

Allied Aviation Fueling of Dallas, LP and Transport Workers Union of America, Air Transport Local 513. Cases 16–CA–24267 and 16–CA–24288

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

On December 21, 2005, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We affirm the judge's finding that employee and union maintenance chair Patrick Sanford did not engage in conduct so egregious as to lose the protection of the Act when he deliberately altered his own signature style and signed the name of another employee on a grievance form without that employee's permission. Our finding is limited to the facts of this case, which show that Sanford acted in the good-faith belief that his action was necessary to preserve a contractual grievance claim, that he derived no direct benefit from the grievance filing, and that he quickly and voluntarily withdrew the grievance and acknowledged the forgery to management upon learning that the affected employee opposed the filing. We do not pass on whether deliberate falsification of signatures on grievance forms would be protected in other circumstances.

In finding that Sanford's suspension and discharge violated Sec. 8(a)(3) and (1) of the Act, we do not rely on the judge's analysis of Sanford's discharge under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board has consistently held that, where an employer admits that it discharged an employee for engaging in protected activity, a *Wright Line* analysis is inapplicable. See, e.g., *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

We also affirm the judge's finding that the Respondent's admitted unilateral change in the company drug-testing policy violated Sec. 8(a)(5) and (1) of the Act, and we adopt his recommendation that we apply the Board's traditional make-whole remedy. We leave to the compliance proceeding, however, litigation of the specific issues regarding the four employees who may have been discharged pursuant to the unlawful policy. To the extent that the judge's decision addresses these discharges, we do not rely on his findings, as the discharges were not fully litigated. We also clarify that nothing in *Storer Communications*, 297 NLRB 296, 297 (1989), cited by the judge, prevents the Respondent from demonstrating at the compliance stage that it would have discharged the employees even in the absence of the unlawful unilateral change in the drug-testing policy.

and to adopt the recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Allied Aviation Fueling of Dallas, LP, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending and/or terminating employees because they engage in protected concerted activities and/or activities on behalf of the Transport Workers Union of America, Air Transport Local 513 or any other union.

(b) Changing its drug-testing policy as it applies to the employees in the following appropriate unit without first giving notice to the Union and affording the Union the opportunity to bargain over the proposed changes:

All employees engaged in the fueling service of the company and other related aircraft services, including the operation and maintenance of the facilities at Love Field, Dallas, Texas, and the Dallas/Fort Worth International Airport, Texas.

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

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

(a) Within 14 days from the date of this Order, offer Patrick Sanford full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Patrick Sanford whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and termination of Patrick Sanford, and within 3 days thereafter notify Patrick Sanford in writing that this has been done and that the suspension and termination will not be used against him in any way.

³ Because, as stated above, the Respondent will have the opportunity to show, in the compliance proceeding, that it would have discharged employees even absent the unilateral change in its drug-testing policy, we shall modify the judge's recommended Order and notice to remove the language requiring the Respondent to expunge the files of these employees "within 14 days of the date of the Board's Order." We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

(d) On request, cancel, withdraw, and rescind its unilaterally implemented drug-testing policy that was announced on April 7 and May 10, 2005 and notify employees of this action.

(e) Offer those employees discharged as a result of the April 7 and May 10, 2005 unilateral changes in the drug-testing policies full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make whole any unit employees who have been disciplined or discharged pursuant to the unlawfully implemented drug testing policies of April 7 and May 10, 2005 for any loss of earnings and other benefits suffered as a result of the unlawfully implemented policy, in the manner set forth in the remedy section of the judge's decision.

(g) Remove from its files any reference to the unlawful discipline or discharges, including any copies of the drug test results, and within 3 days thereafter notify the affected employees that this has been done and that the discipline will not be used against them in any way.

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

(i) Within 14 days after service by the Region, post at its facility in Dallas-Fort Worth, Texas, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees em-

ployed by the Respondent at any time since April 7, 2005.

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT suspend and/or terminate employees because they engage in activities in support of the Transport Workers Union of America, Air Transport Local 513, or any other labor organization.

WE WILL NOT unilaterally change the drug-testing policy for our employees in the collective-bargaining unit represented by the Transport Workers Union of America, Air Transport Local 513 without notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above guaranteed them by the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Patrick Sanford full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Sanford whole for any loss of earnings and other benefits resulting from his suspension and termination, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Patrick Sanford's unlawful suspension and termination, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and termination will not be used against him in any way.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, upon request, cancel, withdraw, and rescind the drug-testing policies that we unilaterally implemented on April 7 and May 10, 2005.

WE WILL offer full reinstatement to those employees who have been discharged under the unilaterally implemented drug-testing policies to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole any employees who have been disciplined or discharged under the unilaterally implemented drug-testing policies for any loss of earnings and other benefits resulting from their discharge.

WE WILL remove from our files any reference to any discipline or discharge administered under the unilaterally implemented drug-testing policies of April 7 and May 10, 2005, including any copies of the drug test results, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the discipline will not be used against them in any way.

ALLIED AVIATION FUELING OF DALLAS, LP

Lisa House, Esq., and Nam Van Esq., for the Government.¹
*Christopher C. Antone, Esq.,*² for the Company.³
Sanford R. Denison, Esq., for the Union.⁴

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful suspension, discharge, and unilateral change in working conditions case. The case was tried before me on November 2 and 3, 2005,⁵ in Fort Worth, Texas. The cases originate from charges filed by Transport Workers Union of America, Air Transport Local 513 (the Union). The charge in case 16-CA-24267 was filed on May 6. The charge in Case 16-CA-24288 was filed on May 19. The prosecution of these cases was formalized on July 29 when the Regional Director for Region 16 of the National Labor Relations Board (the Board), acting in the name of the Board's General Counsel, issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) against Allied Aviation Fueling of Dallas, LP⁶ (the Company).

¹ I shall refer to counsel for the General Counsel as Government Counsel or Government.

² The Company's posthearing brief in this matter was filed by Christopher C. Antone, Esq. and Stephen E. Hammel, Esq.

³ I shall refer to counsel for the Respondent as Company Counsel or Company.

⁴ I shall refer to counsel for the Charging Party as Union Counsel or the Union.

⁵ All dates herein are 2005 unless otherwise indicated.

⁶ The order consolidating cases, consolidated complaint and notice of hearing that issued on July 29, 2005, identified the Respondent as Allied Aviation Holdings, Inc. d/b/a Allied Aviation Services, Inc. The

Specifically it is alleged that on April 8 the Company suspended and on April 19 discharged its employee Patrick Sanford (Sanford), in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), because he engaged in union activities, and to discourage employees from engaging in these and other concerted activities. It is also alleged the Company violated Section 8(a)(5) and (1) of the Act by issuing an April 7, 2005 policy memorandum requiring employees who suffered a workplace injury to submit to a drug test and issuing a May 10 policy memorandum requiring employees who were absent from work for any reason to submit to a drug test. In this regard it is alleged the Company issued the policies without notice to and without affording the Union an opportunity to bargain with the Company with respect to such conduct and the effects of such conduct.

The Company denies having violated the Act in any manner alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by counsel for the Government, the Union, and the Company, I conclude, as more fully explained below, that the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a limited partnership incorporated in the State of Texas with an office and place of business located at the Dallas-Fort Worth International Airport (DFW), where it has been and continues to be engaged in the business of providing fueling services and fuel facility maintenance. During the past year, a representative period, the Company in conducting its business operations purchased and received at its facility goods and materials valued in excess of \$50,000 from points outside the State of Texas. The parties admit and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit and I find that General Manager Gary Shiflet (General Manager Shiflet), Operations Manager Joe Correa (Operations Manager Correa), and Maintenance Manager Jerry Keeney (Maintenance Manager Keeney) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act. There is no dispute that Judith Ann Brandt (Vice President Brandt) is the Company's vice president for human resources and administration. Vice President Brandt is responsible for the Company's human resources and labor relations matters, including the negotiating of contracts and the representation of the Company in arbitrations under the collective-bargaining agreement. It is undisputed that she exercises authority to hire, fire, and train employees and I find her to be a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act.

complaint was amended at hearing to reflect the correct name of the Respondent as Allied Aviation Fueling of Dallas, LP. There is no dispute that Allied Aviation Fueling of Dallas, LP is a division of Allied Aviation Services, Inc.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Unlawful Discharge of Patrick Sanford*

1. Background

The Company, located at the DFW airport, supplies jet fuel for commercial airlines at the DFW Airport. The Company and the Union have had a bargaining relationship for over 30 years and are currently parties to an agreement, with an effective date of November 1, 2003, and a termination date of October 21, 2006. The agreement covers all employees engaged in the fueling service and other related aircraft services and includes the operation and maintenance of the fueling facilities at Love Field in Dallas, Texas, and the DFW International Airport. Article 28 of the agreement provides that an employee must submit a grievance, complaint, or claim of unjust treatment within 7 days.

Before his discharge, Sanford had been employed by the Company for approximately 22 years. At the time of his termination on April 15, 2005, he was employed as a facilities maintenance mechanic, performing repair work on the tank farm facility, company vehicles, and the fueling systems.

Sanford has been a member of the Union since he was first employed with the Company in 1983. At the time of his termination, Sanford held the union office of maintenance section chairman; an office to which he was elected by his fellow Union members. As a section chairman, Sanford was responsible for the representation of approximately 45 employees and the supervision of 4 stewards designated for maintenance and utility. As section chairman, he reported directly to Stoney Lowrance (Lowrance), who was the union executive board member for the Company.

2. The filing of the March 9, 2005 grievance

In mid-February 2005, Sanford spoke with Maintenance Manager Keeney about the Company's outsourcing work in the maintenance department. He recalled that Maintenance Manager Keeney assured him that the Company would cease any further outsourcing. On approximately March 2 or 3, 2005, employees Larry Rottman and Tom Garvin told Sanford about an additional incident involving the Company's outsourcing of maintenance department work.

Sanford testified that when he initially confronted Maintenance Manager Keeney about the additional outsourcing, Maintenance Manager Keeney told him that an upper-management official had instituted the outsourcing. After talking with Maintenance Manager Keeney, Sanford spoke with the Company's Love field station manager and verified that a vehicle was serviced outside the facility.

On March 8, 2005, Sanford informed Lowrance and Local Union President Mark Nelson (Nelson) about the recent outsourcing of work. Nelson directed him to file two grievances on behalf of the two employees who would have been entitled to overtime if the work had not been outsourced. The employees were identified as David Thompson (Thompson) and Larry Rottman (Rottman). Sanford asked Rottman to sign the grievance when Rottman reported to work for the day shift on March 9. Sanford expected Union Steward Charlie Bumpers (Bumpers) to present the grievance to Thompson that same evening

when he worked with Thompson on the midnight shift. Bumpers testified that he attempted to contact Thompson by telephone to let him know that the Union had a grievance to file on his behalf. Despite his attempt, he did not reach Thompson during his shift that ended on March 9.

When Sanford reported to work on March 9, he discovered that Thompson had not signed the grievance. Sanford testified that because March 9th was the seventh day under the terms of article 28 of the collective-bargaining agreement, he signed Thompson's name. Sanford testified that he signed Thompson's name to the grievance in order to stop the outsourcing and because it was his obligation as a section chairman to file the grievances.

In addition to signing Thompson's name, Sanford also completed the other information sections of the grievance form, including the correct address and telephone number for Thompson. Under the terms of the collective-bargaining agreement, the department head receiving the grievance is required to set the matter for hearing within 4 days of receipt of the written grievance and the Company is required to provide written notice by letter or telegram to the Union and to the employee of the scheduled hearing. Sanford testified that by completing the address for Thompson, he expected Thompson to receive the Company's response to the grievance.

When Sanford gave the grievances to Maintenance Manager Keeney, he did not tell Maintenance Manager Keeney that he had signed Thompson's name. He explained that he had not done so because he had not felt that he had done anything wrong. He testified that the grievance was to stop the outsourcing and Thompson would have benefited from the grievance. Sanford cited other company documents including change of shift forms, day trade papers, and preventive maintenance forms that are signed by employees on behalf of other employees. Nelson testified that it is not uncommon for stewards and union officials to sign employees' names on grievances. Vice President Brandt denied knowledge of any incident in which an employee signed the name of another employee on a grievance form.

3. Events following the March 9, 2005 grievance

Bumpers recalled that he was not able to reach Thompson about the grievance until March 12. By the time that Bumpers was able to reach Thompson by telephone, Thompson had already received a copy of the Company's response to the grievance. Describing Thompson as being "pretty mad" about the grievance, Bumpers recalled that Thompson threatened to have Sanford's job because of the grievance.

On March 15, Sanford met Thompson in the hallway during a shift change. Thompson held up the Company's response to the grievance and asked Sanford if he had signed the grievance. When Sanford confirmed that he had done so, Thompson walked away. Sanford came to work early on March 16 in order to speak with Thompson. Sanford explained to Thompson why he had filed the grievance. Sanford also assured Thompson that if he was upset about the grievance, the Union would withdraw the grievance and not push it any further. Sanford recalled that Thompson told him that he wanted to maintain a "low-key profile" on his shift and he did not want any retaliation.

tion from the Company for the grievance. Sanford assured Thompson that there would be no retaliation and that he would speak with Maintenance Manager Keeney.

Following his conversation with Thompson, Sanford sought out Maintenance Manager Keeney and told him that he had signed the grievance for Thompson. Sanford told Maintenance Manager Keeney that because Thompson was upset about the grievance, the Union was withdrawing the grievance and the matter would be dropped.⁷ Sanford testified that he also mentioned Thompson's concern about possible retaliation. Maintenance Manager Keeney assured Sanford that there would be none. Maintenance Manager Keeney corroborated Sanford's testimony and confirmed that Sanford volunteered to him that he had signed Thompson's grievance. In response to Sanford's voluntary admission that he had signed the grievance, Maintenance Manager Keeney did not indicate that Sanford had done anything wrong or could be subject to discipline.

Rottman's grievance, that mirrored Thompson's grievance, was later resolved with the Company's agreeing to make a monetary settlement to compensate Rottman for the lost overtime.

4. Sanford's suspension and discharge

On April 8, 2005, Sanford was called to Operations Manager Correa's office to meet with Correa and Maintenance Manager Keeney. Lowrance was present as Sanford's union representative. Maintenance Manager Keeney informed Sanford that he was suspended and that the Company was conducting an investigation concerning his fraudulently signing Thompson's grievance. Maintenance Manager Keeney also asserted that Sanford falsified a company document. While Lowrance asked questions, no questions were asked of Sanford.

On April 11, Sanford attended an additional meeting with Maintenance Manager Keeney in which he was asked if he had signed the March 9 grievance for Thompson. Sanford again confirmed that he had done so. Maintenance Manager Keeney asked for Sanford's account of what occurred and Sanford provided a written statement. On April 15, Sanford was informed in a meeting with Maintenance Manager Keeney and Operations Manager Correa that because of his having signed Thompson's grievance, he was terminated. Maintenance Manager Keeney explained that the termination was based upon dishonesty, fraud, and his having falsified company documents. By letter dated April 20, 2005, Maintenance Manager Keeney confirmed that Sanford was terminated based upon article 28(b) of the collective-bargaining agreement. The specific violations were identified as "dishonesty, falsifying company documents, and fraud against Allied Aviation that would cause financial impact to Allied Aviation." Maintenance Manager Keeney admitted that the "financial impact" referenced in the letter was the potential arbitration award if the Thompson grievance had been found to have merit. Union President Nelson testified that prior to April 11; he had never heard any company official assert that a grievance form was a company document. He also

confirmed that Union uses the same grievance form for all of the bargaining units represented by the Union.

Maintenance Manager Keeney testified that the decision to terminate Sanford was based upon his signing Thompson's name to the grievance. Maintenance Manager Keeney also admitted that it was his understanding that Sanford signed Thompson's name to the grievance because the grievance would have been untimely if it had not been filed on March 9. Vice President Brandt testified that she alone made the decision to terminate Sanford. She explained that she did so because Sanford "attempted to defraud the Company and the airlines of money." While she identified the "airlines" as a consortium of airlines at DFW, she acknowledged that the Company had no ownership in the consortium.

General Manager Shiflet testified that the Company had also terminated two other employees for dishonesty. One individual was identified as a supervisor who had allowed an employee to "punch in" for an employee who was not present. The second individual was a nonbargaining unit clerk who signed herself in as being at work at a time when she was not. The document offered in support of the supervisor's discharge reflects that the supervisor was terminated for failing to follow company procedures for ensuring that all employees timely report to work.

5. Summary and conclusions

The parties agree that Sanford's discharge resulted from his behavior in the filing of a grievance under the collective-bargaining agreement. The Government maintains that in filing the grievance, Sanford engaged in concerted activity as protected by Section 7 of the Act. The Company, however, asserts that by fraudulently signing an employee's name to the grievance, Sanford lost the protection of the Act.

In order to determine whether an employee has been discharged for concerted protected activity, it must be established that the employee engaged in concerted activity and then if there was concerted activity whether it was activity protected by the Act. Section 7 of the Act in pertinent part states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), the Board set out its definition for "concerted activity." Generally, to find an employee's activity to be "concerted," the Board will require that the activity be engaged in, with, or on the authority of other employees and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if the employer knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the adverse employment action at issue, was motivated by the employee's protected concerted activity. In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enf. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board further clarified that under proper circumstances a single employee may engage in concerted activity within the meaning of Section 7 of the Act.

⁷ Nelson testified that because Thompson did not take the grievance to the second step, the Union did not have to withdraw the grievance.

It is well established that employees, under Section 7 of the Act, have the protected right to file and process grievances,⁸ and the discipline or discharge of employees for doing so is a violation of Section 8(a)(1). *Prime Time Shuttle, Inc.*, 314 NLRB 838, 841 (1994); *Thor Power Tool Co.*, 148 NLRB 1379, 1380–1381 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). It is also well established that union representatives filing grievances are also protected by the Act when presenting a grievance to an employer. *Union Fork and Hoe Co.*, 241 NLRB 907, 908 (1979). The grievance activities of union stewards have been found to be especially important to the effectiveness of grievance-arbitration machinery. *Exxon Mobil Corp.*, 343 NLRB 287 (2004).

For an employee to forfeit the protection of the Act while processing a grievance, “the employee’s behavior must be so violent, or of such an obnoxious character, as to render him wholly unfit for further service.” *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976). It is well established that “union stewards filing and processing grievances on behalf of other employees enjoy the protection of the Act, even if, while doing so, they ‘exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.’” *Roadmaster Corp.*, 288 NLRB 1195, 1197 (1988).

In assessing whether an employee’s protected concerted activity loses the protection of the Act, the Board has recognized that there is a line beyond which employees may not go with impunity. That line “is drawn between cases where employees engaged in concerted activities exceeds the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.” *Prescott Industrial Products Co.*, 205 NLRB 51 (1973). An employee’s action has not lost the protection of the Act when such conduct was not found to be “deliberately” and/or “maliciously false”⁹ or with “malice” or a “deliberate intention to falsify.”¹⁰

⁸ *City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984).

⁹ An employee attended a preelection conference at the Board’s Regional office as a representative of the union and employees. During the conference, the employer’s attorney acknowledged the Board’s jurisdiction and confirmed that the employer’s sales and purchases during the prior year exceeded \$500,000. The employer later discharged the employee for deliberately and maliciously spreading a rumor that the employer made a \$500,000 profit the prior year. In finding that the employee was unlawfully discharged, the Board noted that even if the employee’s report was inaccurate, it was not deliberately or maliciously false. *American Shuffleboard Co.*, 92 NLRB 1272, 1274 (1951). An employee’s misstatements in a newsletter to other employees did not lose the protection of the Act when it was determined that the statements were not deliberately and maliciously false. *Jacobs Transfer, Inc.*, 201 NLRB 210, 218 (1973).

¹⁰ An employee who was active in an organizational campaign made untrue statements to employees about their wage rates compared to employees at another of the employer’s facilities. The Board found that the employee’s discussion of wage rates was an integral and important part of the organizational movement. Additionally, the Board observed that even though the employee failed to carefully investigate the facts,

There is no dispute that Sanford signed Thompson’s name on the grievance without Thompson’s knowledge or consent. The Company maintains that by doing so, Sanford lost the protection of the Act. Citing the Board’s decisions in *Roadmaster Corp.*¹¹ and *OPW Fuel Components*,¹² the Government and the Union argue that a union steward does not lose the protection of the Act by signing another employee’s name on a grievance submitted to the employer.

In *Roadmaster Corp.*,¹³ a steward was terminated for signing the names of other individuals to grievance forms and allegedly violating a company rule prohibiting the falsification of company documents. The steward, who did not deny that he had done so, maintained that he signed another employee’s name to grievance because he was unable to contact the employee and he was concerned at the prospect of missing the contractual deadline for filing grievances. The Board adopted the judge’s finding that the assigned reason for the suspension and discharge was pretextual and that the real reason the employer took action against the steward was his involvement in other protected activity outside his grievance/collective bargaining responsibilities. The Board went on to state however, that had the employer actually fired the steward for signing other employees’ names to the grievance forms, his discharge was still unlawful because his actions were protected by the Act. The steward did not demonstrate intent to deceive the employer and did not stand to profit in any way from deceiving the employer. Specifically, the Board found that the act of signing other individuals’ names to the grievance forms was part of the *res gestae* of the grievance procedure and not sufficiently egregious to render his grievance-filing activity unprotected.

Just as in this case, the employer in *Roadmaster Corp.* asserted that by signing other individuals’ names to the grievance forms, the steward falsified company documents. The Board rejected the argument and concluded that the grievance forms written on the union letterhead could not reasonably be considered company documents within the meaning of the employer’s related rules. Additionally, as in this case, there was no evidence that any management official had ever previously claimed to the union that grievances became company documents. In the instant case, Vice President Brandt testified that she was unaware of any agreement between the Company and the Union confirming that a grievance form is a company document.

In analyzing the facts considered by the Board in *Roadmaster Corp.* and those facts existent in the present case, there is a distinction. In *Roadmaster Corp.*, the employee whose name was signed to the grievance, contacted the steward and asked for his assistance in obtaining reinstatement. When the steward was unable to reach the employee to sign the step 2 grievance form, he signed the employee’s name in order to meet the con-

he did not make the inaccurate statements with any malice or deliberate intention to falsify. *Westinghouse Electric Corp.*, 77 NLRB 1058, 1060 (1948).

¹¹ 288 NLRB at 1197, enfd. 874 F.2d 448 (7th Cir. 1989).

¹² 343 NLRB No. 111, slip op. at 5 (2004).

¹³ *Supra* at 3.

tractual time limits. In the instant case, there is no dispute that Thompson neither authorized nor even knew about the grievance on his behalf. I do not, however, find this factual distinction sufficiently significant to preclude the application of the Board's findings in *Roadmaster Corp.*

In *OPW Fueling Components*, the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(1) and (3) of the Act by terminating a union committeeman for signing a grievance for two employees without their express permission. Similarly to Sanford, the committeeman obtained authorization from the union and filed the grievance on the last day on which a contractually timely grievance could be filed. When the committeeman later learned that the employees were not happy with his having done so, he voluntarily told the employer that the employees were upset about their names being on the grievance and he amended the grievance to remove their names. The employer suspended and later discharged the committeeman for violating a code of conduct and plant rules regarding falsification of records. Citing the Board's decision in *Roadmaster Corp.*, the administrative law judge found that the committeeman's act of signing employees' names to a grievance was "part and parcel" of the grievance procedure and as such was protected concerted activity. The committeeman not only acted without authorization of the employees, he did so without their knowledge and contrary to their wishes. His conduct, however, did not remove him from the protection of the Act.

While the Company concedes that in general, the filing of a grievance is protected activity, the Company maintains that "forging a company document for personal gain is not protected activity." Citing *Washington Adventist Hospital*, 291 NLRB 95 (1988), the Company asserts that conduct can be so egregious or offensive as to be beyond the Act's protection. In the case cited by the Company, a pharmacist used a hospital computer system to publish his concerns about a layoff at the facility. In doing so, the employee not only acted in violation of a signed security agreement and personnel policy manual, but also disrupted the work of hospital employees using approximately 100 computers. The Board adopted the administrative law judge's finding that such conduct interfered with other employees' work and the care of patients in an acute patient care setting. Such conduct was found to be without the protection of the Act. The Company asserts that Sanford deliberately forged another employee's signature on a grievance form "for his own personal benefit" without the employee's consent and thus his conduct was sufficiently egregious to remove the filing of the grievance from the protection of the Act.

I do not find a significant correlation between the circumstances in *Washington Adventist Hospital* and the present case. While Sanford acted to preserve the contractual rights of Thompson, there is no evidence that his actions interfered with the work of other employees or the functioning of the Company. Additionally, there is no evidence that Sanford signed the grievance for his own personal benefit. In *OPW Fueling Co.*, supra at 5, the administrative law judge found no evidence that the committeeman would, or could, profit or gain anything from deceiving the employer. In his posthearing brief, counsel for the Company argues that Sanford "committed fraud for

Sanford's own benefit." Just as in *OPW Fueling Components*, there is no evidence that Sanford personally benefited from his alleged forgery of the grievance. The only acknowledged benefit from the grievance was slowing the outsourcing of work.¹⁴ Certainly, the protection of work for the bargaining unit and the enforcement of employee rights under the collective-bargaining unit were not only matters of interest to Sanford, but also Sanford's responsibility as a union officer. Maintenance Manager Keeney admitted that while Thompson would stand to gain monetary benefits from the grievance, he was unaware of any monetary gains for Sanford. Thus, any personal benefit that Sanford might have derived from slowing the outsourcing of work was only speculative.

In summary, I find that Sanford did not lose the protection of the Act by signing Thompson's name on the grievance. I find that he was terminated for his protected concerted activities in violation of Section 8(a)(1) of the Act.

In most cases the Board applies the criteria set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to evaluate the lawfulness of an employee's discharge. Where an employer has admittedly discharged an employee for engaging in concerted activities and the issue is whether the activity is protected, a *Wright Line* analysis is not necessary. *Phoenix Transit System*, 337 NLRB 510 (2002).

There is no dispute that Sanford was discharged for his conduct associated in filing the grievance and the Company's motivation is not in issue. Even though the *Wright Line* analysis is not necessary, I would nevertheless also find Sanford's discharge violative of Section 8(a)(1) and (3) of the Act under the framework of *Wright Line*. Under the *Wright Line* analysis, the Government must first prove, by a preponderance of the evidence, that the employee's protected or union conduct was a substantial or motivating factor in the employer's adverse action. Once the Government makes a showing of discriminatory motivation, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain the initial burden, the Government must offer evidence: (1) that the employee was engaged in protected or union activity, (2) that the employer was aware of the activity, (3) that the protected activity or the worker's union affiliation was a substantial or motivating reason for the employer's action, and (4) there was a causal connection between the employer's animus and its discharge decision.

As discussed above, Sanford was engaged in activity protected by the Act and he was terminated for such activity. The Company maintains that because there is no evidence of animus, the *Wright Line* analysis must fail. The Government, however, may meet its *Wright Line* burden with evidence short of direct evidence of motivation. Motivation of union animus

¹⁴ In his posthearing brief, counsel for the Company asserts that the circumstances of this case are distinguishable from *OPW Fueling Components* because Sanford would personally profit by obtaining more overtime if there is a slowing of the outsourcing of work. While Sanford acknowledged that there was a benefit in slowing the outsourcing of work, there was no evidence that he would personally obtain more overtime.

may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of factors support circumstantially such an inference. *Union Tribune Publishing Co. v. NLRB*, 1 F.3d 486 at 490–492 (7th Cir. 1993). The Government may thus rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, however, the totality of circumstances must show more than a mere suspicion that protected or union activity was a motivating factor in the employer's decision. *Abramson, LLC*, 345 NLRB 171, 175 (2005).

Under the *Wright Line* analysis, the Government has established by a preponderance of the evidence that Sanford was engaged in protected activity, the Company was aware of the activity, and the Company admittedly terminated Sanford because of his conduct in conjunction with grievance-filing activity. The Company discriminated against Sanford in terms of his employment and Sanford's activity was a substantial or motivating reason for the Company's action. The Company has failed to carry its burden (a burden of persuasion) of establishing its affirmative defense in demonstrating that it would have discharged him in the absence of any union or protected activity. While the Company maintains that it has terminated two other employees for dishonesty, the record evidence reflects that such discharges did not involve comparable conduct. One discharge involved a supervisor's instructing an employee to punch another employee's time card. The other employee, who was also a nonbargaining unit employee, falsified her own time record by claiming hours she did not actually work. Unlike Sanford, these employees falsified company records for their own personal gain or in violation of company procedures. As discussed above, I do not find that in signing Thompson's name, Sanford fraudulently falsified a company document for his personal benefit or gain. Maintenance Manager Keeney admitted that Sanford signed the grievance in his capacity as a union steward and he admitted that he was unaware of whether Sanford would gain any monetary benefit from the filing of the grievance. Maintenance Manager Keeney further admitted that the Union was the employees' recognized bargaining representative and there was nothing in the collective-bargaining agreement that prohibited a union representative from signing a grievance on behalf of an employee. While Maintenance Manager Keeney asserted that Sanford fraudulently falsified a company document, he could not identify the management official who had determined that the grievance was a company document. Although the Union and the Company have had a bargaining relationship for over 30 years, there was no evidence of any document designating grievances as company documents. There was no evidence that prior to Sanford's discharge, the Company had ever asserted that grievances were company documents. Accordingly, I find that when the Company suspended Sanford on April 8, 2005, and then discharged him on April 15, 2005, the Company violated Section 8(a)(3) and (1) of the Act, as alleged. I shall order the Company to offer Patrick Sanford full reinstatement and to make him whole, with interest.

B. Unilateral Change in the Company's Drug-Testing Policy

1. Factual evidence presented by the parties

The collective-bargaining agreement between the Company and the Union for the period from 2000 until 2003 did not contain any drug-testing policy provisions. As a result of additional negotiations with the Union, the Company issued a memorandum to employees on March 5, 2002, containing the guidelines for the Company's policy for drug-testing. The policy provided that employees would be sent for drug testing for the following reasons: (1) aircraft damage, (2) pulling away from aircraft hooked up, (3) pulling away from a fill rack hooked up, (4) personnel injuries due to significant damage, (5) accidents involving significant damage, including company equipment and customer equipment, (6) employees that smell of marijuana on breath or person, (7) employees that smell of alcohol on breath or person.

Lowrance estimated that approximately three to five employees were tested under the policy between March 5, 2002, and April 2005. During the 2003 collective-bargaining negotiations, the Company proposed three new changes related to the drug-testing policy. The Company not only proposed that all employees be subject to drug tests for all accidents, but also proposed the discharge of any employee involved in any aircraft damage. The Company additionally proposed the implementation of Department of Transportation drug testing. The Company later withdrew the drug-testing proposals. Following the 2003 contract negotiations and prior to April 2005, the Company continued to operate under 2002 drug-testing policy.

Vice President Brandt is responsible for monitoring the Company's workers' compensation plan. At the owner's request, she met with the Company's workers' compensation representative to improve the "workers' comp numbers." The representative suggested that she implement a policy that would allow the Company to "drug-test" employees when they returned to work after an absence of 30 days for "anything" including injuries, sick leave, and workers' compensation. Vice President Brandt admits that she implemented the policy without discussing the implementation with her own counsel or anyone.

On April 7, 2005, Lowrance, Nelson, and Union International Representative Joe Gordon (Gordon) met with company representatives to discuss the resolution of certain grievances and other issues. During the course of the meeting, the Company presented the Union with a memorandum for all personnel. The memorandum provided that when an employee has an on-the-job injury, the employee will be taken to the clinic for medical attention. Upon arrival, the employee will also be subject to a drug and alcohol test. The April 7, 2005 memorandum further provided that employees returning to work after an absence of 30 days or more for workers compensation, sick leave, or long term disability would be subject to a drug and alcohol test. Lowrance testified without contradiction that the April 7, 2005 policy differed from the drug testing policy contained within the March 5, 2002 memorandum.

The memorandum provided for immediate implementation. In a followup discussion on April 8, General Manager Shiftlet confirmed to Lowrance that the Company intended to imple-

ment the policy. During the next week, the policy was implemented and the memorandum was posted for employees in the work area.

In a letter dated April 11, 2005, Local President Nelson informed General Manager Shiflet that the Union did not concur or agree with the April 7, 2005 memorandum. Nelson argued that there is nothing in the Texas workers' compensation statutes to give the Company the right to subject an employee to a drug and alcohol test upon reporting an injury or to force an employee to seek medical attention from a clinic that the Company deems appropriate. Nelson asked that the Company rescind the posting and cease and desist from any application of the policy.

The Company's only response to the Union's letter of April 11, 2005, was a telephone call from Vice President Brandt to Nelson, confirming that the Company would implement the policy. On May 10, 2005, the Company issued a memorandum to employees requiring all employees to submit to a drug test before returning to work when they are absent from work for 30 days. Prior to the implementation of the drug testing, General Manager Shiflet told Lowrance that the change was implemented to reduce workers' compensation costs. Lowrance recalled that in a June 27, 2005 conversation, General Manager Shiflet also told Lowrance that the Company was implementing the policy because it had not been able to get the changes from the Union in negotiations.

Nelson recalled that during a telephone conversation in July 2005, he asked Vice President Brandt if she would meet with the Union to discuss negotiating a drug testing policy. She agreed and met with Nelson on August 11. Vice President Brandt acknowledged that she and General Manager Shiflet met with Nelson, Lowrance, and Gordon after the implementation of the policy to determine if they could work out something amenable to both parties. Both Nelson and Vice President Brandt testified that no agreement was reached during the meeting.

Lowrance testified that both the April 7 and May 10, 2005 policies have remained in effect since implementation. Lowrance estimated that more than 25 to 30 employees have been subjected to drug tests under the 2005 policies. Lowrance testified that four employees have been disciplined under the new policies. He asserted that none of the individuals would have been subject to drug testing under the 2002 policy.

2. Summary and conclusions

An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Company admits that it implemented the April 7 and May 10, 2005 guidelines for employee drug-testing without notice to or bargaining with the Union. Counsel for the Company further acknowledges that the Company made a mistake in instituting the April change. In *Johnson-Bateman Co.*, 295 NLRB 180 (1989), the Board found an employer's midcontract unilateral implementation of a drug/alcohol testing requirement for employees requiring medical treatment for work injuries to be a mandatory subject of bargaining. In its decision,

the Board noted that in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Supreme Court described mandatory subjects of bargaining as such matters that are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Utilizing the Court's description, the Board found the drug/alcohol testing requirement to be "both germane to the working environment and outside the scope of managerial decisions lying at the core of entrepreneurial control."

While the Company admits that it implemented the 2005 drug-testing policy without notice to or bargaining with the Union, it asserts that Vice President Brandt made a mistake. In brief, the Company further argues that Vice President Brandt exhibited no union animus and there was no "intentional conduct focused to harm the Union." Accordingly, the Company argues that the 8(a)(5) charge be dismissed. I find no merit to the Company's argument. The fact that an employer may be motivated by economics rather than union animus does not excuse its failure to bargain with a union as the exclusive representative of its employees prior to the implementation of a unilateral change in the terms and conditions of employment. *Sweet Lumber Co.*, 227 NLRB 1084 fn. 1 (1977).

At hearing, the Company also argued that two employees who have been terminated since the implementation of the policy would have been terminated under the 2002 policy. In its decision in *Storer Communications, Inc.*, 297 NLRB 296, 297 (1989), the Board found that an employer's unlawful unilateral change in a drug-testing policy is not "redeemed by the fortuity" that the employer did not cause any unit employees to submit to a drug test for several months after the announced implementation. Despite the degree to which the policy was exercised, the employer, nevertheless, claimed the right to require such a test at any time.

It is established that under certain circumstances, a respondent may avoid liability for unlawful conduct by repudiating the conduct. The repudiation must be timely, unambiguous, and specific in nature to the coercive conduct. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Furthermore, there must be adequate publication of the repudiation to the employees involved. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977), *enfd.* 573 F.2d 898 (5th Cir. 1978). While the Board has more recently stated that it did not necessarily endorse all elements of *Passavant*, it has nevertheless continued to consider the means by which a respondent has attempted to cure its unlawful conduct.¹⁵ Here, there is no evidence that the Company made any attempt to repudiate or even to rescind its unilateral change in the drug-testing policy.

I find that the Company, as alleged in the complaint, unilaterally changed its drug-testing policy on April 7 and May 10, 2005. The Company did so without giving notice to the Union and without giving the Union an opportunity to bargain with respect to this conduct. And as such, its actions violated Section 8(a)(1) and (5) of the Act.

¹⁵ *North Hills Office Services*, 344 NLRB 1083 (2005); *Claremont Resort*, 344 NLRB No. 105, slip op. at 1 (2005).

CONCLUSIONS OF LAW

1. The Company, Allied Aviation Fueling of Dallas, LP, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Transport Workers Union of America, Air Transport Local 513 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) and (3) of the Act by suspending employee Patrick Sanford on April 8, 2005, and by discharging him on April 15, 2005.

4. The Company violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a change in its drug-testing policy for its employees on April 7 and May 10, 2005.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Company having discriminatorily suspended and discharged its employee Patrick Sanford,

it must offer him immediate reinstatement to his former job or if his former job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole for any loss of wages and benefits. Back pay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Company unlawfully implemented a change in its drug-testing policy on April and May 10, 2005, I shall recommend it be ordered, on request, to cancel, withdraw, and rescind the policy and remove from the files of employees notices, reports, or memoranda resulting from the application of unilaterally implemented changes in the drug-testing policy. Finally, I recommend the Company also be ordered to post, within 14 days after service by Region 16, at its Dallas-Fort Worth, Texas facility copies of an appropriate "Notice to Employees" copies of which are attached hereto as "Appendix" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]