal evidence. *Limestone Apparel Corp.*, 255 NLRB 722 (1981)("a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)("if the evidence establishes that the reasons given for the Respondent's action are pretextual...the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct...").

Just as the evidence establishes that Respondent did not have an honest, good faith belief that Powell had engaged in misconduct, it reveals that Respondent tried to hide its discrimination behind a pretext. Indeed, when ranked against the pretexts typically encountered in labor law, this one is particularly obvious, transparent, and unconvincing. As a counterfeit reason for the discipline, it appears as genuine as a $5 bill showing a bald Lincoln.

Respondent claims it suspended Powell because he lied about his intention to attend the bargaining session. Respondent's actions belie that claim. Even when presented with uncontradicted evidence that Powell had, in fact, been present at the meeting site at the appointed time, and therefore had not misrepresented his intention, Respondent persisted in imposing the discipline. Respondent's determination to punish Powell existed independent of the reason Respondent proffered for it.

Respondent's true, retaliatory reason appears all too obvious in the words and actions of its chief negotiator. More than once, Kaspers announced that employees would not receive any wage increase because of the pending unfair labor practice charge. The existence of the charge clearly bothered him. Then, on October 12, he found himself meeting with a Board investigator concerning the charge, and, in fact, spending more time than he had planned for that purpose.

Powell's decision to meet with the Board agent later that same day, rather than to wait longer for Kaspers and Torres to arrive at the bargaining site, did more than remind Respondent of Powell's initial involvement with the charge. Now, it appeared, Powell had "stood up" the management negotiators, choosing to meet instead with the Board investigator. Thus scorned, Respondent reacted with fury. Kaspers accused Powell of lying and then suspended him.

As the Board observed in *Rood Trucking Co.*, 342 NLRB 895 (2004), a finding of pretext defeats any attempt by a respondent to show that it would have discharged a discriminatee even absent protected activities. Accordingly, I conclude that Respondent has failed to rebut the General Counsel's case.

Because Powell's protected activities included signing the unfair labor practice charge and meeting with the Board agent, Respondent's retaliation for those activities violated Section 8(a)(4) as well as Sections 8(a)(3) and (1) of the Act. I recommend that the Board so find.

Complaint Paragraph 16(c)

Complaint paragraph 16(c) alleges that on about October 13, 2005, Respondent imposed points on Rollie Powell under the Respondent's attendance system. Respondent admits this allegation but it denies that it did so because of employees' protected activities, as alleged in Complaint paragraph 18. Respondent also denies that its action violated Section 8(a)(1), (3) and (4), as alleged in Complaint paragraphs 26, 27 and 28. During the hearing, the parties entered into the following stipulation:

> Without waiving Respondent's position that everything which occurred after May 8, 2006 was lawful, the parties stipulate that General Counsel's Exhibit 21a is an attendance point system that the company and the union negotiated and agreed upon in July 2005 and which was implemented effective August 1, 2005.
>
> General Counsel's Exhibit 21b is the attendance point system that has been in effect since June 6, 2006.

Under the negotiated attendance policy, an employee who received a written warning also would receive a negative attendance point, and an employee who received a one–day suspension also would receive two negative attendance points. The Respondent also could assess negative points for absences.

The system also provided for positive "earn back points" which would cancel out negative points. Employees received such points for good attendance. When an employee's score reached 9 positive points, the employee could "sell back" 6 of them for a paid day off.

When Respondent suspended Powell in October 2005, that disciplinary action automatically resulted in Powell receiving negative attendance points. The Complaint treats this imposition of points as a separate act of unlawful discrimination, but it can also be regarded as a part of the violation alleged in Complaint paragraph 16(b).

Either way, the imposition of negative points violated Section 8(a)(1), (3) and (4) of the Act. But for Respondent's unlawful suspension of Powell, he would not have been assessed negative points under the attendance system. Accordingly, the imposition of points was unlawful. I recommend that the Board find that Respondent, by this action, violated Section 8(a)(1), (3) and (4) of the Act.

Powell's employment with Mesker Door ended in September 2006. From the present record, it is unclear whether the unlawful imposition of negative points resulted in Powell being ineligible for a paid day off to which he otherwise would have been entitled. Such an issue must be left for resolution in the compliance phase of this proceeding.

Complaint Paragraph 16(d)

Complaint paragraph 16(d) alleges that on about June 21, 2006, Respondent discharged employee Cecil Herren. Respondent admits this allegation.

Complaint paragraph 19 alleges that Respondent discharged Herren because employees advised Respondent of their intention to seek recourse for perceived discrimination for Union activities through the National Labor Relations Board and to discourage employees from filing charges and giving testimony under the National Labor Relations Act. Respondent denies this allegation. Respondent also denies that Herren's discharge violated Section 8(a)(4) and (1) of the Act, as alleged in Complaint paragraph 28. (The Complaint does not allege that Herren's discharge violated Section 8(a)(3) of the Act.)

Herren was a production employee and, on June 16, 2006, was operating a punch press making steel doors. The settings on such a machine do not stay fixed indefinitely but may drift over time. Moreover, the metal being punched may vary from piece to piece. Therefore, Respondent has a rule that an operator must measure every twentieth door to make sure that it meets specifications.

Supervisor Richard Watson reminded Herren, on June 16, 2006, of this "check every 20" rule. According to Watson, Herren said that he was good enough at his job to run 60 doors without having to check. Plant Manager Roth, who also was present at this point, quoted Herren saying that he was good enough at his work he only had to check every 50 doors. Additionally, Assistant Plant Manager Smith testified that, on this same day, he heard Herren say that he was good enough that he only had to check every 50 doors. However, it is not entirely clear that Smith was referring to the same conversation Roth and Watson described.

Herren denied saying, *in this conversation*, that he was good enough that he only had to check every 50 doors, but he admitted making that statement later the same day. He testified as follows:

> **Q.** At the front end of that day did you have a discussion with James Smith and Rick Watson in which you said, I am good enough at this, I only have to check my doors every 50?
> **A.** No. That was after the doors were already messed up.

For two reasons, I do not credit Herren's denial. First, three other witnesses, Roth, Smith and Watson, testified that he said he was good enough that he only had to check every 50 doors during the discussion early in the day. This 3–to–1 ratio, although not dispositive, certainly does not weigh in Herren's favor.

Second, as discussed below, Herren's work on June 16, 2006 wasn't good, and 20 doors had to be scrapped. If we assume that Herren had not bragged, earlier in the day, that he didn't need to check every twentieth door because of his skill, it would be quite odd for him to make this claim later, while discussing the bad doors coming off his press. On the other hand, if he had made such a statement to the supervisors *before* doing the bad work, it naturally would come back to haunt him in the later discussion.

For these reasons, I find that Herren did, in this early morning conversation, claim that his skill exempted him from needing to follow the check–every–20 rule. Notwithstanding Herren's claim, Supervisor Watson told him to follow the rule.

He did not. Instead, he made 40 faulty doors, 20 of which were unusable and the remaining 20 marginally usable.

On June 19, 2006, Supervisor Watson, and Assistant Plant Manager Smith called Herren to the office, suspended him for one day, and reassigned him to work on another task which had a lower rate of pay.

Herren testified that he had expected to be disciplined because "I messed them [the doors] up, it was my fault." However, the severity of the discipline surprised him. Herren told the supervisors that he considered the discipline unjust and wanted to go to arbitration.

According to Herren, he also told them that he was going to "seek grievance through the National Labor Relations Board." However, both Smith and Watson testified that Herren never mentioned going to the Board. Watson wrote an "Employee Disciplinary Report" summarizing the meeting. This report included an "Employee's Remarks" section in which the following handwritten comment appears: "This is unjust and wishes to go to arbitration." The report makes no reference to the Board.

Considering that Smith's testimony corroborates Watson's on this point, and that no mention of the Board appears in the Employee Disciplinary Report, I conclude that Herren mentioned only arbitration, and not going to the Board, during the disciplinary interview on June 19, 2006. The witnesses agree, however, that during the meeting, Herren said that the supervisors were imposing this discipline because he had voted for the Union, and that the supervisors denied it.

It should be noted that the arbitration procedure mentioned by Herren did not arise out of any agreement with the Union. Indeed, Respondent had withdrawn recognition from the Union more than a month earlier, on May 8, 2006. The record suggests that Respondent created the arbitration procedure, but does not disclose exactly when Respondent did so.

As noted above, on June 16, 2006, Plant Manager Roth had heard Herren brag that his skill made it unnecessary for him to follow the rule. Roth previously had been plant manager at the Huntsville facility, and then had returned from retirement in February 2006 to assume that position again. Roth had some experience with Herren from his earlier duty as plant manager. Either Herren's bragging on June 16 or his massive mistake later that day, or both, reminded Roth of that earlier experience, and Roth decided to review Herren's personnel record. He wanted to find out about Herren's performance during the period before Roth came back from retirement.

Documents in the personnel file indicated problems with Herren's work, including instances in which Herren had failed to check his parts, the same type of error which had resulted in the 40 bad doors. In particular, it troubled Roth that there were, in Roth's words, "many reports of insubordination. Spitting on the floor after being told not to and things of that nature." In light of these previous incidents, Herren's bragging that his skill placed him above the rule took on additional significance.

Roth testified that, after reviewing these records, he "had no reason to think that [Herren] wouldn't continue to [do] the same things that he'd been doing." Roth converted the suspension into a discharge.

Following the *Wright Line* framework, I conclude that the General Counsel has proven that Herren had engaged in some protected activity. Specifically, Herren had testified in a previous Board proceeding in August 2005.

The General Counsel argues that Herren engaged in other protected activity more proximate to his discharge. According to Herren, when he received the suspension, he told the supervisors that Respondent was taking that action because Herren voted for the Union. Herren also testified that he told the supervisors he would take the matter to arbitration and to the Board.

For the reasons discussed above, I do not credit Herren's testimony that he told the supervisors he would go to the Board. However, I do find that Herren told the supervisors that he would take the matter to arbitration.

If the arbitration procedure had arisen out of negotiations between Respondent and the Union, Herren's statement that he intended to use this procedure would constitute an assertion of a right under a collective–bargaining agreement and therefore would enjoy the Act's protection. *White Electrical Construction Co.*, 345 NLRB No. 90 (September 30, 2005); *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). However, the arbitration procedure was not created by contract.

The General Counsel argues that Herren's expression of intent to seek arbitration still would enjoy the Act's protection because arbitrator would decide whether Herren had been discriminated against because of his support for the Union, a question relating to the Act. "Mr. Herren clearly indicated an intent on his part to vindicate rights that are provided to employees only by the National Labor Relations Act," the General Counsel asserts, "and discrimination for that invocation is a violation of Section 8(a)(4)."

The language of Section 8(a)(4), however, may not be quite as wide as the General Counsel claims. The provision makes it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. Sec. 158(a)(4). Nothing in Section 8(a)(4) specifically refers to vindicating rights that are provided to employees only by the Act. Additionally, using the non-contractual arbitration procedure would not constitute either union activity or activity undertaken by employees in concert for their mutual aid and protection. Absent some specific case authority, I will not conclude that the Act protects Herren's remark about taking the matter to arbitration.

Herren did engage in one other protected activity. After becoming disaffected with the Union, Herren signed the petition on which Respondent relied in withdrawing recognition. Because the Act protects both this petition signing and Herren's earlier testimony in the August

2005 Board proceeding, I conclude that the General Counsel has established that Herren engaged in protected activity.

Additionally, I conclude that the government has satisfied the second *Wright Line* requirement. Respondent obviously knew about Herren's testimony in a proceeding to which it was a party. Respondent also knew about Herren's signing the petition, because Respondent received that petition and relied on it when it withdrew recognition from the Union.

The General Counsel also has established that Herren suffered an adverse employment action. Discharge was adverse to his employment.

However, the government has not proven a connection between Herren's protected activity and his discharge. About 10 months elapsed between Herren's testimony in the Board proceeding and his discharge, so I do not infer any connection from the timing. Moreover, there is no other evidence that Herren's testimony was a substantial or motivating factor in the decision to discharge him.

It seems unlikely that Respondent would retaliate against Herren for signing an anti–Union petition and I conclude that Respondent did not.

Based upon my observations of the witnesses, I credit Plant Manager Roth's testimony. His explanation of the decision to discharge Herren seems highly plausible. Considering Herren's demonstrated attitude – he maintained that he did not have to follow the check–every–20 rule even *after* ruining 20 doors – Roth foresaw that Herren would continue to ignore supervision. That, in turn, would lead to more unacceptable product in the future.

Section 10(c) of the Act includes the proviso that "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 backpay, if such individual was suspended or discharged for cause." Crediting Plant Manager Roth's testimony, I conclude that Herren's termination was a discharge for cause within the meaning of this proviso.

Because the General Counsel has not proven the fourth *Wright Line* element, the Respondent has no rebuttal obligation. The government has not made its case. Therefore, I recommend that the Board dismiss the allegations relating to Herren's discharge.

Complaint Paragraphs 16(e), 16(f) and 16(g)

Complaint paragraph 16(e) alleges that on about July 12, 2006, Respondent imposed a 2–day suspension on employee Rollie Powell. Complaint paragraph 16(f) alleges that on about July 14, 2006, Respondent reassigned Powell to take–off duties on the frame department paint line. Complaint paragraph 16(g) alleges that on about July 14, 2006, Respondent cut Powell's rate of pay.

Respondent admits all of these allegations, but denies that it took those actions "because of employees' union activities and concerted protected activities and because employees filed

charges and gave testimony pursuant to the National Labor Relations Act," as alleged in Complaint paragraph 18. Respondent also denies that its actions violated Section 8(a)(1), 8(a)(3) and 8(a)(4) of the Act, as alleged in Complaint paragraphs 27 and 28.

On July 12, 2006, Respondent suspended Powell for 2 days giving, as the stated reason for the suspension, that Powell had made 130 bad parts. For the same stated reason, it transferred Powell to a lesser–paying job on the frame department paint line.

The General Counsel argues, in effect, that Respondent focused its attention on Powell because of his protected activities, and subjected him to more scrutiny than other employees. The General Counsel further asserts that Respondent would not have imposed a 2–day suspension but for the existence of the October 2005 discipline, which was unlawful.

In early July 2006, Powell was a production employee making door frames. The credited evidence establishes that on July 7, 2006, Powell produced 130 frames which significantly departed from the specifications. After examining the faulty frames, management concluded that they might be repaired by welding. With the customer's permission, Respondent had the frames welded and shipped to the customer. As Respondent's Answer admits, management then suspended Powell for 2 days and reassigned him to a lower–paying job.

The General Counsel's argument goes into considerable detail concerning exactly how the frames failed to meet Respondent's specifications, but I reject any suggestion that the defects were minor, tolerable, or no different from work product which had been acceptable in the past. The credited evidence establishes that the defects were serious.

In reaching this conclusion, I specifically do not credit the testimony of James Thompson, an employee in Respondent's warehouse. Thompson admitted that his duties involve determining whether products are properly labeled, inventoried, and stored and that quality control was not his job. However, Thompson's testimony pertained to whether the 130 frames complied with specifications, which is a quality control issue.

Although Thompson testified that he measured all 130 frames, I am skeptical. Thompson testified that the measurements took "maybe five, ten minutes." Completing the measurements in only 10 minutes would require Thompson to have measured 13 frames a minute or one frame every 4.6 seconds. That pace sounds rather rapid, particularly for an employee whose regular job duties do not involve quality control. Thompson also testified that the frames were bound on a pallet and that he did the measurements without unloading the pallet or breaking the packaging apart.

Additionally, to determine whether the frames met specifications required the measurement of miters, but Thompson testified that he usually did not make measurements of miters. Thompson's knowledge of the specified tolerances appeared to be limited. On cross–examination, he testified, in part, as follows:

Q. Do you know what the tolerances are for a throat opening on an 800 series frame?

A. Throat opening, no.

Q. Have you ever seen the Steel Door Institutes published technical data series manufacturing tolerance standard for steel doors and frames?
A. I'm not aware of it, no.

Considering that Thompson's job duties did not include quality control, that he had limited knowledge of the technical standards, and that he claimed to have measured 130 frames in 5 or 10 minutes, I conclude that his testimony is not reliable and do not credit it.

Additionally, the credited evidence does not establish that Respondent subjected Powell to greater scrutiny than other production employees or imposed upon him any conditions which would cause him to make a mistake. The General Counsel argues that Plant Manager Roth instructed Powell that his production "needed both to be of sufficient quality and run quickly" and that this instruction put Powell in a no–win situation: Powell either had to sacrifice quality to meet the production standard or else attend to quality and fail to meet the standard.

The record establishes that Plant Manager Roth did, in fact, talk to Powell about increasing his production. Based on my observations of the witnesses, I have concluded that Roth's testimony is more reliable, and resolve any conflicts by crediting Roth. Accordingly, I find that Roth was concerned about Powell's production level and believed it would improve if Powell spent more time at his machine. Roth told Powell that he should "stay on the job" rather than leave his machine. Roth also said that he didn't want Powell to work any faster; he wanted Powell to work "smarter, not harder."

The credited evidence fails to establish that Respondent imposed on Powell any production standard more onerous than that placed on other employees. Roth's instruction that Powell work "smarter, not harder," simply reflected Roth's believe that if Powell stayed at his machine and devoted his attention to the task, he would increase his production rate without diminishing the quality.

Credited evidence also does not establish that Respondent subjected Powell to any closer scrutiny. Clearly, Respondent was concerned about increasing production. Indeed, it was so focused on production that it brought Roth out of retirement to replace the existing plant manager. Although this change did result in a close examination of the production employees' work, the record does not indicate that this scrutiny fell disproportionately on Powell.

In sum, I conclude that on July 7, 2006, Powell made 130 defective frames. Management reasonably concluded that Powell could not have been following the check–every–20 rule because, if he had been following that rule, he would have detected the problem long before the number of bad frames reached 130.

Further, the record establishes that Powell had clear notice of this rule. On April 19, 2004, he had received a warning for "defective and improper work." This warning specifically stated: "Check every 15 to 20 from now on and you will not have as many bad parts."

Analyzing the facts under the *Wright Line* framework, I conclude that the General Counsel has proven the first 3 requirements. Powell had engaged in extensive protected activity, including serving on the Union's bargaining committee, filing charges with the Board, and

meeting with the Board agent. For the reasons discussed above, I conclude that Respondent clearly knew about these activities. Additionally, there is no doubt that a 2–day suspension constitutes an adverse employment action.

The government also has proven the required link between the protected activities and the adverse employment action. As discussed above in connection with Complaint paragraphs 16(b) and 16(c), in October 2005, Respondent had disciplined Powell in retaliation for his protected activities and had resorted to a pretext in doing so. Powell's protected activities had included filing a charge with the Board and meeting with a Board agent, and retaliation for such activity indicates hostility to the Act and its purposes.

Respondent also committed certain other unfair labor practices, discussed above. Accordingly, I conclude that animus towards union and other protected activity constituted a substantial and motivating factor in the decision to suspend Powell for 2 days. The burden therefore shifts to Respondent to prove that it would have taken the same action in any event, even if Powell had not engaged in protected activities.

The record establishes that Respondent had disciplined other employees for making defective parts. On July 19, 2002, it discharged employee Jeff Kimbrough for that reason, the discharge notice explaining that "due to past history (3 additional write ups) we are terminating your employment with Mesker Door."

Respondent's evidence establishes that it would have taken *some* disciplinary action against Powell even if the absence of protected activity. However, Respondent has not proven, by a preponderance of the evidence, that it would have suspended him for 2 days and transferred him to a lower paying job. To the contrary, Respondent's own evidence indicates the opposite.

Michael Torres, who was then customer relations manager, attended the meeting in which Roth informed Powell of the 2–day suspension and his transfer to the lower–paying job. Torres' notes of that meeting include the following:

> George [Roth] told Rollie [Powell] that the reason he was moved to the paint line was for running bad parts.
>
> Rollie asked if the parts were scrapped, because James Smith had told him that they were going to be scrapped.
>
> George told Rollie that the customer, Wheeler Hardware had been contacted and because they were going to weld the frame they had agreed to work with them.
>
> Rollie then said so you are telling me that I was suspended for running parts that you are going to ship to a customer.
>
> George said no, I'm telling you that you were suspended for running unacceptable parts. You have had several write–ups in the past and your continued failure to run acceptable parts resulted in your suspension.
>
> * * *
>
> Rollie asked why he was suspended for 2–days.
>
> George said because he already had a suspension for 1–day.

Based on Torres' notes, I conclude that Respondent's unlawful suspension of Powell in October 2005 resulted in Respondent's July 2006 decision to suspend Powell for 2 days, rather

than for a lesser period. Therefore, I further conclude that Respondent has not carried its rebuttal burden.

In sum, I recommend that the Board find that Respondent's 2–day suspension of Powell, and the related transfer of Powell to a lower–paying job, violated Section 8(a)(1), (3) and (4) of the Act.

Withdrawal of Recognition

Respondent has admitted that, during the period March 22, 2005 until May 8, 2006, the Union was the exclusive representative, by virtue of Section 9(a) of the Act, of the appropriate bargaining unit described above under "Admitted Allegations." It also admits that on May 8, 2006, it withdrew recognition of the Union and since then has refused to recognize and bargain with the Union, as alleged in Complaint paragraph 20. However, Respondent asserts that it lawfully withdrew recognition because the Union no longer enjoyed the support of a majority of bargaining unit employees.

Alan Frazier, an employee in Respondent's seamless department, prepared a petition stating, "We, the undersigned, no longer wish to be represented by the United Steelworkers Union." Frazier signed it on April 27, 2006, and then began asking other employees to sign it. By May 8, 2006, when Frazier presented the petition to Plant Manager Roth, it had been signed by either 34 or 35 employees.

Although Respondent counts 35 signatures, the General Counsel questions whether one of those signatures should be counted. At the time the plant manager received the petition, the bargaining unit consisted of 65 employees. Therefore, even assuming that only 34 of the signatures are counted, more than one–half of the bargaining unit had expressed an intention not to be represented by the Union. Based on the petition, Respondent withdrew recognition.

The government has not asserted that Frazier was Respondent's supervisor and the record does not establish such status. Additionally, there is no evidence that Frazier was related to any member of management and he credibly testified that he was not. The record also does not establish that management sponsored or encouraged Frazier to circulate the petition or assisted him in that effort.

The General Counsel, however, argues that Respondent lawfully could not withdraw recognition because it had committed unfair labor practices which were unremedied, and which caused the Union's loss of support. In particular, the government contends that unlawful statements in Plant Manager Roth's May 4, 2006 speech to employees caused them to abandon support for the Union.

The Board has held that evidence in support of a withdrawal of recognition "must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996). In cases involving unfair labor practices other than a general refusal to recognize and bargain, there

must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. *Lee Lumber*, above; *LTD Ceramics, Inc.*, 341 NLRB 86, 88 (2004).

To determine whether a causal relationship exists between the unfair labor practices and the employee disaffection, the Board considers four factors: (1) The length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection, and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

In the present case, I will not, of course, consider the unfair labor practice which occurred after the withdrawal of recognition. Respondent's suspension of Rollie Powell for 2 days in July 2006 could not have affected employee support for the Union before Respondent withdrew recognition two months earlier.

However, the following unfair labor practices, discussed above, will be considered:

1. Manager Torres' March 9, 2005 statements to Janice Medlock that "that going around talking to people about FMLA, vacations, etc. could jeopardize her job" that if he heard again that she was keeping records on employees she would be disciplined.
2. The statements of Respondent's chief negotiator, William Kaspers, at the September and October 2005 bargaining sessions, that employees would not receive a wage increase and that the negotiations would not be concluded because of the unfair labor practice charges.
3. Respondent's October 13, 2005 suspension of Rollie Powell.
4. Plant Manager Roth's May 4, 2006 statement "[A]nyone who's so unhappy here that you think you need to put this Company out of business needs to move on, find another job, and leave the rest of us the hell alone."

Plant Manager Torres' March 9, 2005 statements to Janice Medlock would appear to have little effect on employee sentiment more than a year later. Besides the amount of time which elapsed, only one employee heard what Torres said. Therefore, it would appear unlikely to have a detrimental or lasting effect on employees. Additionally, the statement did not directly concern the Union, making it unlikely to cause employee disaffection. Similarly, it had little potential to affect employees' morale, organizational activities or Union membership.

Respondent's statements at the bargaining table in September and October 2005 similarly were remote in time from the withdrawal of recognition. These statements focused on the filing of charges rather than on the Union itself. Therefore, I conclude that they would be unlikely to have a detrimental or lasting effect on employees' support for the Union. Similarly, the statements would be unlikely to cause employee disaffection with the Union, and would have minimal effect on employees' morale, organizational activities, and Union membership.

Respondent's October 13, 2005 suspension of Powell also occurred half a year before the withdrawal of recognition. Although a serious violation, it would be unlikely to have a lasting detrimental effect. Likewise, the suspension would be unlikely to cause employee disaffection or have a significant effect on employees' morale, organizational activities and Union membership.

On the other hand, Plant Manager Roth's May 4, 2005 speech came at a pivotal time in Frazier's efforts to obtain signatures on his petition. Indeed, the General Counsel notes that Frazier increased his efforts to obtain signatures after the speech. Accordingly, the first *Master Slack* factor, the length of time between the unfair labor practice and the withdrawal of recognition, weighs in favor of finding a causal relationship.

However, the nature of the violation does not. As discussed above, Roth's expressions of opinion about the Union, or more exactly, some members of the Union's negotiating committee, enjoy the protection of 8(c) of the Act and are not unfair labor practices. Therefore, I do not consider them in this analysis. Here, I focus on Roth's "find another job" remark.

As to the second *Master Slack* factor, Roth's May 4, 2006 remarks would not appear to have a significant detrimental effect on support for the Union. As noted above, Roth directed the force of his criticism at certain unnamed employees who had supported the Union, and not at the Union itself.

Moreover, I concluded that his "find another job" remark violated the Act because, in the context of Roth's entire speech, it referred to employees who had filed unfair labor practice charges. Employees reasonably would understand Roth to be saying that employees should choose between filing charges and working for Respondent, but that is different from the message that employees should choose between supporting the Union and working for Respondent. Although Roth's remark manifested some hostility towards those who filed unfair labor practice charges, Roth did not express that kind of hostility towards the Union.

Roth's statement might arouse sentiment against the employees whom Roth criticized, but these individuals already had resigned from the Union's negotiating committee. Hostility towards these employees would not automatically translate into hostility towards the Union.

Likewise, the implication inherent in Roth's violative statement, that certain employees were trying to put the Respondent out of business *by filing charges*, would have little effect on employees' morale, organizational activities, or Union membership. The Union certainly is one of the Charging Parties in the present proceeding, but in the context of Roth's entire speech, it appears clear that he was referring to employees who file charges, rather than to the Union.

In sum, following the *Master Slack* analytical framework, I do not find in the record specific proof of a causal relationship between the unfair labor practices and the employee disaffection. Therefore, I conclude that the existence of these unremedied unfair labor practices did not preclude Respondent from lawfully withdrawing recognition. See *Champion Home Builders Co.*, 350 NLRB No. 62, slip op. at 4–5 (August 16, 2007).

Accordingly, I recommend that the Board dismiss the Complaint allegations that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union.

Unilateral Change Allegations

Complaint paragraph 21 alleges that on or about May 15, 2006, the Respondent implemented certain changes to the wage rates of bargaining unit employees. Respondent's Answer admits these changes, although it objects that the allegations are irrelevant because Respondent lawfully withdrew recognition from the Union.

Complaint paragraph 22 alleges that on or about June 5, 2006, the Respondent implemented certain changes in its points and attendance system applicable to bargaining unit employees, such changes pertaining to the method and rate by which employees "earn back" attendance points assessed to them, the number of allowable points, and the cap on the number of points that may be "earned back" under the system. Respondent's Answer again raises a relevancy objection. It further states that, subject to the objection, Respondent "admits that on or about June 5, 2006, the Respondent implemented certain changes to the attendance point system applicable to its production, maintenance and warehouse employees pertaining to the rate by which employees 'earn back' points ass[ess]ed to them, as well as the cap on the number of points that may be 'earned back' under the system. While the Respondent further admits that it gave every employee 2–1/2 points on or about June 5, 2006, the Respondent denies that any change was implemented pertaining to the method by which employees 'earn back' points or the number of allowable points, as alleged in paragraph 22...the Respondent, therefore, denies said allegations and any remaining allegations in paragraph 22..."

Complaint paragraph 23 alleges that in or about July 2006, the Respondent implemented a change to the rules pursuant to which it calculates and determines whether to pay incentive bonuses to bargaining unit employees. Respondent's Answer states: "Subject to the Respondent's irrelevancy objection...the Respondent admits that around August, 2006, the Respondent changed its incentive bonus system so that eligibility for a bonus now depends upon productivity and profitability. The Respondent denies all of the remaining allegations set forth in paragraph 23..."

Complaint paragraph 24 alleges that the subjects set forth in Complaint paragraphs 21, 22 and 23 are mandatory subjects of bargaining. Respondent denies this allegation.

Complaint paragraph 25 alleges that Respondent unilaterally engaged in these acts without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and the effects of such acts and conduct. Again, Respondent's Answer objects that the allegation is irrelevant because Respondent lawfully withdrew recognition from the Union on May 8, 2006. However, Respondent's Answer denies the allegation "since prior notice to the Union and an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees was afforded to the Union between March 22, 2005 and May 8,

2006, with respect to changes in wage rates, the attendance point system, and modification of the incentive bonus system to a bonus system based upon productivity and profitability."

Because of my conclusion, discussed above, that Respondent lawfully withdrew recognition from the Union on May 8, 2006, I conclude that it had no duty to bargain when it made the changes described in Complaint paragraphs 21, 22 and 23. Therefore, I recommend that the Board dismiss these unilateral change allegations.

Conclusions of Law

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

2. The Union, United Steelworkers of America, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. On about March 9, 2005, Respondent violated Section 8(a)(1) of the Act by informing an employee that she would jeopardize her employment if she spoke with other employees about certain terms and conditions of employment, including vacations and Family Medical Leave Act leave, and by informing her that she would be subject to disciplinary action if she kept records concerning the vacation and leave taken by other employees.

4. In September and October 2005, Respondent violated Section 8(a)(1) of the Act by telling employees that employees would not receive a pay increase because unfair labor practice charges had been filed against Respondent, and that negotiations with the Union would not progress to completion so long as the charges were pending.

5. On May 4, 2006, Respondent violated Section 8(a)(1) of the Act by telling employees that employees who were so unhappy that they felt they needed to put the Respondent out of business should find other employment.

6. On October 13, 2005, Respondent violated Section 8(a)(1), (3) and (4) of the Act by suspending employee Rollie Powell because of his Union activity and because he filed charges with the Board and met with a Board investigator in connection with those charges.

7. On about July 12, 2006, Respondent violated Section 8(a)(1), (3) and (4) of the Act by suspending employee Rollie Powell and transferring him to a lower–paying job because it predicated the decision to take this action partly on its earlier unlawful suspension of Powell described in paragraph 6, above.

8. Respondent did not violate the Act in any other manner alleged in the Complaint.

Remedy

To remedy the unfair labor practices described above, Respondent must rescind its unlawful suspensions of its employee Rollie Powell and its transfer of Powell to a lower–paying

job, expunge all references to these disciplinary actions from his personnel file and other records, and make him whole, with interest, for the losses he suffered because of these actions. Respondent must also post at its facility, in the manner described below, the Notice to Employees attached hereto as Appendix A.

ORDER

The Respondent, Mesker Door, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Instructing its employees not to discuss with other employees their terms and conditions of employment, including matters related to vacation and leave, and telling its employees that they will jeopardize their employment and be subject to disciplinary action if they engage in such discussions or keep records of the vacation and leave taken by other employees.

(b) Telling employees that any employee who is so unhappy that he thought he needed to put Respondent out of business needed to find other employment.

(c) Suspending, transferring or otherwise disciplining any employee because he engaged in union activities or because he filed unfair labor practice charges with the National Labor Relations Board, provided information to a Board investigator, or gave testimony under the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Rescind the suspensions it imposed on employee Rollie Powell on October 13, 2005 and July 12, 2006, rescind the July 12, 2006 transfer of Powell to a lower–paying job, expunge all references to those actions from his personnel file and other records, and make him whole, with interest, for all losses he suffered because of the unlawful discrimination against him.

(b) Within 14 days after service by the Region, post at its facilities in Huntsville, Alabama, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 March 9, 2005.

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

Dated Washington, D.C., November 13, 2007.

Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit employees from discussing with other employees their terms and conditions of employment, including those terms and conditions related to vacation time and leave under the Family Medical and Leave Act.

WE WILL NOT tell employees that they jeopardize their employment or could be subject to disciplinary action for discussing terms and conditions of employment with other employees or for keeping track of the vacation and leave days which employees take.

WE WILL NOT tell employees that employees will not receive a pay increase because charges had been filed with the National Labor Relations Board, and WE WILL NOT tell employees that negotiations with a labor organization representing our employees will not proceed to completion so long as unfair labor practice charges are pending.

WE WILL NOT tell employees that any employee who dislikes his job so much that he wishes to put the company out of business should find work elsewhere, or otherwise imply that filing charges with the National Labor Relations Board is incompatible with employment.

WE WILL NOT suspend, transfer or otherwise discipline an employee because that employee engaged in union or other protected activity, or because that employee filed an unfair labor practice charge with the National Labor Relations Board, provided information to a Board investigator, or gave testimony under the National Labor Relations Act.

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

WE WILL rescind the suspensions we imposed on employee Rollie Powell on October 13, 2005 and July 12, 2006, and our July 12, 2006 transfer of Powell to a lower–paying job, will expunge

all references to those actions from our files, and will make Rollie Powell whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

MESKER DOOR, INC.
Respondent

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 an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street, N.E., Harris Tower, Suite 1000, Atlanta, Georgia 30303–1531
(404) 331–2896, Hours: 8a.m. to 4:30 p.m.

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 WITH ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331–2877.