

**DTR Industries, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.** Case 8–CA–33708–1

September 7, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On April 9, 2004, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended order only to the extent consistent with this Decision and Order.<sup>2</sup>

The judge found, and we agree, that during the course of a union organizing campaign, the Respondent violated Section 8(a)(1) by creating the impression that an employee's union activities were under surveillance, threatening an employee with discipline if he continued to engage in activities in support of the Union, disparately enforcing its uniform policy against a prounion employee,<sup>3</sup> and, as further explained below, threatening employees with layoff and job loss if they selected the Union as their bargaining representative. The judge also found that the Respondent violated Section 8(a)(3) and (1) by suspending, discharging, resuspending, and failing properly to reinstate John Callahan and by discharging Daniel Gahman. For the reasons explained below, we reverse the judge and dismiss the 8(a)(3) and (1) allegations as to both Callahan and Gahman.

Background

The Respondent manufactures hose assemblies and other parts for several automobile companies. Following the Union's unsuccessful organizational effort in 1989, the Respondent was the subject of an unfair labor practice proceeding in which the Board determined that the Respondent committed sufficiently serious violations to

<sup>1</sup> 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), enf. 188 F.2d 362 (3d Cir. 1951.) We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have modified the conclusions of law to conform to the violations found.

<sup>3</sup> The Respondent filed no exceptions to this finding.

warrant imposition of a bargaining order.<sup>4</sup> On appeal, United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's Order.<sup>5</sup> On remand, applying the court's view as the law of the case, the Board certified the election results and dismissed the complaint.<sup>6</sup>

Threats of Job Loss and Layoffs

In August 2002,<sup>7</sup> following the Union's resumption of organizational efforts, Respondent's executive coordinator, Thomas King,<sup>8</sup> spoke at employee meetings about the effect of unionizing on the Respondent's status as sole supplier of parts to its primary customers. Crediting the testimony of three employees over that of King,<sup>9</sup> as detailed below, the judge determined that the Respondent unlawfully threatened that unionizing would cause the Respondent to lose business, which would result in job losses. Analyzing the statements under the long-established standard of *NLRB v. Gissel Packing Co.*,<sup>10</sup> the judge concluded that King's predictions were not "carefully phrased on the basis of objective fact . . . as to demonstrably probable consequences beyond . . . [the Respondent's] control . . ."<sup>11</sup> and, therefore, violated Section 8(a)(1).

The Respondent argues that the judge failed to consider controlling Sixth Circuit precedent—including the case involving the Respondent referred to above—and that, if properly analyzed, King's remarks are protected by Section 8(c) of the Act and lawful. We reject the Respondent's contention. The judge considered the Sixth Circuit decision, and determined that the employees' accounts of King's statements were distinguishable from those the court had found protected. We agree with the judge's finding that the Respondent threatened employees with job loss in violation of Section 8(a)(1).

In *DTR Industries v. NLRB*, supra, the Sixth Circuit, inter alia, reversed the Board's finding that in a pre-election letter to employees, the Respondent's then-president, Yuji Kobayashi, unlawfully threatened plant closure. Reviewing the 4-page letter, the court determined that Kobayashi provided an objective context and

<sup>4</sup> 311 NLRB 833 (1993).

<sup>5</sup> *DTR Industries v. NLRB*, 39 F.3d 106 (6th Cir. 1994).

<sup>6</sup> 317 NLRB 825 (1995).

<sup>7</sup> Dates refer to 2002, unless otherwise stated.

<sup>8</sup> King is responsible for all human resources activities and reports directly to the Company's president, chairman, chief executive officer, and chief operating officer.

<sup>9</sup> In discrediting King, in addition to his general reliance on demeanor, the judge observed that the Respondent presented neither testimonial corroboration nor objective documentation, e.g., an audio or video recording or printed text, of King's remarks.

<sup>10</sup> 395 U.S. 575 (1969).

<sup>11</sup> *Id.* at 618.

explained the reasons why he believed customers who had been using the Respondent as their sole source for parts “were likely to split their business in order to have an alternative supply source in the event of a strike.”<sup>12</sup> The court reasoned that because the letter explained that Kobayashi’s perspective was based upon his industry experience and knowledge of the Respondent’s customer base, he was entitled to make those statements. The court held that once an employer provides such rationale, the violation can be found only if it is shown that the prediction falls outside Section 8(c) as either not objective in nature or untruthful.<sup>13</sup> Absent evidence that the statements in the letter were subjective or false, the court concluded that no violation of the Act had occurred.

In this case, by contrast, the statements provided no objectively-based rationale. Employee Rita McVetta testified that King said that if the Union got into the plant, customers “wouldn’t probably do business with us and we wouldn’t have jobs.” This mirrored the substance of McVetta’s affidavit, which referred to a statement that “customers would not want to deal with us because of the Union.” Testifying about another of King’s meetings, employee James Lehman said King told them they “would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs”; that if customers became concerned about the reliability of DTR’s production flow, they “would look for other sources” which “would mean there would be less work and fewer jobs at DTR.” Finally, employee Daniel Gahman testified that King said, “if the UAW was to get into DTR we would lose that sole supplier status,” and with customers allowing other companies to compete with DTR to provide parts, “it would result in layoffs” and DTR’s longstanding no-layoff policy “would have to change.”<sup>14</sup> Thus, based on the credited testimony of these employees, the consistent message of King’s remarks was that unionizing would result in the Respondent’s loss of customers and a decrease in business, leading inevitably to the loss of work and their

<sup>12</sup> *Supra* at 114.

<sup>13</sup> The court’s analysis was based upon its prior treatment of statements as to the effects of unionization in *Pentre Electric*, 998 F.2d 363 (6th Cir. 1993).

<sup>14</sup> Chairman Battista concurs that the threat was unlawful. Even assuming arguendo that customers of the Respondent would no longer look to the Respondent as a sole source, that would not itself cause the Respondent to depart from its prior “no layoff” policy. There are ways, other than layoffs, to deal with dropoffs of business, and the Respondent’s statement suggests that it used those other ways in the past. In essence, the Respondent was saying here that selection of the Union would cause a change in that past practice.

jobs.<sup>15</sup> Unlike the earlier case, where the context and basis for Kobayashi’s prediction were part of his remarks, King’s statements offered no support for his prediction.<sup>16</sup> In these circumstances, we find that the Respondent unlawfully threatened employees in violation of Section 8(a)(1).<sup>17</sup>

#### Discipline/Discharge of John Callahan

Callahan had worked for the Respondent since 1996. He was assigned to the first shift assembling fuel feed hose assemblies.<sup>18</sup> In July 2002, he became active in the Union’s organizing campaign, attending meetings, passing out leaflets, signing an authorization card, and soliciting others to sign cards.

On August 26,<sup>19</sup> Group Leader/First Level Supervisor Desmond Williams assigned Callahan to line 3, instead of line 2 where he had usually worked. Both lines, however, were equipped with the same machinery, and were set up as mirror images of each other. There is no evidence that Callahan had any problems producing acceptable parts on August 26.

Early in the day on August 27, as Callahan continued working on line 3, inspector Janet Schroeder reported to Williams that defective, unusable hoses were coming from Callahan’s line.<sup>20</sup> Williams counseled Callahan to place the parts at a different angle, but soon thereafter Williams discovered that bad parts were still being pro-

<sup>15</sup> In its exceptions, the Respondent relies on King’s testimony, not credited by the judge, that King had only referenced what might happen if the Union were successful.

<sup>16</sup> Compare, *TNT Logistics North America, Inc.*, 345 NLRB 290 (2005), where the Board found a supervisor’s statement about the consequences of unionizing was not only based on certain objective, known facts, but also would have reasonably been understood by employees to be merely an expression of his personal opinion. Member Liebman finds it unnecessary to rely on this decision, in which she dissented.

<sup>17</sup> This case is also distinguishable from *Pentre Electric*, *supra*, on the same basis. In that case, the court found the respondent’s president and vice president made statements about the probable consequences of unionizing based on objective facts, their knowledge of the nature of the customer base, and their experience in the industry. Carefully reviewing the substance of their remarks, the court concluded that “no employee could reasonably have come away from either speech with the belief that antiunion sentiment on the part of the company could lead to closure if the employees voted in favor of the union.” *Pentre Electric*, *supra* at 370. By contrast, there is no credited evidence that King articulated an objective basis for his statements.

<sup>18</sup> The assembly process begins with a machine connecting a center hose to two end metal pieces. Employees then set this piece on a bar to ensure the correct angle between the hose and the metal ends is maintained, whereupon a machine crimps the metal ends to the hose, locking them in place.

<sup>19</sup> The judge’s finding that Callahan was assigned to line 3 on August 26, contrary to our colleague’s contention, is supported by the record.

<sup>20</sup> Defective parts are cut up and scrapped so they are not inadvertently shipped to customers.

duced on line 3. After Williams spoke to Callahan again, no faulty hoses were produced during the remainder of the shift. Before the matter was corrected, however, Callahan had produced 137 defective hoses due to misalignment of the parts. Neither of the line 3 employees on the shift before or after Callahan's produced defective parts.

The next day, Callahan was again assigned to line 3. Williams soon discovered that hoses with even worse angle errors than those of the previous day were coming from Callahan's line. Williams testified that the severity of the defect caused him to think that the problem might not be merely that Callahan was placing the hose on the bar incorrectly, but rather that he might be acting intentionally to twist the angle of the hose. As he had done the day before, Williams again spoke with Callahan, showed him how to place the part properly on the bar, and personally completed the assembly of two hoses.<sup>21</sup> Approximately 90 minutes later, the inspector informed Williams that he was continuing to get parts with extremely bad angles, with the notable exception of the two hoses bearing the marks showing they were Williams' work.

Williams went to Callahan, who told Williams that his machine was not working properly. Thereafter, machinery repair person Dan Staley and production engineer Doug Caldwell conducted a thorough check of the equipment, found no malfunction, and made no modification to the machine. They concluded that the angle at which Callahan was positioning the hoses on the bar was causing the problem. Just as Williams had already done that day and the day before, they instructed Callahan to set the hose at a different angle. Making the adjustment, Callahan ran the assembly for the remainder of his shift without producing any more defective parts. By the time the second day's problem was corrected, Callahan was responsible for approximately 350 additional bad parts, nearly 500 in all, at a cost of about \$6000. Callahan experienced no production problems the next day, August 29.

Williams notified his supervisor, Rick Huffer, who, in turn, told King and others in management about Callahan's production difficulties. Toward the end of his shift on August 29, Callahan was called to meet with Williams, Huffer, and King to discuss his production errors. Callahan heatedly denied the suggestion that he had purposely ruined the parts. King said they would continue to investigate. The next morning, Williams called Callahan to the office where Huffer and King again were pre-

<sup>21</sup> Williams identified the parts he assembled with a white marker before they went into the final phase of the production process.

sent. King told him they did not need his type running the machinery anymore, to turn in his timecard, and that he would hear further by mail. On September 6, Callahan received a letter stating he had been on a nonpaid suspension since August 30, and was now terminated. No basis for the discharge was cited.

Callahan requested a "peer review" of his termination, and the Respondent scheduled it for September 17.<sup>22</sup> Williams prepared a factual summary of events, King acted as facilitator, and a human resource specialist presented the Respondent's case that Callahan had deliberately made defective hoses. Callahan denied the accusation, indicating he followed Staley's direction and corrected the problem, and pointed to his history of cooperation by responding to the Respondent's request to assist with a special production need during his vacation the prior July. The panel overturned Callahan's discharge by a 3:2 vote.

The Respondent did not immediately reinstate Callahan.<sup>23</sup> By letter dated September 17, the Respondent advised Callahan he was being suspended from September 18 through January 3, 2003, "due to your conduct during August 27 and 28, 2002 when you destroyed critical safety parts supplied to our customers." The letter stated further that prior to January 6, 2003, he would be instructed where and to whom to report. When he returned, Callahan was assigned to the mixing department, without bidding rights for other jobs, at the same pay he had received previously, and after a few weeks training, was placed on the second shift. King testified he placed Callahan in that position because he believed he had intentionally run bad parts and would be less likely to cause damage in mixing than in an assembly job.<sup>24</sup> As of the time of the hearing, the machine on which Callahan made bad parts still had not malfunctioned or been modified.

The judge criticized the Respondent's reliance entirely on supervisors' testimony about the defective hoses, and observed that testimony from an inspector or others who saw the final product would have been valuable. He also criticized the Respondent's failure to place in evidence any of the actual flawed parts, given that the Respondent cited the severity of their defects in concluding that Cal-

<sup>22</sup> The Respondent had a formalized peer review process for discharge decisions. A randomly-selected five-person panel, composed of three employees and two supervisors/managers would convene to hear each side present its case, and then vote by secret ballot whether to uphold or reverse the decision.

<sup>23</sup> Management retains the right to impose other disciplinary measures if the peer review process overturns a decision to terminate.

<sup>24</sup> Callahan left the Respondent's employ in June 2003. The General Counsel does not seek reinstatement.

lahan acted deliberately.<sup>25</sup> Crediting Callahan's testimony that King told him, "we don't need your type running the machinery here anymore," the judge concluded that the Respondent had already decided to terminate him, even before completing its investigation. Discrediting aspects of both Williams' and King's testimony and finding evidence of animus through the Respondent's other unlawful conduct, the judge determined that the Respondent unlawfully suspended, discharged, re-suspended, and then failed properly to reinstate Callahan to his former position because of his support for and activities on behalf of the Union.

The Respondent, *inter alia*, challenges the judge's failure properly to consider the seriousness of Callahan's extensive production errors. We find merit in the Respondent's position.

For purposes of this analysis, we will assume that the General Counsel has carried his initial *Wright Line*<sup>26</sup> burden of showing that the Respondent's disciplinary treatment of Callahan was unlawfully motivated.<sup>27</sup> The burden then shifts to the Respondent to establish it would have taken the same action against Callahan even absent his protected activity. Contrary to the judge and our dissenting colleague, we find the Respondent has satisfied its burden and proven that the disciplinary action would have been taken against Callahan even if he had no involvement with the Union.

In order to meet its burden under *Wright Line*, an employer need not prove that the disciplined employee had committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee had committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. See *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002) (citing, *inter alia*, *GHR Energy Co.*, 294 NLRB 1011, 1012-1013 (1989), *enfd.* 924 F.2d 1055 (5th Cir. 1991)).

There is no dispute that during a 2-day period, Callahan was responsible for producing nearly 500 defective hoses, turning several thousand dollars worth of the Respondent's product into useless scrap. Only Callahan had problems with line 3, and these problems occurred only during a portion of his shift on 2 successive days.

<sup>25</sup> The judge's criticism of the Respondent's failure to place into evidence any of the defective hoses as the best evidence of the extreme nature of their imperfection ignores the fact that these faulty parts were promptly scrapped to ensure against their accidentally being shipped to customers, in accord with the Respondent's routine procedure.

<sup>26</sup> 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

<sup>27</sup> The evidence shows that Callahan had engaged in union activity, that the Respondent was aware of this conduct, and that it had committed violations of the Act which showed its antiunion animus.

No employee on the shifts before or after Callahan's on those days experienced production problems, and Callahan had no problems on the third day. This information, known to the Respondent, provided a basis for the Respondent to scrutinize his production activity in order to assess responsibility. When Supervisor Williams counseled him, demonstrated the correct procedure, and personally assembled two hoses on the same machine, Williams produced hoses without angle errors on the same machine and during the same timeframe in which Callahan was producing defective parts. These circumstances, taken together, reinforced the reasonable perception that the product flaws were attributable to matters within Callahan's control.

Because of the overwhelming number of bad parts, Williams notified other managers about the problem. The initial decision to terminate Callahan was reached only after consultation among Williams, Williams' supervisor, Huffer, the division assistant manager, Keith Cauldill, the director of manufacturing, Steve Underbrink, the vice president of manufacturing, Bill Yokas, and King. Having ruled out equipment malfunction and operating instructions as the cause of the defects, and in view of the fact that other employees were producing nondefective hoses with the same machinery, management concluded that Callahan's extensive production errors were due to his intentional malfeasance. The Respondent reached this determination only after fully investigating the various other possible causes for the errors and eliminating them as the basis. The disciplinary decision followed collaborative deliberation about this serious and costly issue among representatives at several levels of responsibility in the production process.

We are not faced with the issue of whether Callahan in fact intentionally produced the defective hoses. We simply conclude that the Respondent was motivated by the belief that he had done so. As our colleague notes, Callahan was a skilled employee. As the Respondent perceived it, a skilled employee uncharacteristically produced 500 defective hoses in 2 days. Our colleague says that "it appears" that the problem was caused by the manner in which line 3 was configured, and she says that "it seems that" Callahan's usual facility was thereby impaired. However, apart from this speculation, there is no evidence that he gave these reasons to Respondent as the explanation.<sup>28</sup> Thus, the Respondent was not told of anything that would rebut its belief that Callahan engaged in intentional misconduct.

<sup>28</sup> Importantly, Callahan made good parts on line 3 all day on August 26, the day before the dissent contends his unfamiliarity with that line caused the problem.

Finally, our colleague relies on the examples of other employees who were not similarly punished for assertedly similar misconduct. The answer is that these employees were not reasonably believed to have engaged in intentional misconduct.

In these circumstances, we find that the Respondent has established its reasonable belief that Callahan bore responsibility for the intentional production of defective hoses and that its decision to discipline him was based on this belief.<sup>29</sup> Accordingly, we find that the Respondent has carried its burden of showing that it would have taken this action irrespective of Callahan's union activities and that it has not acted unlawfully. As we have concluded that the Respondent's initial decision to discharge Callahan was lawful based on the Respondent's reliance on his production errors, we also find that the Respondent's later decision, after the peer review process, to suspend Callahan and to reassign him to other work based on these same production-related considerations was likewise lawful. We therefore reverse the judge and dismiss the allegations of Section 8(a)(3) and (1) as to Callahan.

#### Discharge of Daniel Gahman

Pursuant to its drug and alcohol policy, the Respondent conducts random drug testing of employees.<sup>30</sup> Laura Crisp, the Respondent's safety manager is in charge of employee drug testing. In April, the Respondent contracted with a local hospital, Lima Memorial Hospital (LMH), to manage the program. This included using the hospital's computer periodically to randomly generate employee names for testing. On various dates in September, a large number of employees were selected for testing.<sup>31</sup> Third shift maintenance employee Gahman was among those randomly selected to be tested on September 18. There are no exceptions to the judge's finding that this selection process was lawful.

Toward the end of his shift,<sup>32</sup> a representative from the human resources department brought Gahman from his worksite to the Respondent's nurse's station, where plant

nurse Tonya Weigt explained why he was there. After the necessary forms were completed, Weigt gave him the sample container<sup>33</sup> and asked him to submit a urine specimen. With Weigt outside the restroom stall, Gahman produced a very small sample, which failed to register on the container's temperature gauge. Weigt testified that the sample was an unusual dark brown color and, because the amount was insufficient to perform the test, she disposed of it.<sup>34</sup> She then asked Gahman to remain in the area, drink at least forty ounces of water, and try again. On second effort, Gahman produced a sufficient specimen, which Weigt described as being an unusually bright, neon yellow hue. It, too, however, failed to register on the temperature strip. Nonetheless, Weigt sealed the container<sup>35</sup> and followed all other standard security procedures to submit that sample for testing.<sup>36</sup> Because of the absence of a temperature reading, however, Weigt told Gahman that he was required to provide another sample, witnessed either by a male management official or Dr. Merris Young, the medical review officer at LMH. Weigt advised him that if he failed to provide an observed sample he would be terminated, but if his test result was positive, he would retain his job, but be required to receive substance abuse counseling.<sup>37</sup>

Gahman went directly to LHM where he provided a urine sample under Dr. Young's observation. While that specimen also failed properly to register a temperature, Young said it was acceptable because he had witnessed its production. Two days later, Friday, September 20, Dr. Young telephoned Gahman and told him he had tested positive for marijuana and he should contact Crisp for further instructions.<sup>38</sup> Crisp directed Gahman to go to Century Health for counseling and to report to work. The next Monday, Gahman went to Century Health and called Crisp thereafter to tell her he had done so. Following Crisp's instruction, he reported to work at his regular 11 p.m. starting time on September 23.

On the afternoon of Tuesday, September 24, Crisp received LMH's report of the test result of the second

<sup>29</sup> In so finding, we need not address whether Callahan had, in fact, deliberately produced defective parts. Given the magnitude of the financial loss caused by this 2-day spurt of ruined production, and the Respondent's careful elimination of other bases to explain the production errors the Respondent clearly has shown the basis for a reasonable belief that Callahan acted with intent and was responsible for the errors.

<sup>30</sup> The Respondent follows procedures established by the Ohio Drug-Free Workplace Discount Program, which gives participating employers a discount on workers' compensation premiums.

<sup>31</sup> Because the Respondent had recently changed its program contractor and hired a new nurse, it had fallen behind in testing, necessitating testing many employees in September in order to qualify for the workers' compensation discount.

<sup>32</sup> Third shift ends at 7 a.m.

<sup>33</sup> Weigt's practice was to verify the pristine condition of the container with the employee being tested. Each container is covered with a foil seal and a color-coded temperature indicator is affixed to the outside.

<sup>34</sup> This was Weigt's standard practice when the quantity was inadequate for testing.

<sup>35</sup> The judge discredited Gahman's testimony that this second sample was also discarded.

<sup>36</sup> As part of the chain of custody certification, Gahman was required to sign a document asserting that he/she has not "adulterated it in any manner."

<sup>37</sup> The evidence includes Weigt's written notes regarding this sequence of events, submitted to King in a document entitled Center for Occupational Health progress report, dated September 18.

<sup>38</sup> Gahman testified that he knew he would fail the drug test.

specimen Gahman submitted at the Respondent's facility on September 18. Its substantive content reads, in full, as follows:

POSTIVE/ABNORMAL REPORT. . . .  
 THE TEMPERATURE OF THE SPECIMEN  
 AT COLLECTION WAS OUTSIDE OF THE  
 RANGE FOR NORMAL URINE (32-38 C/90-100  
 F).  
 SPECIMEN SUBSTITUTED: NOT CON-  
 SISTENT WITH NORMAL HUMAN URINE

Crisp promptly notified King.<sup>39</sup> Because Gahman's shift ended earlier in the day, he was not in the facility.

Shortly after the start of third shift on September 24, Group Leader Rick Mead sent Gahman to see King. King asked for Gahman's timecard and keys, told him to leave the building, not to speak to anyone, and that he would receive further information concerning his employment status by mail. By letter the following day, Gahman was terminated for "submission of at least one false sample" in a drug test.<sup>40</sup>

King testified that after consulting with Weigt about the report's meaning, he concluded it contained two independent findings, with the second being critical, i.e., that it was not really urine. On that basis, King's recommendation that Gahman be terminated for submitting a false sample was promptly endorsed by the Respondent's management consensus team and he was fired.

The judge found that Gahman's termination violated Section 8(a)(3) and (1). First, he rejected the Respondent's interpretation of the lab report, and found that it was unclear whether the statement in the report made conclusions as to two independent findings; first, that the temperature was off, and second, that it was not human urine; or whether the statement only made a single conclusion that the sample was not human urine because the temperature was off. In view of this ambiguity, the judge found the Respondent's failure to seek clarification from persons responsible for the lab report indicated disparate treatment. This finding of disparate treatment was based on the judge's contrasting the Respondent's treatment of Gahman with its treatment of employee Randy Evans, whose test results he found similarly ambiguous, but who was not known to be prouinion. Evans' abnormal test results, which indicated the presence of a substance that

interfered with the test, led to further lab analysis. In addition, King spoke directly with Dr. Young about the meaning of Evans' report before making a decision.<sup>41</sup> The judge reasoned that the only difference between the two employees was the Respondent's knowledge about Gahman's union activities. The judge thus concluded that discriminatory motivation based on the Respondent's antiunion animus was the reason for Gahman's termination, in violation of Section 8(a)(3) and (1).

The Respondent argues that the judge failed to make proper findings of fact and erroneously assessed the record evidence. The Respondent asserts that the lab report clearly stated that the substance was not what it was supposed to be and that no further analysis or clarification was necessary. By proffering something other than a urine specimen, Gahman violated company policy. In Evans' case, the specimen was genuine, but there was an impediment to testing it, necessitating additional lab work for a conclusive result. The two cases were handled differently because they were different. We find merit in the Respondent's position.

For the purposes of our analysis, we will assume that the General Counsel has carried its initial *Wright Line* burden of showing that the Respondent's discharge of Gahman was unlawfully motivated.<sup>42</sup> Our analysis of the Respondent's *Wright Line* defense is based on whether the Respondent has affirmatively established that it would have taken the same action against Gahman even absent his protected activity. Specifically, we consider whether the Respondent has shown that it had a reasonable belief that Gahman had engaged in misconduct in relation to the drug test, and whether it had acted on that belief when it decided to discharge him. See *McKesson Drug Co.*, supra.

We find the judge's analysis of the evidence is fundamentally flawed. It is based on a strained interpretation of Gahman's test report and an erroneous comparison of nonequivalent situations. The judge found ambiguity in a report that consists of two simple statements of fact, each set forth in its own separate line. The first deals exclusively with temperature and stands on its own.<sup>43</sup> The second begins with the words, "specimen substituted." This phrase is unequivocal; it means that the substance tested was something other than what Gahman was supposed to submit. Following the colon after that

<sup>39</sup> Weigt testified that she learned first of Gahman's positive report for marijuana resulting from the observed test, and a few days later of the abnormal test result from the test she administered at the Respondent's facility.

<sup>40</sup> The Respondent's employee handbook lists certain conduct as forbidden and will result in discharge, including, "falsification of employment applications, medical documentation or any other company records/documents" and "dishonesty."

<sup>41</sup> Further testing revealed that the adulterant in Evans' sample was chromium, an agent designed to interfere with the testing process. Only after learning this did the Respondent discharge Evans.

<sup>42</sup> Several of the 8(a)(1) violations in this case were directed at Gahman prior to his termination.

<sup>43</sup> The statement as to the temperature of the specimen at collection refers to a fact that was observed by the Respondent's nurse, and thus was not a result of the laboratory analysis at LMH.

phrase, it concludes by explaining, “not consistent with human urine.” This, just as clearly, means precisely what it says; Gahman submitted something other than urine in the test container. There was no need for further investigation because it did not matter what the substance was.<sup>44</sup> It was enough to know that Gahman had attempted to circumvent the purpose of the test, and in doing so acted dishonestly. This alone violated the Respondent’s policy and was sufficient reason to warrant discharge.

Moreover, the judge’s comparison of Gahman’s situation to that of Evans was erroneous. In Evans’ case, the sample could not properly be tested because some type of adulterant interfered with the results. The additional testing was performed at the lab level, as a matter of course and without the Respondent’s request, to identify the nature of the adulterant. Without further testing, it was possible that the sample was contaminated through no fault of Evans. Once it was discovered that the containment was a widely-known masking agent, however, the Respondent could—and did—draw the inference that Evans was responsible for the presence of the agent and promptly discharged him as well.

Thus, there is no evidence of disparate treatment. Because the Respondent read and understood the plain meaning of Gahman’s report, there was no need to consult with the lab. Unlike with Evans’ report, the lab’s function was complete and no additional test was needed to identify the contaminant. Upon the lab’s conclusion that a drug-masking agent had been added to Evans’ sample, the Respondent dispensed the same disciplinary action against him as it did with Gahman. Contrary to the General Counsel’s contention, the Respondent’s treatment of Evans actually reinforces the Respondent’s argument that Gahman’s falsification of his drug test was the actual sole motive for his discharge.

For these reasons, therefore, we find that the Respondent has established that it would have terminated Gahman when it did, irrespective of his activities on behalf of the Union. Accordingly, we dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging Gahman.

#### CONCLUSIONS OF LAW

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

<sup>44</sup> The Respondent’s review of this test result included directly communicating with the nurse who collected the sample, who had observed it being visually atypical of normal urine based on its “neon” color.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act.

(a) In early summer 2002, by its representative Thomas King, giving employee Gahman the impression that his union activities were under surveillance.

(b) In early summer 2002, by King, threatening Gahman with discipline if he continued his support and activities on behalf of the Union.

(c) On or about August 29, 2002, by King, threatening employees with layoff and job loss if the employees selected the Union as their bargaining representative.

(d) On or about September 25, 2002, by its representatives David Berry, Rick Mead, Roger Helms, and David Byglin, disparately enforcing its uniform policy against Gahman.

The above-described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

The Respondent has not committed any other unfair labor practices alleged in the complaint.

#### REMEDY

The Respondent has engaged in the unfair labor practices stated above and is ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

#### ORDER

The Respondent, DTR Industries, Inc., Bluffton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving an employee the impression that his union activities are under surveillance.

(b) Threatening an employee with discipline if he continues his support and activities on behalf of the Union.

(c) Threatening employees with layoff and job loss if they select the Union as their bargaining representative.

(d) Disparately enforcing its uniform policy against an employee who shows support for the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facility in Bluffton, Ohio, copies of the attached notice marked “Appendix.”<sup>45</sup> Copies of the notice, on

<sup>45</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judge-”

forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the employer at any time since July 22, 2002.

(b) 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.

MEMBER LIEBMAN, dissenting in part.

The Respondent used John Callahan's production errors as a pretext to justify suspending, terminating, then resuspending, and subsequently reinstating him to a less desirable position, because of his activities on behalf of the Union. No evidence supports the Respondent's claim that Callahan deliberately sabotaged the production process, and the record affirmatively shows that the discipline imposed on him was atypically severe in contrast with other instances of performance-related production flaws. In disagreement with the majority then, I would affirm the judge's determination that the Respondent disciplined Callahan in violation of Section 8(a)(3) of the Act.

#### I.

Callahan was an early and ardent supporter of the Union. Beginning mid-summer 2002,<sup>1</sup> he openly engaged in nonworktime leafleting and card solicitation among fellow employees. The record establishes that the Respondent was well-aware of his active support for the Union. The Respondent opposed the employees' efforts to unionize, and some of its conduct designed to quell those efforts violated Section 8(a)(1).

At the time of the events of this case, Callahan had been employed by the Respondent for nearly 7 years. He worked on the first shift, assembling fuel feed hoses. There is no evidence that he presented job performance or discipline problems at any time.

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ment of the United States Court of Appeals Enforcing an order of the National Labor Relations Board."

<sup>1</sup> Dates refer to 2002, unless stated otherwise.

On the morning of August 27, First Line Supervisor Desmond Williams reassigned Callahan from line 2,<sup>2</sup> his usual work station, to line 3.<sup>3</sup> Within a short time after the start of the shift, inspectors notified Williams that defective hoses were coming off line 3. After Williams twice spoke to Callahan about the defective output and suggested some adjustments, the problem appeared to be corrected. The following day, Callahan was again assigned to line 3, and production problems resurfaced. Both repair person Staley and production engineer Caldwell were called in to check the equipment. After personally assembling two defective hoses, but finding no mechanical malfunction, Staley altered the angle at which he placed the hose on the assembly bar. When this adjustment appeared to correct the problem, Staley instructed Callahan to make the same change. After that modification, Callahan produced consistently good parts for the remainder of the shift, as well as on the following day, August 29.

Toward the end of his shift on August 29, Callahan was called into the office. Williams, Williams' supervisor, Huffer, and King were present. King asked Callahan why he was running bad parts. Callahan replied that he had not done so intentionally and suggested that King speak to Staley. King told Callahan to go home and that he would followup the next day.

On August 30, after discussing the matter with several supervisors and managers, but without having spoken to Staley, King directed Callahan to turn in his timecard and leave the premises. By letter dated September 6, Callahan was officially terminated. Callahan promptly requested reconsideration of his discharge by a peer review panel.<sup>4</sup> At the September 17 peer review proceeding, the panel voted to overturn Callahan's discharge. Despite that decision, King immediately imposed a 3-1/2-month unpaid suspension on Callahan. The ensuing written notice<sup>5</sup> attributed the suspension to Callahan's having "destroyed critical safety parts supplied to our customers" and stated that upon his return he would be assigned to a job based on the company's needs. Upon his return in January 2003, King told Callahan to report to the mixing department, that he would have no right to bid on

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<sup>2</sup> Supervisor Williams testified unequivocally that he assigned Callahan to line 3 on August 27. By contrast, Callahan's testimony is confusing and contradictory.

<sup>3</sup> Assembly lines 2 and 3 contained the same equipment, but were set up as mirror images of one another.

<sup>4</sup> The Respondent's peer review process provides terminated employees the opportunity to appeal their termination before a randomly-selected, five-person committee (comprised of three employees and two management representatives), who may recommend upholding, reversing, or modifying the termination.

<sup>5</sup> The suspension was from September 18 through January 3, 2003.

other jobs, and after the first few weeks, he would be assigned to the second shift.

Although his pay and benefits were not affected by the new assignment, Callahan described the mixing department as the worst job in the plant, being both dirty and physically demanding. Callahan quit in June 2003, and does not seek reinstatement.

## II.

Assuming that the General Counsel satisfied his initial *Wright Line* burden, the majority concludes that the Respondent successfully rebutted that prima facie case. They accept the Respondent's contention that it would have taken these disciplinary measures against Callahan regardless of his union activity. I disagree. In my view, the Respondent has proven neither that Callahan intentionally ruined the hoses nor that it would have disciplined him as it did were it not for Callahan's involvement in union activities.

Just weeks before these 2 days of production problems, Callahan's skill, cooperation, and value to the Respondent's operation were fully acknowledged. Faced with an emergency, the Respondent asked Callahan to come in from vacation in July to assist in the effort to turn out replacement hoses, after someone had run "thousands of bad parts" which had been mistakenly sent to a major customer.<sup>6</sup> The Respondent called on Callahan because of his proven ability to produce quality hoses expeditiously. Callahan's prompt and competent response to the emergency request helped to rectify a significant and costly mistake and provide needed parts to an important customer.<sup>7</sup>

Callahan's run of misaligned hoses appears to have been attributable to the way the hose components were positioned on the assembly equipment. Line 3 was not his usual worksite and the line on which he was accustomed to working was set up in the opposite configuration from line 3. As a result, it seems that Callahan's usual facility with the process was impaired. In any event, despite a supervisor's attempts to correct the matter, it took the intervention of a repairman and a production engineer before the problem was finally identified and a resolution was devised. Once Callahan was af-

forded specific instructions, he was able to correct the problem and resume producing quality parts.

The Respondent nonetheless accused Callahan of deliberately sabotaging the production process, citing the absence of machinery malfunction and the fact that employees working on line 3 on shifts before and after Callahan did not produce defective parts. The Respondent neither presents objective evidence nor offers a reasonably plausible basis for concluding that Callahan's production problems were the result of malicious intent. There is no evidence that Callahan harbored antagonism that would motivate him to destroy the Respondent's property. Yet the Respondent leapt to the conclusion that the production flaws "must have" resulted from intentional malfeasance. Given Callahan's long and well-regarded work tenure, his unblemished disciplinary record, proven job dedication, demonstrated productivity, and the absence of any factual basis for attributing ill intent to him, a reasonable explanation is that the Respondent seized on Callahan's production difficulties (likely attributable to his unfamiliarity with line 3) to retaliate against him for supporting the Union.

Obviously, the Respondent has the right to impose disciplinary measures on employees because of performance inadequacies. And, Callahan's 2 days of faulty production did result in considerable product loss for the Respondent. But, it is not enough for an employer simply to assert a legitimate reason for its disciplinary action. Rather, it must establish, once the General Counsel has satisfied his threshold burden of proving discriminatory motivation, that it would have taken the same action even absent protected conduct. Here, as explained below, the Respondent cannot sustain its burden because the evidence shows that the discipline Respondent imposed on Callahan was atypically severe as compared with its handling of other instances of performance-related deficiencies.

To illustrate, in May 2001, the Respondent issued merely a "verbal counseling" to an employee for "disregard[ing] proper procedure" and "causing substantial loss of product" when he failed to check for batch tags and running rubber in the extruder. Several months later, the same employee again received only a "verbal counseling" for not running appropriate checks on the coil production, resulting in an unacceptable, illegible print message on a large quantity of product. In February 2002, another employee was given only a "formal letter of warning" after a series of incidents, including running "the wrong chemicals in two batches of rubber causing lost production and high scrap costs." A third employee received only a warning notice for having assembled over 100 defective hoses as well as falsifying documents

<sup>6</sup> The Respondent presented no testimony to dispute Callahan's account of this incident.

<sup>7</sup> There is no evidence as to what, if any, investigative or disciplinary action the Respondent took in response to this incident, which by Callahan's account appears to be more serious than the production problems he experienced in late August. The Respondent's failure to put on evidence demonstrating that the other employee was also severely disciplined undercuts the Respondent's affirmative defense for Callahan's discipline.

relating to those hoses. When the same individual subsequently ran 78 additional parts with hoses of the wrong length, the Respondent merely verbally counseled him regarding the infraction.

These examples illustrate that the severity of Callahan's treatment, initially imposed after an incomplete investigation and essentially reaffirmed despite a review panel's determination that it was unwarranted, stands in stark contrast to the fairly mild reprimands given employees with similar performance errors who exhibited no prounion sentiments. In these circumstances, I do not believe that the Respondent has established that it would have taken the same action against Callahan absent his protected conduct. I therefore part company with the majority and would adopt the judge's reasoned determination that the Respondent's series of disciplinary actions against Callahan violated Section 8(a)(3).

#### 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 give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with discipline if you continue your support and activities on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

WE WILL NOT threaten you with layoff and job loss if you select the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as your bargaining representative.

WE WILL NOT disparately enforce our uniform policy against you if you show your support for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

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

DTR INDUSTRIES, INC.

*Iva Y. Choe, Esq.*, for the General Counsel.  
*Robert F. Rivera, Esq.* and *James A. Rydzek, Esq. (Jones Day)*,  
of Cleveland, Ohio, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

JOHN W. WEST, Administrative Law Judge. The charge was filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union, the Charging Party or UAW) against DTR Industries, Inc. (DTR or Respondent) on September 30, 2002.<sup>1</sup> The charge was amended on December 17 and January 27, 2003, and a complaint was issued on February 28, 2003, alleging that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by (a) in early summer 2002 at its facility, by its representative Thomas King, giving employees the impression that their union activities were under surveillance, (b) in early summer 2002 at its facility, by King, threatening its employees with discipline if they continued their support and activities on behalf of the Union, (c) on or about August 29, by King, at the Respondent's facility, threatening employees with layoff and job loss if the employees selected the Union as their bargaining representative, (d) on or about September 25, 26, and in late September 2002 by its representatives David Berry, Rick Mead, Roger Helms, and David Byglin, at Respondent's facility, disparately enforcing its solicitation policy and its uniform policy against employees showing their support for the Union, and (e) in late August or early September 2002 by King, at Respondent's facility, giving the impression that employees' union activities were under surveillance, and (2) violated Section 8(a)(1) and (3) of the Act by (a) on or about September 17 selecting its employee Daniel Gahman for a drug test and discharging him on September 25 because he formed, joined, and assisted the Union and engaged in concerted activities, (b) on or about August 30 suspending its employee John Callahan, (c) on or about September 6 discharging Callahan, (d) on or about September 18 suspending Callahan after an internal peer review group overturned Callahan's September 6 discharge, and (e) on or about January 3, 2003, failing to return Callahan to his former or substantially equivalent position of employment, engaging in the conduct described above in (2)(b), (c), (d), and (e) because Callahan formed, joined, and assisted the Union and engaged in concerted activities. In its answer the Respondent denies violating the Act as alleged in the complaint, and the Respondent asserts that the disciplinary action taken against Graham and Callahan was taken for a valid and lawful business reason; that Callahan voluntarily resigned his position with the Respondent on June 24, 2003, and had he not, he would have been terminated; and that King's above-described comments on August 29 about the Respondent being the "sole source supplier" to various of its customers are protected under Section 8(c) of the Act, and were the type of comments expressly approved in *DTR Industries, Inc. v. NLRB*, 39 F.3d 106 (6th Cir. 1994).

<sup>1</sup> All dates are in 2002, unless indicated otherwise.

A trial was held in this matter on December 16, 17, and 18, 2003, in Lima, Ohio. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a Delaware corporation with an office and place of business in Bluffton, Ohio, has been engaged in the business of manufacturing rubber products for the automobile industry. The Respondent admits that annually, in performing its business, it sells and ships goods valued in excess of \$50,000 directly to points located outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent manufactures rubber and plastic automotive hoses and also rubber antivibration products. It has three shifts at its Bluffton facility, namely the first which runs from 7 a.m. to 3:20 p.m., the second which runs from 3 to 11:20 p.m., and the third which runs from 11 p.m. to 7:20 a.m. There are about 800 employees at the Bluffton facility, with about 375 on the first shift, 225 on the second shift, and 200 on the third shift.<sup>2</sup>

The Respondent's employee handbook, General Counsel's Exhibit 2, contains the following:

Our non-union status is a compliment to all of our . . . [employees] and all of our managers at DTR. We believe that it is not necessary for our . . . [employees] to belong to a union in order to enjoy a satisfying work life at DTR. It is the commitment of DTR management to make every effort to maintain a working environment where . . . [employees] can openly discuss their problems and ideas. Maintaining this type of environment and maintaining positive relationships between all . . . [employees] protects our customers, our jobs and our Company.

When called by counsel for the General Counsel, King, who is the Respondent's executive coordinator, testified that it is the Respondent's preference to remain union free, and the Respondent does not think a union would contribute any positive affect to the relationship between the Company and its employees.<sup>3</sup>

According to his testimony, in mid-July 2002, while he was on vacation, Callahan, who was hired in 1996 and was a general laborer in hose manufacturing on assembly line 3, was "begged" by his supervisor, Chad Risner, to come to work on a Sunday because DTR had to quickly get out some parts for

<sup>2</sup> The employees are referred to as associates by DTR but since the Act refers to employees, that is how they will be described herein.

<sup>3</sup> As executive coordinator, King is responsible for all human resources activities in the Company with respect to all of the employees and management. He reports to the president of the Company, the chairman, the COO, and the CEO.

Honda to replace some bad parts.<sup>4</sup> Callahan testified that Risner told him that he could run line 3 faster than anybody, he knew the machinery, and he could get the parts out. Callahan worked that Sunday.

When he returned from his vacation Callahan went to line assembly 2 for about 2 weeks.

In July 2002, Callahan, who worked on the first shift, became active in the union organizing drive at DTR. He attended union meetings, signed a union authorization card, passed out union leaflets, had other employees sign union authorization cards, and talked about the Union every workday in the lunchroom when he passed out union leaflets.

In July 2002, Gahman, who worked on the third shift, became active in the union organizing drive at DTR. He attended union meetings, passed out union authorization cards during his lunch and breaks, in the smoking area in front of DTR and at a bar after work, and talked about the Union to employees. While he was talking to other employees in the smoking area or in the lunchroom about the Union, he saw Helms, who is the third shift supervisor. Helms also showed up at the bar where the employees hung out after work.

King met with Gahman in late July 2002. King's notes, General Counsel's Exhibit 11, taken during this meeting read as follows:

Dan Gayman—[sic]

Pretty much done with U—don't intend to do any more. Leave it where it is

Joke about knives.

Attended 3 meetings—won't attend any more. Disgusted with it.

. . . [end of page two of General Counsel's Exhibit 11 which is a copy of King's handwritten entries on a page of his notebook with a portion redacted]

Won't be a future problem—I've pretty much relinquished everything. [Page three of General Counsel's Exhibit 11 which is a copy of King's handwritten entries on a page of his notebook with a portion redacted.]

King testified that he thought that the meeting took place on July 22 after 7 a.m.<sup>5</sup>

<sup>4</sup> At the trial herein it was determined that the employment history that Callahan gave in his 1996 DTR application for employment, R. Exh. 1, was not correct in that while he indicated that he worked for two-named companies in 1990, he was in fact in prison (from 1986) for "Agg Burglary," was paroled on "11-08-91," and his "Final Release" occurred on "12-04-92." See R. Exh. 4 which is a certification of record from the State of Ohio Department of Rehabilitation and Correction.

<sup>5</sup> The ellipsis in the above-quoted material is a line at the bottom of p. 2 of GC Exh. 11 which reads as follows; "Wayne Harrison articles." It is not clear what this refers to. Page 1 of GC Exh. 11 are the following notes of King which he testified he took between 6:30 and 7 a.m. on July 22:

7/22/2—6:30A—Tom King, Kevin Phillips, Dave Byglin, Bill Yokas 7/17—Wed AM after 1st break—Dan Gayman [sic] approached Kevin in break room in front of other people—asked him & girlfriend to sign card. Other guy signed after Dan sharpened fish & filet knives. zone D woman. Gayman [sic] felt he had better than 50% of 3rd & good amount of 1st shift. Can't get 2nd shift going.

Gahman testified that in the beginning of August 2002, the morning after he attended a union meeting at the hotel in Bluffton, King spoke to him about union activities; that the discussion took place in the conference room at DTR; that he, King, Helms, Laura Crisp, who is safety director, and Byglin, who is the third-shift human resources specialist, were present; that King said that he was aware that Gahman was an outspoken supporter for the UAW and had attended union meetings; that King said that several things had been brought to his attention about Gahman's behavior that he did not approve of; that King said that he had heard that Gahman had sharpened a knife for an employee in trade for the employee signing a union authorization card, and Gahman refused to install a fan for an employee who did not support the UAW; that he told King that he did sharpen an employee's knife as a favor to the employee and after he sharpened the knife, he talked to the employee about the Union and the employee did sign a union authorization card; that it was not a trade off; that he told King that he could check the computer record and he would see that he, Gahman, installed all of the fans that were requested; that King said that he "wasn't happy with my support . . . of the UAW, and he thought there was good people working there and the UAW would be a bad thing for them . . . [a]nd if he didn't hear anymore reports about my support and the UAW or openly supporting the UAW, that there would be no further mention of the allegations that he brought up" (Tr. 181); that King then said that "if he continued to hear reports about my UAW support that there would be disciplinary action for the knife incident and the fan incident" (Id.); that he told King that "it wouldn't be a problem because I had come to a decision to discontinue my support for the UAW and, . . . that I would no longer be involved with it one way or another so that he wouldn't be getting any more reports about me and UAW activity" (Id.); that at the union meeting the day before he bragged about his methods to get people to listen to him; that more specifically he bragged about sharpening an employee's knife and then told the employee about the Union and got him to sign a union authorization card; that at the union meeting he also spoke about a female employee asking him why she could not have a fan installed in her area, and later, during break, he told the employee that if they had a union, they might be able to get a fan for every employee like a UAW Ford plant; that at the time there was no work request to install a fan in her area so he did not have the authority to install a fan for her; and that before this he believed that union meetings were confidential.

On cross-examination, Gahman testified that King opened the meeting with "[I]t's been brought to my attention" (Tr. 229); that he has sharpened knives many times; that the knife sharpener that he used was his own that was bought for him for Christmas; that he did sharpen the knife at issue on Company premises; that he had been doing it for all the years that he

worked at DTR; that King said that it had been reported to him that Gahman told one or more employees that he would not install a fan unless they signed a union authorization card; that he told King this was not true; and that he understood King to then say that if he heard any reports about him supporting the UAW, King would discipline him.

When called by the Respondent, King testified that he received information from an employee through several supervisors that Gahman was organizing during working hours on the plant floor, disrupting other employees by attempting to persuade them to sign authorization cards while both Gahman and the other employee were supposed to be working; that he told the supervisors that he wanted to meet with the employee to hear the information himself; that he had a meeting with the third shift employee, Phillips, who told him that (1) Gahman inappropriately in front of other people tried to get him and his girlfriend while they were in the cafeteria to sign authorization cards, (2) he *heard* that Gahman sharpened a knife for an employee and in exchange the employee signed an authorization card, and (3) he *heard* that Gahman was telling people that (a) if they signed an authorization card, he would install a fan for them, and (b) if they did not, he either would not install a fan or the installation would be low priority; that General Counsel's Exhibit 11 are his notes of the meeting he had with Phillips on July 22; that, with respect to Gahman's solicitation of Phillips signature on an authorization card, Phillips told him that he did not like being interrupted on a break; that later that same day he met with Gahman, with Bill Yokas, Helms, and Byglin present; that he asked Gahman about what another employee had told him he *heard*; that Gahman volunteered that he was disgusted with the Union, he had attended three union meetings, and he is not going to be involved anymore; that Gahman denied the allegation about the fan installation but admitted sharpening a knife, and said that he did it all the time; that he told Gahman that he could not sharpen personal knives for anyone on DTR's property with its equipment during working hours because it creates substantial liability and risk for DTR, and uses time he should be performing his duties; that he did not tell Gahman anything about the fact that he knew that Gahman was attending union meetings; that he did not tell Gahman that if he did not engage in union activity in the future, he would not be disciplined for the knife sharpening; and that he did not make threats of any kind to Gahman regarding the events that were reported to him. On cross-examination, King testified he assumed that the complaining employee was on his break when Gahman solicited his signature on a union authorization card; that he did not speak with the employee who had his knife sharpened or the employee who allegedly complained about the fan; that after speaking with Gahman, he had Byglin and Helms check the records with respect to fans and they did not find anyone who wanted to come forward and say the alleged fan incident happened; that he did not think the complaining associate knew the name of the woman in zone D who complained about a fan; and that the only report that he had about Gahman engaging in union activity during worktime was from Phillips.

Callahan passed out union leaflets outside of DTR's facility three times. The first time was in mid-August 2002, when he passed out leaflets from 6 to 6:45 a.m. He was standing on the

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King testified that he believed the reference to the zone D woman referred to Kevin Phillips telling him that the woman complained that Gahman would not install a fan unless she signed an authorization card. King did not know the woman's name. Those portions of King's notes between the divulged entries for the meetings with Phillips and Gahman and after the divulged notes for Gahman's meeting were redacted by the Respondent.

outside of the west parking lot on the main road with two other employees and two or three UAW representatives. A police officer came to the site and he indicated that he just wanted to make sure that the people handing out leaflets knew where they were supposed to stand.

Approximately 2 weeks after he first handed out union leaflets outside of DTR's facility, Callahan did it for the second time. King drove by while Callahan was 3 feet behind someone who tried to give King a union leaflet.

On Monday, August 26, Desmond Williams, who is a group leader, assigned Callahan to assembly line 3.<sup>6</sup>

On August 27, at about 9 a.m., Williams told Callahan that parts were coming out at a bad angle and he should set the parts down at a different angle when he took them out of the machine. The operation Callahan was performing that day involved putting a piece of hose on a machine, which machine then coats the inside of the hose with an adhesive and inserts a metal piece on each end of the hose. Callahan then took the hose attached to the two metal pieces out of the machine and placed it on a bar at a certain angle to allow the adhesive to set. After a set period of time had passed, Callahan would crimp both metal ends over the hose and place the part in an oven to cure the adhesive. About 11 a.m. Williams told him that the parts were still coming out at a bad angle. Callahan testified that Williams spoke to him three times that day about bad parts, finally asking him if he had problems or was anything wrong with him; that he had been setting the parts on the bar exactly the way Williams wanted him to set them; and that after the third time he did not hear from Williams again that day.

On August 28, according to Callahan's testimony, Williams approached him about 11 a.m. and told him that the parts were coming out at a bad angle. Callahan testified that he told Williams that they needed to get the set up guy, Dan Staley; that when Staley came to the machine Callahan assembled a part, while Staley stood there, and he handed the part to Staley who put it in the inspection jig and determined that it was not within specifications; that they did three more parts and each time the part, when placed in the jig, did not meet specifications (it did not fit properly in the jig.); that he told Staley to handle the part himself when it came out of the machine so there would not be any question about the way Callahan was handling the part; that Staley told him "that it was the machine, . . . to go to lunch, . . . he would get a production supervisor to look at it" (Tr. 115); that Williams was not present while he and Staley were running parts; that he went to lunch and when he returned Staley, in Williams' presence, told him when the part came out of the machine he should rotate it at a 180-degree angle and set them down; and that he followed this procedure the rest of the day.

On cross-examination, Callahan testified that once the part is crimped he does not put it directly in the curing machine but rather he puts it in the chuck which drops it in the oven; that he did not recall there being any sensors in the chuck to determine if the part has been crimped properly; that as long as the part fits in the hole on the chuck, it blocks the sensors and the part will be dropped into the curing oven; that the part is in the curing oven for 80 minutes; that when the part comes out of the

curing oven it is pressure tested by other employees; that the part is put is put back in another oven to dry it off from the water test; that he was told that the parts were bad but he was not told that the angle on the small metal piece was not within specifications; that the involved part is a high pressure fuel hose; that he made the part on hundreds of occasions prior to the 2 days in question; that the only difference between line 2 and line 3 with respect to this part is that one is left handed and the other is right handed; that in the past he has made some bad parts but he never made 500 bad parts in the past; that there was a situation where the metal was bad and there were "thousands of bad parts" (Tr. 144) run, and this was the time that someone had sent bad parts to Honda and Risner called him while he was on vacation and asked him to run the parts for Honda; that in that situation the larger piece of metal was bad;<sup>7</sup> that on Monday, August 26, he did not have a problem with the same part; that the part is placed on the bar to make sure that as the adhesive sets the angles of the metal to the hose are correct; that he was given a one-point lesson on how to support the smaller metal block, part 01-291 (which at that point is attached to the hose, the other end of which is attached to the large metal block) on a bar so as to avoid producing "bad angles," (R. Exh. 5); that on August 27 he was told that he made bad parts in the morning and after lunch as well; that on August 28, he started making good parts after lunch; that

Now I'm fast at this. I'm the best at this area, this job. There's nobody who can put out parts quicker than I can and I can do those three [on the bar—the one point lesson indicates that "AT LEAST 3 TO 4 PARTS SHOULD BE RAN AHEAD TO GIVE GOOD SET UP TIME," [R. Exh. 5] before they dry and I'm thinking as I'm grabbing them and doing them, they're not having time to dry because I, I am pretty quick at it.

I've got to be real good and the more I think about it, I think that's what the problem is. When I grab them I go, I move quick. This machine is a little slower than Line 2 and you have to get a thousand parts out a day[.] [Tr. 152.]

that he told his supervisor, Williams, the second day that the machine was a little slower and he happened to move a little faster; that he thought that he made more parts on August 27 and 28 than he did on August 27; that there were no problems with bad parts after Staley looked at the machine; that in a letter he gave to the Board in the course of the investigation of this case he indicated that he ran the involved line 2 machine 20 to 25 other times; that he made the involved part hundreds of times; that there are bad parts every day; that he did not recall

<sup>7</sup> As noted above, a piece of metal is attached to the two ends of the hose. See R. Exh. 2. Both pieces of metal are hollowed, metal blocks with two pieces of tubing (small pipes) extending out from the blocks. Those tubes which connect with the two ends of the hose have an attached crimping collar or sleeve so that the tube goes inside the rubber hose while the crimping collar or sleeve attached to the tube goes outside the rubber hose. Both pieces of tubing which connect to the rubber hose are bent at an angle to the hollowed metal block from which they extend. The larger metal block has a mounting plate attached to it. And the smaller block appears to have a mounting hole drilled through the block itself.

<sup>6</sup> Crisp testified that a group leader is a first-level supervisor.

ever making 500 bad parts, not even on August 27 and 28; that he never told Williams or King that he thought that the problem was that he was working too fast, but he did tell this to peer review; that the Company never told him what the problem was with the bad parts; and that they did tell him that it was a bad angle but they did not tell him if it involved the small block or the large block side.

On redirect Callahan testified that Williams told him that the part was coming out at a bad angle; that Williams showed him how to lay the part on the bar, namely the tip of the small block, and he told Williams that is how he had been doing it; that he went to lunch and when he returned Williams and Staley told him to lay the part on the bar at 180 degrees different than he had been doing so that now the big block was on the bar instead of the small block (This is contrary to the placement of the part on the bar set forth in the above-described one-point lesson, R. Exh. 5.); that pursuant to these instructions he placed the big block on the bar and there was no trouble for the next day and a half; that a one-point lesson took about 1 minute to read, sign, and pass on to another employee at the morning meeting; and that he did not recall the one-point lesson received as Respondent's Exhibit 5.

Williams, who worked for DTR for over 6 years and is a group leader in hose assembly, testified that he had been a group leader for 4 years and had been in hose assembly for 18 months at the time he testified at the trial herein on December 17, 2003; that he made the involved part during his training program when he came over to hose assembly; that an assembly machine is used to connect the two metal parts at the ends of the hose; that the machine places glue inside the hose and then takes the two metal blocks and inserts them in the hose; that the assembler then places the assembled part on a blue bar in front of him so that the correct angle is maintained during the setting process; that the assembler should have between three and five assembled pieces on the bar; that the assembler then slides the parts along the blue bar, taking the part that has been resting on the bar the longest and he crimps the sleeves at both ends; that the assembler then puts the crimped part into a chuck which verifies that both ends are crimped and places the part in heat treat where it stays for about 80 minutes to make sure the adhesion is set in place;<sup>8</sup> that after the heat treat, the part goes through a high pressure water leak test; that the part then goes inside a dryer and then to final inspection; that, as here pertinent, the final inspector inspects the angles in a check fixture; that Respondent's Exhibits 2 and 24 through 30, collectively, are pictures of the involved part before it is assembled, good and bad assembled parts, the check fixture, and five of the assembled parts on the blue bar; and that the small metal block always is the one to rest on the blue bar.

With respect to Callahan, Williams testified that on Monday, August 26, Callahan was working on line 2 and he did not have a problem with the involved part; that on Tuesday, August 27,

Callahan was working with the same part but on a different line, line 3, than Monday, August 26; that about 8:30 a.m. on August 27, his final inspector Janet Schrader, who was being trained by Rick Stewart, reported to him that she was receiving bad angles; that the shift began at 7 a.m.; that he spoke to Callahan and showed him how to lay the parts on the bar; that about 1.5 hours later Schrader reported to him that she was receiving bad angles again; that he spoke to Callahan again and Callahan repeated a statement he made during their first conversation namely, that he thought that the problem had to be with the inspector; that the rejected parts were then reinspected by Williams' person-in-charge, Jerry Blossard, who was an experienced inspector; that Blossard reported to him that out of 142 parts made by Callahan, 137 were bad; that he spoke with Callahan again asking him if there was any problem other than work causing him to make bad parts; that after lunch Callahan made good parts for the rest of the day and nothing had been changed on the machinery; that assemblers on the shifts before and after Callahan's August 27 shift made the same part on the same machine and they did not have any difficulty in making good parts; that about 8:30 a.m. on the morning of August 28, Stewart and Schrader reported to him that they were getting really bad parts after the shift change divider, which were Callahan's parts; that the parts were so bad that it was not just a matter of not using the bar properly but rather the assembler would intentionally have to twist the part; that he spoke to Callahan, telling him that the angles were worse than yesterday; that he himself ran two parts, marking them with white marks; that 90 minutes later the inspectors reported to him that they received the two parts with white marks and they came out good but Callahan's parts continued to come out really bad; that there were about 350 bad parts; that he told his supervisor, Rick Huffer, that an extraordinary amount of bad angles came off line 3, and Huffer told him to check into it; that he told Callahan to stop running the process; that he had never seen so many bad parts; that Callahan said that he thought that the assembly machine was not working properly; that if this was the case he himself would not have been able to make two good parts; that he called his set up man, Staley, who repairs machines, and had him look at the fixture, and he got the production engineer for that area, Doug Caldwell; that Staley, who is an hourly employee, checked the fixture while he watched; that they had the check fixture with them to make sure the angle was correct; that at the start of every shift the assembler is supposed to use the check fixture to check the first part; that if he was making bad parts on August 28, he should have caught it when he used the check fixture on the first part; that when Staley checked the parts that he made on the check fixture he found that they were good; that Caldwell could not find any problem with the check fixture; that neither Staley nor Caldwell found anything wrong with the machinery; that neither he, nor Staley, nor Caldwell made any changes to the machinery; that Callahan was at lunch during the inspection process; that when Callahan came back from lunch he made good parts the rest of the day; that on the really bad parts he concluded that Callahan had to intentionally turn the part to take it so far out of specifications; that the assemblers who worked on the two shifts after Callahan making the same part on the same machine did not

<sup>8</sup> A video tape was received in evidence as R. Exh. 22, which shows the involved process up to the time the part is placed in heat treat. Williams testified that if the part is not crimped, an alarm goes off and the door to the heat treat will not open; and that once the part is crimped the metal ends are set in place.

have any problems; that on August 29, Callahan made good parts all day; that his supervisor told King about the situation; that sometime that week he and Huffer met with King; that he thought that during this meeting he said that the assembler had to be forcibly turning the parts for them to come out that bad; and that General Counsel's Exhibit 9 are his planner notes which were made on the dates indicated.<sup>9</sup>

On cross-examination, Williams testified that before he worked in hose assembly he worked in hose metal which is the department which makes the parts for hose assembly; that bad parts are cut up and scrapped so that they are not sent out by mistake; that on August 27, the first time he spoke with Callahan about 8:30 a.m., he showed Callahan how to place the part on the bar and he stood there for a few minutes and watched Callahan place the parts on the bar, but he did not see Callahan place the parts in heat treat; that before lunch on August 27, he again showed Callahan how to place the parts on the bar and he stood there for a few minutes and watched Callahan place the parts on the bar, but he did not see Callahan place the parts in heat treat; that he did not have any documents with him to show that (1) the assemblers who worked second and third shift making the same part on the same machine made good parts, or (2) Callahan made good parts after he asked him if he had any problems outside work on August 27; that in his planner notes, General Counsel's Exhibit 9, he does not indicate that Callahan made good parts after he asked him if he had any problems outside work on August 27; that his planner notes for August 28 do not indicate that Callahan made good parts on August 28; that his planner notes do not indicate that Blossard inspected parts and found five good parts; that on August 28 after he spoke with Staley and Caldwell, he told Callahan, when he returned from lunch, that the machine was okay to operate and to make sure that he used the bar; that he could not recall if Staley and Caldwell were at the machine when Callahan returned from lunch on August 28; that he believed that he saw Callahan making parts after lunch on August 28; and that he knew that Callahan was a supporter of the UAW in that he saw him out in the parking lot.

On redirect Williams testified that he and Blossard cut Callahan's bad parts up and disposed of them so the bad parts would not get to DTR's customers; that this is normal operating procedure; and that on August 27 between 50 to 100 of the parts were really bad.

Subsequently Williams testified that even if the hose were placed at a 90-degree angle to the bar, the angle should not be bad if the small metal block was properly resting on the bar; and that the part of the machine which holds the metal blocks during the assembly process cannot move.

<sup>9</sup> An entry for August 27 reads: "Callahan fault 130 pcs. of bad angles @ \$12.50." And the following entries were made for August 28:

Conversation w/John Callahan about angles being worst [sic] than the 137 pcs. scrapped yesterday. Parts so bad that small . . . [end] not even touching block. Informed him on how it should be set on the bar.

.....

Rick informed H.R., Steve U., Bill Y. Tom King about the situation.

Staley testified that he has worked at DTR since 1992 and he is a setup person; that on August 28, Blossard asked him to look at the machine that Callahan was using; that he is the first person to look at a machine if there is a problem; that the first thing he checked on the machine Callahan was using was the MM (adhesive) flow which was okay; that he took a part from the assembly machine, laid it on the bar, crimped it, and checked the angles on it in Callahan's presence; that the angle was a couple of degrees off; that he then looked to see if anything was loose thereby allowing movement; that the metal and the hose are clamped down when they are inserted so there is no movement; that he could not find anything wrong with the machinery and he did not make any adjustments to the machinery; that he then got Caldwell, an engineer, so they could get engineering involved; that they were having a problem with the angle of the small metal block end and they looked at the fixture in the machine to see if there was abnormal wear; that he and Caldwell did not find anything wrong with the machinery or the fixtures and they did not make adjustments of any kind; that Callahan was there when he and Caldwell checked out the machine and fixture, and they could not find a problem; that on September 4 [Tuesday of the following week (Tr. 504)] King asked him if he checked out the machine; that King asked him to take him through what he did to the machine step-by-step, and he told King that there was nothing wrong with the machinery and no adjustments were made; and that he did not know why bad parts were being made. On cross-examination, Staley testified that it was before lunch when Blossard asked him to look at Callahan's machine; that the part he made touched the blue nylon on the check fixture which meant it was a bad part; that when he could not figure out why he was having bad parts he called Caldwell; that he did not know how many parts he made; that when he and Caldwell looked at the machine he did not recall Williams being present; that he made one or two bad parts and then he got the engineering department, Caldwell, involved; and that he and Caldwell concluded that

[I]f you laid the part down, at a 90 degree angle, to the bar, you could have . . . one or two degree angle, that the angle would be off.

But, we found that if you laid it basically at a 45 degree angle, to that bar, and let it set up, you would be okay, the parts were good. [Tr. p. 510.]

Staley further testified that he could not recall if he spoke with Callahan after Caldwell arrived at Callahan's workstation; that he would have to say that he and Caldwell talked to Callahan on how to place the part on the bar; that he was aware of the fact that this was not the first time Callahan made this part; that it would appear that Callahan would, therefore, have known the angle before the day in question; that he spoke with King after Labor Day; that he was on vacation on Friday, August 30, and he had a message that King wanted to speak with him about the Callahan situation; that he telephoned King who told him that he knew he was on vacation and they would talk when he got back to work; and that he returned to work on Tuesday, September 3. Subsequently, Staley testified that he checked the left side of the machine because that is the side which involves

the small metal part (block); that they were having the angle problem on the small metal part end of the hose; that while the angle of the large piece, if it was inaccurate, might affect the remainder of the piece, DTR still used the same fixtures, unmodified, at the time of the trial herein; that he did not check the right side of the machine which temporarily houses the large metal block because his concern at the time was the small side; that when the assembler hits the start button, the first movement is for brass clamps to hold down the metal parts in place in the fixtures in which they are sitting; that the clamps have a sensor which requires a contact to be made in order for the machine to proceed; and that the contact is determined by stroke length.

At the 7 a.m. monthly P/A meeting in August 2002, according to the testimony of Respondent's employee Rita McVetta, King spoke to the 40 or so assembled employees, telling them that "the sole source suppliers we were and that if we got Union into the plant that they wouldn't probably do business with us and we wouldn't have jobs." (Tr. 15.) The president employees meetings are held once a month. On cross-examination McVetta testified that she attended a union meeting away from the Respondent's facility "where a man spoke who identified himself as the President of a Union that supplied goods to Honda" (Tr. 19); that she could not recall if the union meeting occurred before King spoke to the employees at the August 2002 president employees meeting; that she could not say whether the speaker at the union meeting talked about the fact that Honda would not care whether DTR was the sole source supplier; that at the August 2002 president employees meeting King said that sole source meant that for a number of customers DTR was the only provider for a number of parts; that she knew that DTR is the sole source provider to many of its customers; that most of DTR's customers are "just in time," which means that the customer needs parts when they are scheduled; that King said that "if we got a, had a Union in the plant that they would not do business with us" (Tr. 22); and that in her affidavit to the Board she indicated that King said "[I]f we had a Union in there customers would not want to deal with us because of the Union" (Tr. 24).

James Lehman, who has been an employee of the Respondent for over 14 years, attended a 2:35 p.m. P/A meeting in August 2002. He testified that there were about 30 employees at the meeting; that King told the employees that there was a third party trying to organize, the employees had the right to choose whether they wanted third party representation, and there were some facts he thought the employees needed to know; and that King told the employees that if they unionized, they "would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs and therefore Honda and Toyota could no longer rely on us as source suppliers" (Tr. 33). On cross-examination, Lehman testified that he attended union meetings but that he did not recall a meeting in July or August 2002, where a man presented himself as a Honda local union president; that the Union never talked to him about the sole source issue; that Honda and Toyota are two of the biggest DTR customers, DTR is the sole source for the rubber parts that it supplies to Honda and Toyota, DTR is a just-in-time supplier for Honda and Toyota, and an

interruption in DTR's production would cause a problem for Honda and Toyota; that it is his understanding that DTR has been fined for interruptions in the just-in-time system; that King pretty much said that if Honda and Toyota or any other customer became concerned about the reliability of DTR's production flow, then those customers would look for other sources; and that King said that if the customers pulled some business away from DTR because of fear of reliability, that would mean that there would be less work and fewer jobs at DTR.

According to his testimony on August 29, Callahan ran the same part and no one said that the parts were bad. Callahan testified that about 3 p.m. Williams asked him to come to the office; that he saw King and Huffer in the office and he told Williams that he wanted to get someone to sit in with him; that King raised his voice and said that he should not have walked out to get someone to sit in on the meeting with him, he should have asked and management would have gotten someone; that King asked him why were the parts being made bad; that he told King that he did not know, he had been at DTR for 6 years and he had never had any trouble with bad parts; that he told King about Staley, and King said that they were not bad parts the day before; that he got upset, was a little loud and yelled because he was being accused of something he did not do, and he knew that he did not do it; that he told them that he came in while on his vacation just a couple of weeks ago and worked on a Sunday; that he swore on both of his kid's lives that he did not do this on purpose; that King said, "[Well] you sound like you got an attitude problem and you're the type we don't need here" (Tr. 118); and that King said that he was going to investigate further and he would get back to him the next day. On cross-examination, Callahan testified that when King asked him what happened he did not tell King that he was working too fast; and that he used the same machine on August 29 that he used on August 27 and 28, and he did not have any problems with bad parts.

Williams testified that he attended a meeting with Callahan, King, Huffer, and employee Sheen Mitchell, who Callahan brought to the meeting; that King talked to Callahan about the bad parts and said that they were going to investigate further; and that Callahan did not offer any explanation.

Gahman, who worked on the third shift, testified that in August 2002 he attended a P/A meeting at which King said as follows:

... he explained to us that we had a sole supplier deal going with some of our customers where we were the only company that made particular parts for them, and said that if the UAW was to get into DTR that we would lose that sole supplier status ... because the companies would no longer feel confident with us being their only supplier because the UAW would make us more unreliable.

And so they would allow other companies ... to compete with us for some of the parts that we were making. And he stated that if that happened it would result in layoffs and DTR had never laid anyone off he said he, in the time that they'd been a company, but if the UAW came there that that policy would ... have to change. [Tr. 185.]

On cross-examination, Gahman testified that he had very little knowledge about DTR's customers or their policies since that was not part of his job; that he understood what King said about sole source and the just-in-time inventory system where the customer did not have a large inventory that they could use if there was any interruption in the flow of parts from DTR; that King said that customers would be concerned if there was a union at DTR and the possibility of a strike; and that King said that there would be layoffs if customers pulled part or all of their business out of DTR.

When called by the Respondent, King testified that he has been involved with DTR since 1989, he was present for the union organizing effort in 1989 and the resulting litigation, he attended the original hearing in 1991–1992, he went to the Sixth Circuit Court of Appeals for the argument in that case, and he knew that one of the major issues in that case was the sole source issue; that DTR's customer base consists of tier I business, namely, Japanese transplants,<sup>10</sup> Ford Motor Company, and previously Chrysler, and some tier II business with some other suppliers in the automotive industry; that Japanese transplants account for 95 percent of DTR's business; that just in time is part of the Toyota production system whereby the part must be delivered at a specific time and not early or late; that virtually all of its customer base uses just-in-time; that he knew and reviewed DTR's sole source statements which were at issue over 10 years ago; that he was familiar with the Sixth Circuit Court of Appeals decision regarding DTR's use of sole source statements to employees; that he decided to insert the sole source issue into the campaigning in 2002 because DTR wanted to make sure that the employees understood what sole source supplier meant and its value to the business and to the employees' jobs; that additionally, he had received a report that at a union meeting a person who said that he was the president of a UAW Local in the Cleveland area that was a supplier to Honda told DTR employees that they should not worry about being unionized, the supplier to Honda was unionized; that in his mind it was the Union that first raised this issue: that he made substantially the same presentations at all of the August 29 P/A meetings; that at the meetings he defined the sole source supplier,<sup>11</sup> said that many of DTR's customers give it 100 percent of their business regarding specific parts and this gives DTR a great deal more business than it otherwise would have; and that he told the employees

I'm bringing up this issue because you need to understand the impact of this. We all know that there's union organizing going on here. You have to be blind not to understand that this is happening.

And we consider it . . . not only our right but our responsibility to make you aware of the consequences of possible union organization on our sole source supplier status.

. . . .

<sup>10</sup> Mazda, Subaru, Isuzu, and the joint venture between Toyota and GM.

<sup>11</sup> King testified that roughly 75 percent of DTR's sales revenue comes from sole source business.

We currently enjoy our sole source supplier status. If the . . . [employees] at DTR should decide to be represented by a union, and that's entirely your choice, you have that right under the law to do that, I am not attempting to infringe on that right at all, but if you decide to do that you have to understand that our customers will most likely re-valuate our position with them in relation to the sole source supplier status.

. . . .

It's just common sense. . . . Our customers are smart. They run successful businesses because they're smart.

And if they look at DTR and see that we are now represented by a union and there is the potential of a work stoppage, they cannot afford to have any one company control their business.

So they will re-evaluate as to whether or not we ought to continue to enjoy our status as a sole source supplier. I can't say what's going to happen. I—I have no way to predict what they are going to do. But they are going to review our status, that's for certain.

And it may come to the point where they would decide that they are in too vulnerable a position to allow us to be the sole source supplier of that product and they could give part or all of the business to somebody else.

We don't know how they would divvy it up, if they would divvy it up. But that risk is there.

King further testified that prior to making this presentation he checked with DTR's attorney, James Ryder, to make certain that the law in the Sixth Circuit had not changed and he could make this type of presentation without violating the law; that implementing the just-in-time system is complicated; that customers come to the DTR facility frequently to work on the just-in-time system; that DTR's view that the customers would review the sole source status is based on DTR's dealings with its customers closely on the just-in-time system; that he told the employees that they were DTR's most valuable resource, DTR wants to protect jobs, and DTR was not making threats that they were going to lay anybody off; and that if customers take business from DTR, it's hands may be tied. On cross-examination, King testified that he received the report about an individual who spoke at a union meeting from an employee the Monday after the meeting; and that the employee also told him how many employees were there. On redirect, King testified that the employee volunteered the information about the union meeting.

According to his testimony on August 30, Callahan started work at 7 a.m. and at 9 a.m. Williams called him into the office with King, and Huffer. Callahan testified that King said, "[W]e don't need your type running the machinery here anymore. I want you to turn your time card in. You can talk to your wife on the way out, tell her you . . . can pick her up and you'll hear from us in the mail shortly." (Tr. 118); and that he asked them if they had spoken with Staley and they said, "yes." (Id.) On cross-examination Callahan testified that at the time of the trial herein his wife still worked for DTR.

When called by counsel for the General Counsel, King testified that he recommended Callahan's termination to Steve Un-

derbrink, who is the director of manufacturing, Yokes, who is vice president of manufacturing, Fajiwara, who is chairman and CEO, and Okata, who is president and COO. According to King's testimony, he believed that Callahan purposely and intentionally produced scrap parts and even if he did not, he was certainly guilty of gross negligence in the performance of his duties. King testified that Supervisors Huffer and Williams told him on August 27 that they were having a problem with production and Callahan's performance; that they told him that Callahan was running an extraordinary number of bad parts; that on August 28 he attended a meeting with Underbrink, Huffer, and Williams about this situation and they reviewed it; that at this meeting Williams said that Callahan produced good parts on the afternoon of August 27, and then on the morning on August 28 Callahan began producing bad parts which were even worse than the day before; that later on August 28 he met with Callahan, Underbrink, and Williams; that Callahan denied that he made bad parts, he claimed that Staley, who is the setup person in Callahan's department, understood why Callahan was running bad parts, and he asked King to talk with Staley; that in fairness to Callahan he spoke with Staley on August 29; and that he saw General Counsel's Exhibit 8 but he did not recall when he first saw it and he did not recall if it was one of the documents that he relied on to make the decision to terminate Callahan.<sup>12</sup>

<sup>12</sup> The exhibit is a 1-page document which is signed at the bottom by Williams. The first half is dated August 27, and reads as follows:

Final Inspection (Janet Schroeder) tells me that she was receiving 01291D with Bad angles.

Told John Callahan of the situation and that he needs to watch his angles. Said he didn't know what could be causing the problem, but it might be the inspector.

Later on she said that she was still receiving bad angles. I went to John showed him how to sit the parts on the bar.

Jerry Blossard said he inspected 142 pcs, found 5 pcs good.

Took John off to have a one on one conversation about what could be the problem. Told him this was unusual for him. He said he has been running this for three years and doesn't know what the problem could be. I asked was there anything bothering him and if so is there anything I could do to help. He said no, nothing at work. I let him know how many bad ones were run.

Continued to build for the rest of the day with no problems.

The remainder of the document is dated August 28 and reads as follows:

Shortly after 8:30 am was informed by Final Inspection that they were receiving bad angles right at the shift change divider. I immediately told John about it. Once again showed him how to lay the parts on the bar. I marked 2 pcs with white marker on how they should be. Told him to lay his parts like that and continue to build.

Later Rick and Janet both informed me that his parts were still coming out bad after they received the 2 parts with white marks (both good pieces). At this time I told John not to run anymore until Dan Staley (set-up) looked at it. He did this around 11:15 am. John said it was the assembly fixture.

During his lunch period Dan, Doug and myself looked at the process. Did some test samples on how to lay the parts and tried to recreate the bad angle. Came to the conclusion that there was nothing wrong with the fixture, but it was the way the parts were being laid on the bar after assembly. Moved the bar to a distinct

When called by the Respondent, King testified that on Tuesday, August 27, Huffer reported to him that Callahan was running an incredibly large number of bad parts, way beyond anything DTR had experienced before in that area, and Huffer did not know why; that on Wednesday, August 28, about lunchtime Huffer with Williams told him that Callahan had run a significant number of bad parts; that they told him that after Williams spoke to him on Tuesday Callahan ran good parts but he ran bad parts Wednesday morning and they were even worse; that he had a meeting at 3:30 on August 28 with Huffer, Williams, Callahan, and Mitchell; that he told Callahan that he thought he was doing it intentionally, and Callahan denied this; that Callahan told him to talk to Staley, who knew what was wrong; that he told Callahan that he had not talked to Staley but he would talk with Staley before he went any further; that during the meeting he told Callahan that instead of just bringing in another employee, Mitchell, he should have come into the meeting alone, asked if it was an investigatory interview, request a representative, and then management would have the option to agree or just cancel the meeting; that he told Callahan that he did not have the right to pull someone off her job without getting permission from management; that Staley had already gone home; that he believed that he talked with Staley on August 29 between P/A meetings; that Staley told him that there was nothing wrong with the equipment, the jigs and fixtures, they talked about how to use the bar and Callahan knew how to use it, but otherwise he did not see that anything was wrong; that on Friday morning he met with Williams, Huffer, Keith Caudill, Steve Underbrink, and Yokas; that they determined the problem had to be an operator issue and he concluded that it had to be intentional; that he recommended to senior management that Callahan be terminated; that he met with Callahan on Friday morning, August 30, with Huffer, Williams, and possibly Jean Ream present; that he told Callahan that they had concluded that he purposely made bad parts, he should leave the premises, and he would be advised regarding his status; that he did not tell Callahan that he did not want people like him around DTR; and that senior management decided to terminate Callahan because they concluded that it was intentional. On cross-examination King testified that when Huffer told him on August 27 that Callahan had run 137 bad parts it was either late morning or after lunch; that DTR's employees are not trained on how to ask for a representative in a disciplinary meeting; that he did not recall that Staley said that he had spoken with Callahan; that Staley may have said that he spoke with Callahan; that "[o]kay yes" Staley told him that he talked to Callahan about how to place the parts on the bar (Tr. 482); and that he did not recall how long his meeting with Yokas, Williams, and Underbrink on August 30 lasted but it was held before he met with Callahan around 9 a.m.

By letter dated September 6, General Counsel's Exhibit 18, King, as here pertinent, advised Callahan as follows:

location and turned the pieces at an angle. We then took digital photos . . . of proper bar placement.

. . . . [Photo omitted]

He ran good parts for the rest of the day, ended up with 346 bad angles.

This letter is official notification of the termination of your employment from DTR Industries, Inc. effective today, September 6, 2002.

The period between August 30 and September 6, 2002 is considered a suspension without pay.

On September 11 Callahan requested peer review of his termination, General Counsel's Exhibit 19.<sup>13</sup> The peer review panel hearing was scheduled for September 17. Gahman testified that he knew Callahan because Callahan worked on the third shift when Gahman first started working at DTR; and that by letter dated September 11, General Counsel's Exhibit 21, he was advised that he was selected to participate in a peer review on September 17.

With respect to the peer review procedure, King testified, when called by counsel for the General Counsel, that if an employee requests peer review, which is available only with regards to a termination, it is King's responsibility to make certain that the proper process is followed to select the peer review panel, schedule the peer review meeting, he functions as a facilitator with the peer review panel members, he distributes the ballots when the panel members are prepared to vote, he counts the ballots, and he reports the decision to the employee and the human resources specialist who presented the case for the Company. King also testified that he does not have a vote in the peer review; that the terminated employee picks ping pong balls with numbers on them to select members of the peer review panel; that after the members are identified based on the number on the ping pong ball, the terminated employee has the right to eliminate one of the employee members chosen and one of the management members chosen so that there are three employees and two management members on the panel; that he attends all of the peer reviews at the Bluffton facility; that at the peer review the terminated employee decides if he or she wants to present their case first; that he then asks the panel members if they discussed the case with the terminated employee or the human resources specialist who is presenting the Company's case; that the peer review panel members are not told in advance of the peer review what case they are hearing or who the other panel members are; that after the presentations are made, panel members may ask to have another person who may have some relevant information brought to the hearing so that they can question the person; that he is present during the discussion of the panel; that when the discussion is complete he distributes ballots to the panel members and they vote secretly on whether to confirm or overturn the decision; and that he collects the folded ballots, throws them against a wall, picks them up, reads them, and then announces the results.

Regarding Callahan's peer review, King testified, when called by counsel for the General Counsel, that he was the facilitator; that HR specialist Ream presented DTR's case; that employees John Thomas, Gahman, and Gary Averecsh were chosen from the employee pool, and Woody Roberts and Curt Stover were chosen from the management pool to be on Calla-

han's peer review panel;<sup>14</sup> that Ream explained the process to the peer review panel members, she provided them with the number of bad parts Callahan ran on August 27 and 28, and showed them the bar used to establish the proper angle for the part and the jig used to determine if the part is within specifications; that he did not make a statement to the panel at Callahan's peer review but he did ask them if they discussed the matter prior to convening; that he did not recall making any statement to the panel with respect to the facts leading up to Callahan's discharge; that he could not recall whether any witnesses were called before the peer review panel; that the peer review panel overturned Callahan's discharge; that as demonstrated by the ballots, General Counsel's Exhibit 10, the vote was three to two to overturn the decision to terminate Callahan;<sup>15</sup> and that he, along with Yokas, Fajiwara, Okata, and Underbrink decided to suspend Callahan even before Callahan's peer review panel met. On cross-examination King testified that he met with upper management twice in September before the peer review panel meeting regarding Callahan; that at the second September meeting they discussed the possibility that the peer review panel would overturn the termination and what his recommendation was to do if that happened; that he could not recall what questions the peer review panel asked him; that he is not aware that the employee who is faster than Callahan making the involved part makes any bad parts; that during the peer review panel discussion Averecsh, who is a maintenance person, said that everyone runs scrap; that he did not have any evidence of the bad parts that Callahan ran; that he did see Callahan's bad parts on either Thursday evening, August 29, or Friday morning, August 30; that it is DTR's practice not to leave those parts on the plant floor so as to eliminate any risk of a part like that going out to a customer; and that the hose is cut on the part.

Callahan testified, with respect to his peer review hearing, that he presented his case after the Company presented its case; that he told the peer review panel he did not do it, he told them what happened from his point of view, and he told them that they should call Staley in as a witness; that later that day he was told by King "that the peer review reversed and I could have my job back but that I was going to be suspended from September 18 until January 3, 2003 without pay" (Tr. 121); and that he went to the UAW hall and he was told that they were going to file charges on his behalf. On cross-examination Callahan testified that one of the theories he provided to the peer review panel was the theory that he was working too fast. On redirect, Callahan testified that he was not present during the

<sup>14</sup> Employee Rick Stewart and Manager Joe Brinkman were stricken from the list of those chosen by Callahan. (GC Exh. 7.)

<sup>15</sup> The ballots read as follows:

Case # _____	Date _____
Peer Review Ballot	
Place an X to indicate your blind ballot on this decision.	
Confirm the decision _____	
Overturn the decision _____	

It appears the same person wrote the case number and the date on each of the ballots. Therefore, the panel members only placed an "X" on the ballot.

<sup>13</sup> The peer review form indicates, as here pertinent, "[a]s an . . . [employee] of DTR Industries, you have the right to have a termination decision reviewed by a panel of . . . employees and Managers."

Company's presentation; and that during his presentation to the peer review he was asked questions.

Gahman testified that Ream presented the Company's case to the peer review panel, stating that a lot of bad parts were produced on a particular day and Callahan was operating the machine that the parts were produced on; that after Ream finished King

took over . . . [stating] that he firmly believed that . . . [Callahan] made the parts bad on purpose because . . . [Callahan] made good parts before . . . he always made good parts and now he was making bad parts and they *couldn't determine a reason for the . . . parts to be bad. So it was his conclusion that therefore . . . Callahan was responsible for the parts being bad.* [Tr. 188.] [Emphasis added.]

Gahman testified that Callahan stated that

he did not produce bad parts on purpose. It was his sincere feeling that he was actually doing the Company a favor.

He said that he was on vacation and that they called him and told him they really needed him because somebody else was . . . sick and they needed . . . somebody to run a particular machine.

He said the machine was not the machine that he normally operated, but he felt that he had the ability to do it, so . . . as a favor . . . he would come in on his day off and run the machine for them, and that he did his very best . . . to do his job as he always had before.

And he said when it was brought to his attention that parts were coming out bad the [sic] he did fully cooperate with his supervisor and the Production Specialist to try to determine the reason for the bad parts. [Tr. 188.]

According to Gahman's testimony Callahan said that the production specialist was Staley; and that the peer review panel wanted to speak with Staley but for one reason or another he did not appear at the meeting. Gahman testified that the peer review panel requested to speak with Staley and the request was denied; that he believed that they asked King if they could speak with Staley; that King then went outside the room and after a short period he came back in and he could not recall if King said that Staley was not available, or he was not there, or what reason King gave the panel; that a majority of the peer review panel voted that Callahan was unjustly fired and he should be reinstated with his backpay; that he got upset when he found out that Callahan was not going to be reinstated but rather he was going to be suspended and punished for the incident that Gahman thought a majority of the peer review panel had just decided that there was not enough evidence to support; that it was 2 p.m. and he works the third shift so to him it is like 2 a.m., he made the effort to come in, and for the Company to suspend Callahan after the decision of the peer review panel made him feel like it was all just a total waste of his time; and that what the Company did made him change his mind so that he supported the Union again.

On cross-examination, Gahman testified that he knew Callahan before the peer review panel meeting; that he and Callahan had shown up at a lot of union meetings; that he talked with Callahan about the Union a lot; that he was friends with Calla-

han; that he did not recall talking with Callahan about his termination before the peer review panel meeting; that he did not have any contact with Callahan during which he discussed his termination before the peer review panel meeting; that he did not recall discussing Callahan's situation with the members of the peer review panel before the meeting; that the first time he knew that the peer review panel meeting was about Callahan's termination was when he showed up for the meeting that day; that during the meeting King told the peer review panel members that he was convinced that Callahan had done this on purpose because Callahan was very experienced in running these parts and had never had a problem prior to those 2 days; that he believed that King also said it was intentional on Callahan's part because they could not find any problem with the machine and that was a factor in his consideration; that King might have mentioned that the employees who worked on the same machine before and after Callahan did not have a problem making good parts; that King might have said ("that sounds familiar"<sup>16</sup>) something about the volume of bad parts, namely that it was one thing to run 5 or 10 bad parts, but when there are 500 over the course of 2 days, that is a whole other ballgame; that he did not know if King said that one reason he was convinced that Callahan had done this purposely was because sometimes he could produce good parts and sometimes he could produce bad parts, but there was nothing that changed on the machinery or the setup to explain why that was the case; that if King made this statement he would not have believed him since he works in maintenance, is familiar with machines, and knows that machines run good parts and sometimes they run bad parts and this is typical; that King said that Callahan and no one else had ever been able to come up with an explanation of why bad parts occurred; that this is why the peer review panel wanted to talk with Staley; that in his presentation to the peer review panel Callahan said that he did not know why the bad parts were being produced, he was doing his best to do it exactly as his supervisors instructed him; and that he did not recall Callahan telling the peer review panel that the problem he was having with bad angles on the parts was because he was working too fast.

Williams testified that he was called as a witness before the peer review panel; that he was asked if the bad parts could be intentionally made; that he answered that the bad parts would have to be intentionally made; that he had never heard Callahan's theory before that he was so fast that he was getting the parts off the bar into the crimper before they were properly set and that was the problem; that Callahan is not the fastest operator of the involved machine; and that there is no way that moving the parts off the bar too quickly would produce really bad parts; and that he prepared the notes received as General Counsel's Exhibit 8 not long before the peer review at the behest of Ream for her use at the peer review. On cross-examination, Williams testified that he did not indicate in his prepared notes received as General Counsel's Exhibit 8 that the only way that an operator could come up with extremely bad parts was intentionally; that under the August 28 portion of his notes he indicates that he came to the conclusion that there was nothing

<sup>16</sup> Tr. 223.

wrong with the fixture but it was the way the parts were laid out on the bar after assembly; that he believed that he came to the conclusion that Callahan made the bad parts intentionally before the peer review but he did not write this in his summary prepared for Ream; that he was not sure if it was before or after the peer review panel meeting that he started making extremely bad parts to try to recreate the bad parts that Callahan made; and that the bad part he brought to the trial herein was dated October 6, 2003, but this was not the first bad part he made.

When called by the Respondent, King testified that he did not make any presentation before the peer review panel; that during the discussion after the presentations of Ream and Callahan, he did recall responding to some questions; that he did not recall Callahan arguing that he was working too fast and that was the problem; that the first time he heard this theory was at the trial herein; that he did not believe that anyone asked for Staley to be brought into the peer review meeting as a witness, he did not recall that request being made; that the panel has the right to request a witness who they think will be able to provide information; that DTR would respect that request; that the panel asked to talk to Williams and Williams was brought into the meeting; that he was present for the panel members deliberations but he did not express an opinion; that with the support of DTR management, he decided to suspend Callahan because regardless of what the peer review panel decided, in his mind Callahan had done it intentionally, and even if Callahan had not done it intentionally, he was still guilty of gross negligence; that while Callahan's suspension raises the question why have a peer review process if DTR can overturn it by giving Callahan a lengthy suspension, he did not overturn the peer review decision in that they can only review terminations which does not mean that no other corrective action can take place if the termination is overturned; and that the involved parts cost the company \$12.60 and, therefore, 500 bad parts is about \$6000 worth of scrap.

By letter dated September 17, General Counsel's Exhibit 20, King advised Callahan as follows:

This is official notification that you are suspended without pay from employment at DTR Industries for the period September 18, 2002 through January 3, 2003. This suspension is due to your conduct during August 27 and 28, 2002 when you *destroyed critical safety parts supplied to our customers*. You are expected to return to work on Monday, January 6, 2003. Upon your return, you will be assigned to a department and shift based on our needs at that time. We will contact you before January 6, 2003 to give you instructions as to where to report and to whom you must report. [Emphasis added.]

Callahan testified that he could not recall when he received his last discipline before this.

With respect to DTR's drug and alcohol policy, King testified, when called by counsel for the General Counsel, that random drug testing started at DTR in 1998; that when the policy was initially implemented in November 1998 all of the employees were tested for drugs and alcohol; that individuals were randomly selected for drug testing in August and September 2002, but he could not recall when the previous time was when employees were randomly tested for drugs; that Crisp, the man-

ager of safety training and wellness, determines when a random drug testing is going to take place; that Crisp reports directly to him and he is informed when random drug testing is going to take place; that the procedure for selecting individuals for random drug testing involves Crisp or Tonya Weigt, Respondent's on site occupational nurse, contacting Lima Memorial Hospital Occupational Health Center and requesting that a random list be compiled for a specified number of people; that after Crisp or Weigt receives the list, the employee is notified that they have been selected for a random drug test; that the HR specialist who gets the employee informs the employee that he or she is going to have a drug or alcohol test; that the HR specialist sometime escorts the employee to the Wellness Center for the random drug test; that he has not taken a random drug test and he has not observed a specimen being collected; and that he could only recall receiving a note from Weigt one time regarding a drug test and it involved Gahman. King testified that he believed that he received the note in September 2002. Her note, General Counsel's Exhibit 4, which is titled Center for Occupational Health Progress Report and is dated "9-18-02," reads as follows:

Employee (Daniel Gahman) was chosen for a random drug screen. When he brought out his first specimen it was very brown in color and was only about 20cc with no temp. He was then asked to give another specimen so we could obtain a minimum of 30cc of urine. He was instructed to drink up 40 oz (4 glasses) of water and to stay up front near the HR office. After drinking, he stated he was able to go to the restroom and when he brought out his specimen, which was a bright neon yellow, approximately 40 to 60 cc, there was no temperature on the side of the cup and the cup, to touch, was not warm. He was then instructed that he needed to give another specimen since this specimen had no temperature and this time it would have to be witnessed by either Tom King, HR or Dr. M. Young MD. He said that his wife was waiting on him and that he was already late to meet her and he didn't know if he could have another one done. He wanted to know what would happen if he couldn't make it. He was instructed that if he refused to give another witnessed specimen then it was policy to be terminated. He questioned the fact that if he refused to donate a specimen he would be fired but if he came back positive he would get another chance and counseling. He was then instructed that if he gave a specimen and it was positive then it was my understanding that DTR would offer counseling but a refusal was termination. He then stated that he would prefer to go to Lima Memorial and have Dr. M. Young witness his specimen. LMH was contacted that he would be arriving.

King further testified that it was unusual for him to receive such a note; that Weigt is in charge of the specimens that are provided by employees for testing; and that it is his understanding that she collects the specimen, has the necessary forms filled out, verifies the identification numbers, and complies with the required chain of custody procedures to send it for testing to Quest.

Weigt testified that she prepared her above-described notes on September 18 because Gahman's first specimen was too

small and it was extremely dark, and his second specimen was glow in the dark yellow and lacked temperature.

Gahman started working for DTR in July 1999. At the time of his termination he was working third shift maintenance. He was supervised by Tony Averech, Mead, and Helms. Gahman was responsible for keeping production running and completing work orders. On Wednesday, September 18, during shift change Byglin told him that he needed to go with him. Byglin did not tell him why. They went directly to the nurses station at DTR. The nurse informed him that he had been selected for a random drug screening. Gahman testified that they both entered the men's room and he went into a stall; that he gave the nurse a specimen, she said that it was not the correct temperature, and she dumped the specimen down the urinal; that the nurse told him that he would have to give her another specimen and he told her that he was not able to at that time; that she told him that he should drink three glasses of water and she has someone bring him three glasses of water; that he sat outside the men's room until he could produce another specimen; that the nurse said that the second specimen was not the correct temperature and she dumped the second specimen down the urinal; that the nurse told him that he had three options, namely (1) he could refuse to give a third sample and he would be terminated, (2) he could have King observe the actual collection of the sample, or (3) he could go to the Memorial Hospital and let a physician observe the collection of the sample; that he chose option 3; and that he went directly from work to the hospital, where they took his picture, a Dr. Young observed him produce a specimen, Dr. Young gave the specimen to a nurse who said that the specimen was not the correct temperature, and Dr. Young told the nurse that it would be an acceptable sample because he observed the production of the sample and the temperature would not matter because of that.

On cross-examination, Gahman testified that he knew that he was going to fail the drug test; that he did not remember the DTR nurse also telling him that the first specimen was too small of a sample to measure; that the nurse did not take the second sample and send it out to be tested but rather she also dumped the second specimen down the urinal; that he signed page 2 of General Counsel's Exhibit 5 which indicates, as here pertinent, "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen bottle is correct"; that both of the samples that he provided at DTR were dumped down the urinal; that he asked the nurse what would happen if he did not sign the form, she said that he would be terminated immediately, and he signed the form; that he gave a statement to the National Labor Relations Board (the Board) on October 21, but he did not indicate in it that the nurse threw out the second sample; that when he gave the statement to the Board, he was aware that he had been terminated for giving a fraudulent sample; that he thought he did tell the Board that the second sample had been dumped; that he did mention to the Board that the first sample was dumped but there is no mention of the second one in his affidavit; that he provided two additional statements to the Board and neither one mentions that the

second sample was dumped; and that he did not give any fraudulent samples.

Tonya Weigt, who is a licensed practical nurse, has been the plant nurse at DTR since the end of July or the beginning of August 2002. She testified that she is an employee of DTR; that in her prior employment she has given close to, if not over, 1000 drug screens; that at DTR after an employee is selected for a drug test she takes the name and shows it to Crisp, who is the safety director and her supervisor;<sup>17</sup> that she then gets someone from human resources to get the employee and bring him to the nurses office; that she works from 6 a.m. to 4 to 6 p.m.; that she has the employee fill out a consent form, Respondent's Exhibit 6; that Respondent's Exhibit 7 is a chain of custody form; that she was trained at the Lima Memorial Hospital with respect to chain of custody; that after the employee fills out the consent form she basically fills out step 1 of the chain of custody form to the extent that information is not already on the form, and she indicates how many drugs they are going to test for in the screening, namely 10; that she then asks the employee to provide a specimen in a container which up to that point has been sealed and which she opens in front of the employee, Respondent's Exhibit 8; that she tells the employee how much specimen, 30 cc's, the laboratory needs in order to do the test; that the specimen container has a temperature indicator strip which measures between 90 and 100 degrees Fahrenheit; that specimens of less than 30 cc's are flushed down the toilet; that when the employee gives the specimen to her she checks the temperature and makes sure that there is 30 cc's in the container; that the specimen is placed in a larger container and labeled with a specimen ID number over the top of the lid so that it seals the lid completely; that the specimen ID number that she uses to seal the lid is an adhesive strip which she takes from the bottom of the custody and control form and puts over the lid to seal it; that the adhesive strip has the specimen ID number along with a bar code and also a place where the donor initials and dates the adhesive strip used to seal the container; that she reviews the step 1 portion of the chain of custody form with the employee, along with the specimen ID number; that she puts the sealed specimen in a bag and she puts the tracking label over the bag for a second seal; that she continues reading the rest of the custody and control form with the employee, completing step 2 by marking the specimen temperature yes or no, single specimen collection, and completing step 4 by signing the form, printing her name, giving the time and the date, and checking off Quest Diagnostics Courier; that she then would have the employee fill out step 5 of the form, as here pertinent, sign and date a certification that the employee

provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen bottle is correct[.]

that sticker B is not used because DTR only sends one specimen; that DTR's medical review officer is Dr. Maris Young

<sup>17</sup> Crisp corroborated that Weigt began working for DTR in July or August 2002.

who receives the results from Quest Laboratories of all drug screens; that Dr. Young, who is located with Lima Memorial Hospital, is not a DTR employee; that the specimen which is in a bag with the third seal placed on it is placed in a lock box for pickup by Quest Diagnostics Courier; that no one has access to the box until the Quest Diagnostics Courier employee picks up the specimen; that when Dr. Young receives the results he informs DTR; that DTR does not select employees for random drug testing but rather it contacts Lima Memorial Hospital when DTR wants to have a random drug screen and DTR tells Lima Memorial Hospital how many employees it needs to randomly test and the Hospital has a computer system that randomly generates names; that DTR does not have any control over who is selected for random testing; that when DTR receives a list of names from Lima Memorial Hospital that is the first time DTR knows who is going to be tested;<sup>18</sup> that a lot of people were tested in September 2002, because DTR was going from one medical provider to another, Lima Memorial Hospital, and it had to test 25 percent of its work force in a particular timeperiod, which ended in September 2002 for the Bureau of Worker's Compensation (BWC);<sup>19</sup> and that normally the people on the list are tested the day after DTR receives the list, if not the same day. On cross-examination, Weigt testified that she believed that there were some random drug tests at DTR in August 2002; and that she is the first one at DTR to see the computerized lists of DTR personnel like those in Respondent's Exhibit 9. On redirect, Weigt testified that Respondent's Exhibit 12 are the lists for random drug tests in August 2002.<sup>20</sup>

With respect to Gahman, Weigt testified that she received the list from Lima Memorial Hospital dated September 17 on September 17 with Gahman's name on the list; that Gahman's test was unusual in that his first specimen was only about 20 cc's and it was brown; that she had never seen a specimen quite that dark; that she flushed the specimen down the toilet and told Gahman to drink at least 40 ounces of water and then try again; that she routinely discards undersized specimens; that Gahman's second specimen was a very bright neonish, kind of yellow; that the quantity was sufficient; that she had never seen a specimen that bright; that there was no temperature on the urine specimen cup; that she sealed it just like she would a regular specimen because it was an adequate amount; that she went through the steps on the chain of custody form, as described above, and Gahman signed it; that she then told Gahman that he had to have a witness specimen after that because of the temperature; that Gahman signed General Counsel's Exhibit 5 acknowledging that the specimen was sealed; that she also

signed the form and she put Gahman's specimen in the lock box; that she is the only one from DTR with a key to the lock box; that she told Gahman that he needed to produce a witnessed specimen and he could either have someone from management at DTR or Dr. Young at Lima Memorial Hospital be the witness; that Gahman said that he did not have the time because his wife was waiting; that she told Gahman that if he refused to give a specimen, he would be terminated; that Gahman asked him what would happen if he tested positive and she told him that a first offender would get counseling;<sup>21</sup> and that before this test she had not met and she did not know Gahman. On cross-examination, Weigt testifies that she did not specifically remember indicating that King would be the witness at DTR; that she told Gahman that King could observe him producing a specimen; that to her knowledge King has never observed an employee producing a specimen; that she might have mentioned King as a male figure in HR but she did not specifically remember saying King; and that the statement on the Quest Diagnostics report on Gahman's second specimen (R. Exh. 10 and p. 3 of GC Exh. 5) that "THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF THE RANGE FOR A NORMAL URINE" is based on her checkmark in step 2 of the chain of custody form, page 2 of General Counsel's Exhibit 5.

Crisp testified that DTR does not have the ability to determine whose names are pulled on the random drug testing lists; that she telephones the Occupational Health Clinic at Lima Memorial Hospital and asks them to do a random pull; that the list is sent to a confidential fax machine in human resources where Weigt gets it; that the random selection process is described in Respondent's Exhibit 14; that Respondent's Exhibits 15, 16, 17, 18, and 19 are BWC progress reports that she submitted to demonstrate DTR's eligibility for the premium discount; that there were so many random drug tests in September 2002 because DTR had changed to Lima Memorial Occupational Health, Weigt was hired, and the deadline for getting 200 random drug tests completed to get the premium discount was September 30; that Weigt's predecessor did not do random drug testing; that on September 18, Weigt told her that the first specimen that Gahman produced was dark and the second specimen was almost like a fluorescent type color; and that Weigt told her that the temperatures were off on both specimens and she needed to send Gahman for an observed specimen collection.

On Friday, September 20, Dr. Young telephoned Gahman and told him that the specimen had come up positive for marijuana. Dr. Young asked Gahman if he took the prescription medicine Marinol and he told him he did not. Dr. Young told him to telephone Crisp to find out what he should do from there. Crisp told him to report to work and attend counseling at Century Health. On cross-examination, Gahman testified that Crisp told him that he had to attend counseling before coming back to work and he did not work on the shift beginning on Sunday, September 22.

<sup>18</sup> See R. Exh. 9 which are lists dated September 3 (25 names), 9 (15 names), 16 (15 names), 17 (15 names), and 23 (30 names with one crossed out). These are all of the lists for September 2002. Crisp's name was on the September 3 list and she took the drug test. She pointed out that the random drug testing program encompasses both management and hourly employees.

<sup>19</sup> Crisp testified that random drug testing of a specified percentage of the total work force over the course of a year entitles DTR to receive the BWC premium discount for a 5-year period which ended in September 2003.

<sup>20</sup> The dates included are August 5, 12, and 26. There are four names on each of the lists.

<sup>21</sup> The first offender remains on the random drug screen list and also the person can receive a followup test at any time during the following year.

Crisp testified that on Friday, September 20, she found out about Gahman's positive test result for marijuana, Respondent's Exhibit 11, when Dr. Young's office telephoned her and confirmed that Dr. Young spoke to Gahman about the positive results on the drug test; that a positive result in the individual receiving counseling before coming back to work, and the individual is subject to a minimum of four additional tests during a 1-year period; and that she sent Gahman to Century Health for counseling on Monday, September 23, because this was the soonest appointment she could get him. On cross-examination, Crisp testified that typically the drug counseling lasts from three to five sessions but a person could have just one session; and that Gahman went to one session and then returned to work so he had not completed counseling.

Gahman attended the counseling on Monday, September 23, and was told to telephone Crisp, advise her that he attended, and ask her what the procedures would be from there. Crisp told him to report to work that night at his regular starting time. He did.

On cross-examination, Weigt testified that on September 23 she received the last page of Respondent's Exhibit 9, which is the Lima Memorial Hospital list, dated September 23, of DTR personnel to be randomly tested; that Gahman's name is on the list; and that she did not conduct a random drug test on Gahman on September 24.<sup>22</sup> On recross, Weigt testified that she did not recall giving Gahman a drug test on September 24. Subsequently Weigt testified that Gahman was not tested on September 24 because "I believe that's around the time that we got confirmation from the first test that was sent back." (Tr. 287.) Then on redirect Weigt testified that this would be the fraudulent test which report indicated not human urine, and at that point the decision was made that there was no point in testing any further.

Crisp testified that she found out about the test result on Gahman's second specimen, Respondent's Exhibit 10, on Tuesday, September 24, or Wednesday, September 25; that she believed that she received it on Tuesday, September 24, or she received notice of it; that the report, Respondent's Exhibit 10, indicates that the specimen that was given to Weigt by Gahman was not human urine; that when she received that report on Tuesday afternoon, she contacted King and told him that DTR had a fraudulent sample given to it; that Gahman's shift ended at 7 a.m. on September 24, so he would have already left the facility when she received the report; that King comes to work at 6 a.m. on Wednesdays for group leader meetings; that on Wednesday, September 25, King told her that he met with Gahman, sent him home, and he was terminated for submitting a fraudulent sample; that there was one other fraudulent specimen situation, Respondent's Exhibit 20, and the involved employee, Randy Evans, was terminated by letter dated October 8, Respondent's Exhibit 21; that first page of the report on Evans' specimen indicates that there is something in the urine; that if there is an additive or something interferes with the testing of the sample, then a second test is done to find out what adulterant is present in the urine; that the second report shows the

presence of chromium in the specimen; that King got Dr. Young on the speaker phone to explain what this meant, and she was present for the conversation; that Dr. Young said that this was an extreme amount of chromium in the urine, and it would not be naturally occurring in human urine; that Dr. Young told them that the purpose of adding chromium to a specimen would be to throw off the test so that you could not get an accurate test of whether prohibited substances were present in the specimen; and that the chromium is a masking agent. On cross-examination, Crisp testified that she believed that on Tuesday afternoon, September 24, she received the results of the test of Gahman's second specimen; that she believed that the results came in the mail because there would not have been a reason for the Occupational Clinic to actually call her; and that the Occupational Clinic does telephone her for a confirmed positive.

At the time of the trial herein, McVetta, who has worked for the Respondent for 15 years, had never been selected for a random drug test although she had been tested apparently before the Respondent started doing the testing on a random basis.

Callahan testified that he was tested for drugs in 2000 at DTR but it was not a random test in that the whole plant had to take a drug test at that time; and that he was not given a random drug test from 2000 to 2002, and he did not know anybody who got one during those years.

On September 24, according to the testimony of R. Shawn Carnahan, who has worked for the Respondent for 3 years, Berry, who is the second shift plant supervisor, and Helms, who is the third-shift plant supervisor, in his presence, told Gahman to remove the union hat he was wearing at Respondent's facility. Carnahan testified that Berry told Gahman that it was against company policy to wear a UAW hat in DTR's facility; that when Gahman protested he was told to speak to King in the morning; that Berry said the hat was offensive to him when Gahman asked him if he had to take the hat off because it had UAW on it; and that toward the end of that shift Mead, who is the first shift group maintenance leader which is a supervisory position, told Gahman to take off the UAW pin he was wearing it was offensive and Gahman needed to go to human resources and talk to King about it. On cross-examination, Carnahan testified that he did not know if Gahman was disciplined for wearing a UAW hat and pin; that he has worn a hat or a pin and he was not disciplined for it; and that he did not know anyone in the plant who wore a hat or a pin and was disciplined for it.

Gahman attended a union meeting at 9 p.m. on September 24, and then reported for work at his normal starting time at 11 p.m. He was in DTR's facility for about 5 to 10 minutes when Second Shift Supervisor Berry noticed that he was wearing a hat with the UAW logo on it and told him to take the hat off. He asked Berry why and Berry said that he was offended by it. He told Berry that another employee was wearing a Bengals hat and he was offended by the other employee's hat. He asked Berry if he had to take his hat off, did the other employee have to take his hat off also. Berry told Gahman that if he had a problem with the other employee's hat he had to go report it to the HR department. Gahman took his hat off and went to HR where he spoke with Dave Byglin, who is the third shift HR representative and a woman who is the second-shift HR repre-

<sup>22</sup> She also did not conduct a random drug test on Gahman on September 23.

sentative. He told them that Berry told him to take off the hat and he asked them why he could not wear the hat. The second shift representative told him that he could not wear anything with a UAW logo on it in the plant. He asked her why and she told him because we are not a union shop. He told her that this was not a Bengals shop but the other employee was wearing a Bengals hat. He then asked her if the other employee could wear the Bengals hat, why couldn't he wear the hat with the UAW logo on it.<sup>23</sup> Byglin said that they were not qualified to answer that question and if he wanted an answer he would have to talk with King.

At the end of this shift, which would have been Wednesday morning, September 25, Gahman attended a transition meeting. Rick Mead, who is the maintenance group leader, told him to take off the UAW pin he was wearing. Gahman asked him why and Mead told him that he could not wear anything with a UAW logo on it inside DTR's facility. When he asked Mead why, Mead told him to go see King right now and ask him. At that point Gahman and another employee became engaged in a verbal confrontation over Gahman wearing a UAW pin. Byglin walked into the room and told Gahman that King was ready to talk to him now. Byglin took him to King's office. Gahman asked King why he could not wear a UAW pin and King said that it was irrelevant, he wanted Gahman's timecard and his keys to the building, he wanted Gahman to exit the building and not talk to anyone on the way out, and Gahman would receive information in the mail to notify him of the status of his employment with DTR.

Weigt testified that on Wednesday, September 25, she received the results from Quest Diagnostics of the test of the second specimen Gahman gave her on September 18 at DTR, Respondent's Exhibit 10 and page 3 of General Counsel's Exhibit 5,<sup>24</sup> that she contacted her Supervisor Crisp, who administers the drug-free workplace program; that Respondent's Exhibit 11 is Gahman's positive report for marijuana,<sup>25</sup> that as demonstrated by page 2 of Respondent's Exhibit 11, Gahman declined a retest of the specimen after it is split; and that she received the positive test results before she received the fraudulent test results. On recross Weigt testified that she received the report on the second specimen on September 24 or 25, but before that Crisp received a verbal over the phone; and that she did not receive a telephone call regarding the report on Gahman's second specimen.

By letter dated September 26, General Counsel's Exhibit 23, King, as here pertinent, advised Gahman as follows:

This is official notice of the termination of your employment from DTR Industries, Inc. effective immediately.

The reason for your termination is your submission of at least one false sample when you were selected for a

<sup>23</sup> The "UNIFORM RULES," GC Exh. 22, which Gahman acknowledged receiving in 1999, specify "4. Hats are allowed, . . . [employee's] choice. If the hat is deemed inappropriate the . . . [employee] will be asked to remove the hat."

<sup>24</sup> The report date and time are September 19 at 6:38 p.m.

<sup>25</sup> The report date and time are September 19 at 9:05 p.m.

random drug test pursuant to DTR's Drug and Alcohol Free Policy.

When called by counsel for the General Counsel, King testified that he recommended that Gahman be terminated and his recommendation was supported by other members of the consensus decisionmaking process, namely Walt Hawkins, who is the manager of plant maintenance in engineering, Yokas, Fajiwara, and Okata. According to his testimony, in making his recommendation King relied on a report from the laboratory that does the testing that Gahman had submitted a specimen that was not human urine but rather a substitute. See page three of General Counsel's Exhibit 5.<sup>26</sup> King testified that he believed that he received the report on Tuesday, September 24, from Crisp but he could not recall the time of the day he received it; that he did not rely on General Counsel's Exhibit 6 which is the report from the Quest lab indicating that Gahman tested positive for marijuana metabolites; and that he was informed that Gahman tested positive.

When called by the Respondent King testified that one other employee at DTR submitted a fraudulent urine sample and he was terminated; that, as here pertinent, page 27 of DTR's employee handbook indicates that "[t]he following conduct will not be permitted and will result in discharge: 1. Falsification or [sic] employment applications, medical documentation or any other company records/documents. . . . 6. Dishonesty, stealing or removal of another . . . [employee's] property or DTR property without permission"; that other employees have been terminated for falsifying documents of one kind or another; that he had nothing to do with the selection of Gahman to take a random drug test, and there is no way he could have done that; that he met with Gahman on September 25; that he had been told that Gahman wanted to speak with him and he needed to

<sup>26</sup> As here pertinent, the report reads as follows:

	DRAWN DATE & TIME	RECEIVED TIME	REPORT DATE & TIME
Gahman, Daniel	09182002 07:47AM	09192002	09192002 6:30PM

\*\*\*POSITIVE/ABNORMAL REPORT\*\*\*

THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE FOR A NORMAL URINE (32-38 C/90-100 F). SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL HUMAN URINE

CERTIFYING SCIENTIST: DARLENE MANOJLOVSKI  
SPECIMEN RECEIVED AND PROCESSED IN THE  
SCHAUMBURG DHHS CERTIFIED LABORATORY.

LAB: Quest Diagnostics—Chicago  
506 E State Pkwy  
Schaumburg, IL 60173  
>> END OF REPORT <<

Page 2 of GC Exh. 5 is the form filled out and signed by Weigt and Gahman, dated 9/18/02. Weigt indicated that the specimen was collected at 7:47 a.m. and she checked the "no" box for "Read specimen temperature within 4 minutes. Is the temperature between 90 . . . and 100 . . . [degrees] F?" and she indicated on the form that it was a single specimen collection. Otherwise she did not comment on the form about the specimen.

talk with Gahman; that Byglin was there when he met with Gahman; that Gahman asked him about the UAW hat and he told Gahman that the hat was irrelevant, it was not part of the meeting; that he told Gahman that he wanted to talk to him about the false specimen that he submitted for a drug test, pointing out that the report indicated that the specimen did not have a temperature and was not consistent with human urine; that Gahman said that his other test did not have temperature either; that he told Gahman that that did not matter and the important point was that he submitted a sample that was not consistent with human urine; and that he then told Gahman to leave the building and he would be contacted regarding his status.

On cross-examination, King testified that he did not call Quest Diagnostics to determine what the analysis of Gahman's specimen test meant; that he asked Weigt on September 24 what the Quest Diagnostic report meant; that he thought that Crisp was present at this meeting; and that about 6 a.m. on September 25, Byglin and Helms told him that Gahman wanted to see him, but he could not recall if they said something about a hat or a pin.

Callahan handed out union leaflets for the third time at the end of September or the beginning of October 2002. The leafletting started at 10 p.m. and lasted 1 hour.

On January 6, 2003, Callahan returned to work at DTR in mixing manufacturing. Callahan testified that he had received a letter from DTR's human resources department telling him he was supposed to report to King at 2 p.m. on January 6, 2003, and King told him that he was going to the second shift in the mixing department and he had no bid rights (to bid on other jobs); that King told him that he "was walking a very fine line" (Tr. 122) and he could start working on January 7, 2003 on the first shift for 4 to 6 weeks and then he would be going to the second shift; and that he had never worked in the mixing department before, it is very dirty and physical work where new people start "[I]t's very hard to keep people working there, [I]t's the worse [sic] job in the plant by far." (Tr. 123.) On cross-examination, Callahan testified that employee Gloria Davis bid into the mixing department to be able to go from the third shift to the first shift and that was the only way she could go on the first shift; that there are two parts to the mixing department and Davis did not work in the part that he worked in; and that his pay and benefits were not affected when he went into mixing.

When called by the Respondent, King testified that he assigned Callahan to the mixing department because he still believed that Callahan intentionally ran the bad parts; that Callahan was put where the damage he would create would be minimized because before rubber leaves mixing it is goes through quality testing; that mixing is not the dirtiest, heaviest, and least attractive job in the plant; that there are very high seniority people in the mixing department; that one man has been there since 1989 by his own choice and he has enough seniority to bid out to another department; that it is dirty work but it is not the type of operation that Callahan described; and that Callahan ended up on the second shift because that is where DTR needed manpower, and he was not going to displace any other employee by putting Callahan in his place. On cross-examination, King testified that Callahan was assigned to

work the various positions in the mixing area because employees in the mixing area rotate jobs weekly.

In February or the beginning of March 2003, Callahan was moved to second shift. He quit working for DTR in June 2003. Counsel for the General Counsel stipulated that there is no claim for reinstatement regarding Callahan.

Using King as a sponsoring witness, counsel for the General Counsel introduced a number of exhibits, General Counsel's Exhibits 12 through 17, which deal with the disciplining of other employees, namely Nicole Davis, Lewis Shine Sr., Stephanie Brown, Danny Smith, Martin Baldazo, and Dominic Worthy, respectively. All of these employees are currently employed by DTR. Davis has had on-going quality issues, passed bad parts, has received a number of warnings, and one of the notes in her file, as here pertinent, reads as follows: "Please get her off final or Ford line entirely. My #s are way down from correcting her bad parts. Thank you for any help you can give me. Also, could she come back here & re-do her own mess? To discard all those parts is really a big waste." (Emphasis in original.) The note is signed by Karen Davis. Shine on more than one occasion had multiple parts returned from the customer that were defective and on other occasions the defective parts were caught before they went to the customer. Brown received a verbal warning for running 173 bad parts. Smith ran 104 parts which were not the right length, he falsified documents, he ran 78 parts with wrong hose, and did not follow standard operating procedures on more than one occasion. Baldazo received a number of warning notices and verbal warnings and a formal letter of warning conduct which reads, as here pertinent, as follows:

On December 21, 2001, you were issued a Written Warning for Conduct. On February 20th and 22nd, 2002, you ran the wrong chemicals in two batches or [sic] rubber causing lost production and high scrap costs. This action necessitates this Formal Letter of Warning. Any further Conduct violation will necessitate the next step of disciplinary action up to termination.

And Worthy ran rubber in extruder disregarding proper procedure which caused substantial loss of product, ran product with print message illegible, and did not follow standards and make sure the product running was correct.

With respect to the disciplines described in the next preceding paragraph, King testified that none involve people doing "anything intentionally to sabotage the operations or to purposely make bad parts or to intentionally violate SOP's or requirements." (Tr. 464.)

#### Analysis

Paragraph 6 of the complaint alleges that in early summer 2002, the exact date being unknown, Respondent, by its representative, Thomas King, at Respondent's facility, gave employees the impression that their union activities were under surveillance. Counsel for the General Counsel on brief contends that Gahman testified that after he began his union activity he saw Helms in areas he did not formerly regularly see Helms, including the bar where employees hang out after work. The Respondent on brief argues that the standard for determining

whether an employer violates the Act by giving the impression of surveillance is ‘whether the employee would reasonably assume from the statement in question that . . . [his or her] union activities had been placed under surveillance.’” *Fred’k Wallace & Son*, 331 NLRB 914, 914 (2000), citing *Flexsteel Industries*, 311 NLRB 257 (1993); and that the only reference that can be stretched to relate to this allegation was Gahman’s recollection of exaggerating stories about knife sharpening and fans at a union meeting the day prior to the meeting with King.

Helms, Byglin, and either Yokas (according to King) or Crisp (according to Gahman) were present at the July 22 meeting between King and Gahman. None of these other supervisors were called by the Respondent to corroborate King’s testimony. The Respondent chose to rely solely on the testimony of King, whose credibility—because of the questionable role he played in almost all that occurred in this proceeding, obviously was going to be an issue. At the outset of this meeting King told Gahman that he was aware that Gahman was an outspoken supporter of the UAW. Contrary to his testimony, King also told Gahman that he was aware Gahman had attended union meetings. Then King told Gahman that it had been brought to his attention that Gahman had sharpened a knife for an employee in exchange for the employee signing a union authorization card, and Gahman refused to install a fan for an employee who did not support the UAW. Gahman had made statements about knives and fans at the union meeting the day before. He realized that what he said had been relayed to King, and as so often occurs, something was lost in the repeating of the statements. As King’s own notes of this meeting reflect, Gahman admitted that he had “[a]ttended 3 union meetings—won’t attend any more. Disgusted with it.” General Counsel’s Exhibit 3. Gahman explained that before this he believed that the union meetings were confidential. His meeting with King was not about a knife and fans. His meeting with King was about Gahman’s union activity. The last entry in King’s notes on his earlier meeting with Phillips indicates that “Gayman [sic] felt he had better than 50% of 3rd & good amount of 1st shift. Can’t get 2nd shift going.” Undoubtedly this was Phillips repeating a statement that Gahman made at the union meeting the day before.<sup>27</sup> King, who attended law school, and did not hesitate to tell Gahman on September 25 that the union paraphernalia issue was irrelevant, demonstrated what was relevant to him about this meeting in his own notes of his July 22 conversation with Gahman. All of his notes (excluding Gahman’s name) deal with the union activity of Gahman except for one line which deals with knives (there is no reference to fans in King’s notes of his discussion with Gahman).<sup>28</sup> In making it a point

<sup>27</sup> Actually a portion of King’s notes were deleted. The portion occurs between that portion of King’s notes dealing with his meeting with Phillips which were turned over to counsel for the General Counsel and King’s notes on his meeting with Gahman. King testified that “I think . . . it may have been these notes that are on the first page or some notes relating to another meeting, I’m not positive.” (Tr. 78.) Respondent’s attorney indicated “[t]hose notes reflect an entirely different employee and an entirely different set of incidents so it was redacted.” (Tr. 79.)

<sup>28</sup> There is a line at the bottom of the page which reads as follows; “Wayne Harrison articles.” It is not clear what this refers to. No one testified that this was something that was discussed during King’s

to tell Gahman that he knew that Gahman was an outspoken supporter of the UAW and attended union meetings, and then going on to basically repeat what Gahman said at the union meeting the day before, King was creating the impression of surveillance. Gahman could reasonably assume that his union activities had been placed under surveillance. The Respondent violated the Act with respect to Gahman as alleged in paragraph 6 of the complaint.

Paragraph 7 of the complaint alleges that in early summer 2002 at its facility, King, threatened its employees with discipline if they continued their support and activities on behalf of the Union. The General Counsel on brief contends that King’s threat of future discipline if Gahman failed to renounce his union support is a violation of Section 8(a)(1) of the Act. The Respondent on brief argues that DTR did not threaten discipline for employees who supported the Union; that Gahman’s testimony is directly contradicted by King; that the contents of the meeting come down to the conflicting testimony of Gahman, an admitted illegal drug user who falsified a drug test, and King, a former union organizer who is keenly aware of what can and cannot be said to employees in the context of union organizing; that Gahman is essentially accusing King of stupidity in claiming he threatened discipline for his union activities; and that the General Counsel failed to prove that Respondent violated the Act by threatening discipline for union support.

Again, the Respondent could have but did not call the other supervisors who were present at the July 22 meeting between King and Gahman to corroborate King’s testimony. Again it is King’s word against the word of Gahman. Why? If King’s testimony is the truth, it would be so easy to corroborate it with the other supervisors. Gahman did not have a representative with him at this meeting so he has no one he could call to corroborate his testimony. That is not the case, however, with King. King had three other supervisors with him in this meeting. None were called to testify about this discussion. Why not? The Respondent argues that the contents of the meeting come down to the conflicting testimony of Gahman, an admitted illegal drug user who falsified a drug test, and King. But we also have King’s own contemporaneous notes of the meeting, General Counsel’s Exhibit 11. King testified that Gahman volunteered that he was disgusted with the Union, he had attended three union meetings, and he is not going to be involved anymore. King’s notes indicate that Gahman said that “[w]on’t be a future problem—.” What was the problem that was not going to occur in the future? The “[w]on’t be a future problem—” statement, according to King’s own notes, occurs right after “Attend 3 meetings—won’t attend any more. Disgusted with it” and just before “I’ve pretty much relinquished every-

meeting with Gahman. While it might be argued that the line “Won’t be a future problem—” could refer to sharpening knives, both the placement of this line after “Attend 3 meetings—won’t attend any more. Disgusted with it,” and Gahman’s testimony that he told King that it would *not be a problem* because he had come to a decision to discontinue his support for the UAW warrants the conclusion that this line also referred to union activity.

thing.”<sup>29</sup> As noted above, Gahman testified that King said that he “wasn’t happy with my support . . . of the UAW . . . [a]nd if he didn’t hear anymore reports about my support and the UAW or openly supporting the UAW, that there would be no further mention of the allegations that he brought up” (Tr. 181); that King then said that “if he continued to hear reports about my UAW support that there would be disciplinary action for the knife incident and the fan incident” (Id.); and that he told King that “it wouldn’t be a problem because I had come to a decision to discontinue my support for the UAW and, . . . that I would no longer be involved with it one way or another so that he wouldn’t be getting any more reports about me and UAW activity.” (Id.) King’s notes, in conjunction with Gahman’s testimony, demonstrate, in my opinion, that the “[w]on’t be a future problem—” statement referred to union activity. King testified that Gahman volunteered that he was not going to be involved with the Union any more. Gahman made this statement but it was made after King threatened him with disciplinary action if he continued to support the Union and engage in union activities. With respect to Gahman, King violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 8 of the complaint alleges that on or about August 29, King, at the Respondent’s facility, threatened employees with layoff and job loss if the employees selected the Union as their bargaining representative. The General Counsel on brief contends that pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer is free to predict the economic consequences it foresees from unionization so long as the prediction is “carefully phrased on the basis of objective fact to convey . . . [its] belief as to demonstrably probable consequences beyond . . . [its] control. . . .”; that King told DTR’s employees that its customers would, in fact, review DTR’s status as a sole source supplier; that such a statement is more than just a prediction in that it informs employees that upon such a review of DTR’s status, jobs would be lost; that King provided no objective facts that sole supplier status would be lost, specifically any facts demonstrating that Honda, Toyota, or any of its other customers would view unionization as a vulnerability in and of itself to contemplate changing DTR’s status; and that statements similar to those made by King during the involved P/A meetings have been found to be threats of reprisal in violation of Section 8(a)(1) of the Act, *ITT Automotive*, 324 NLRB 609, 622 (1997), and *Long–Airdox Co.*, 277 NLRB 1157, 1169 (1985). The Respondent on brief argues that DTR complied with the law of the United States Court of Appeals for the Sixth Circuit in *DTR Industries v. NLRB*, 39 F.3d 106 (6th Cir. 1994), when King delivered a speech on the Company’s sole source status in response to union misinformation; that King relied on objective facts based on his experience in the industry, focusing on what customers might do in response to unionization and not on what actions the Company would take if the Union were successful; that King spoke to the employees in terms of what might happen and not what would happen; that King told the employees that he had no way to

predict what the customers would do if DTR’s employees chose to be represented by the Union; that King focused on the fact that customers would reevaluate the sole source status of the Company and that the reevaluation presented a risk of customers removing business from DTR; that the General Counsel’s witnesses McVetta and Lehman supported King’s assertion that he based his speech on objective, widely known facts, and that he focused on what customers might do, not DTR; and that King’s speech is protected by Section 8(c) of the Act and did not violate Section 8(a)(1) of the Act.

At pages 618 and 619 in *Gissel*, supra, the Court indicated

an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment . . . . As stated elsewhere, an employer is free only to tell “what he reasonably believes will be the likely economic consequences of unionization that are outside his control,” and not “threats of economic reprisal to be taken solely on his own volition.” [Citations omitted.]

DTR has been down this road before. One would think that the second time around DTR would want to avoid any question with respect to what its representative told employees. Yet DTR did not make a video or even an audio recording of what King told the employees. Indeed DTR did not even introduce into evidence a prepared printed text of what King told the employees about what he believed were the consequences of unionization. Why not? Did DTR want the flexibility to assert that it said one thing while King in fact said something else? Indeed from the Company’s side, King is the only witness with respect to what he told the employees at the P/A meetings. On brief the Respondent cites the testimony of two employees called by counsel for the General Counsel with respect to what King said at two of the involved P/A meetings. Actually a third employee testified about what King said at the third shift P/A meeting. Contrary to the argument of DTR on brief, McVetta and Lehman did not testify that King based his speech on objective, widely known facts, and focused on what customers *might* do, not DTR. Rather, McVetta testified that King said that DTR was a sole source supplier and if the Union got into the plant, customers “*wouldn’t probably* do business with us and we *wouldn’t* have jobs.” (Tr. 15, emphasis added.) In her affidavit to the Board, McVetta indicated that King said “[I]f we had a Union in there customers *would not* want to deal with us because of the Union.” (Tr. 24, emphasis added.) As noted above, Lehman, who attended another meeting, testified that

<sup>29</sup> As indicated above “Wayne Harrison articles” is written at the bottom of the page after “Attended 3 meetings—won’t attend any more. Disgusted with it.”

King told the employees that if they unionized, they “*would* lose sole supplier source from Honda and Toyota and *if* this happened there *would* be a reduction of jobs and therefore Honda and Toyota could no longer rely on us as source suppliers” (Tr. 33, emphasis added). Lehman also testified that King pretty much said that *if* Honda and Toyota or any other customer became concerned about the reliability of DTR’s production flow, then those customers *would* look for other sources, and *if* the customers pulled some business away from DTR because of fear of reliability, that *would* mean that there would be less work and fewer jobs at DTR. As set forth above, Gahman testified that King said if UAW was to get into DTR, it *would* lose its sole supplier status, customers *would* allow other companies to compete with DTR for some of the parts that it was making, layoffs *would* result, there had never been layoffs at DTR but if UAW came in that policy *would* have to change, customers *would* be concerned if there was a union at DTR and the possibility of a strike, and there *would* be layoffs *if* customers pulled part or all of their business out of DTR.

As here pertinent, in *Gissel*, supra at 618, the United States Supreme Court indicated that the

a prediction as to the *precise effects* . . . [the employer] believes unionization will have on . . . [the] company . . . must be *carefully phrased on the basis of objective fact* to convey an employer’s belief as to *demonstrably probable consequences* beyond . . . the employer’s control. . . . [Emphasis added.]

More often than not there are at least two ways to view something. Here, one way is to view situation from the perspective of the Company. If the employer believes that something is likely, it might be argued that this sufficient. But it appears that what really matters is the impact the employer’s statements have on the employees. While the expression of views is to be encouraged, if they contain an implied threat, they are in violation of the Act. What the employer may think it knows is of no consequence if the employer does not carefully explain, giving the employees the objective facts upon which it bases its prediction. If the employer believes that there are demonstrably probable consequences, explain them fully to the employees, giving valid examples to support its statements (if such examples exist). To make conclusionary statements to employees without carefully phrasing the statements on the basis of objective fact might unjustifiably raise questions and concerns in the minds of the employees, and invite scrutiny. DTR’s approach here did just that. Again the Respondent set it up so that to believe DTR’s position one must rely on King’s word alone. The problem with this approach is that I did not find King to be a credible witness. I credit the testimony of the three employees who testified about what King said at the three P/A meetings they attended. King did explain to the employees what a sole source supplier is. But he did not carefully phrase his predictions on the basis of objective fact. The employees walked away from the meetings with the understanding that if they had a Union, “customers would not want to deal with . . . [DTR],” DTR “would lose [its] sole . . . source [standing] from Honda and Toyota and if this happened, there would be a reduction of jobs,” and DTR’s layoff “policy would . . . have to change.”

King intended to make the employees fear the loss of their jobs and in taking the approach he did; he succeeded in conveying this fear. The Respondent violated the Act as alleged in paragraph 8 of the complaint.

Paragraph 9 of the complaint alleges that on or about September 25, 26, and in late September 2002, by its representatives David Berry, Rick Mead, Roger Helms, and David Byglin, at Respondent’s facility disparately enforced its solicitation policy and its uniform policy against employees showing their support for the Union. The General Counsel on brief contends that the testimony of Carnahan and Gahman on this issue should be credited, taking into consideration that the Respondent presented no witnesses to rebut or refute their testimony; that Respondent’s actions in prohibiting Gahman from wearing a union hat and a union button, while allowing other employees to wear nonunion related items cannot be said to be a nondiscriminatory approach to its uniform rule; and that in *E. I. DuPont de Nemours*, 263 NLRB 159, 166 (1982), the Board held that a supervisor’s statements to an employee that he should not wear various items with pronoun insignia was coercive and violated Section 8(a)(1) of the Act. The Respondent on brief argues that the Board held in *Beverly California Corp.*, 326 NLRB 232, 261–262 (1998), no violation of the Act where vague evidence of disparate enforcement of a dress code was merely an isolated incident; that Carnahan was never disciplined for wearing a hat or pin; and that there is insufficient evidence to support a finding that Respondent violated Section 8(a)(1) of the Act by disparate enforcement of Respondent’s uniform policy.

As pointed out by counsel for the General Counsel, Respondent presented no witnesses to rebut or refute the testimony of Carnahan and Gahman, which testimony is credited. Contrary to the impression Respondent attempts to convey on brief, the issue is not discipline. Rather it is the disparate enforcement of the uniform policy. The wearing of a union hat or pin is a protected Section 7 activity. The Respondent has not shown that it has a business justification for its prohibition. And the Respondent allowed the wearing of a Bengals hat at the same time it prohibited Gahman from wearing a UAW hat and pin. The Respondent violated the Act as alleged in paragraph 9 of the complaint in that it disparately enforced its uniform policy against showing support for the Union.

Paragraph 10 of the complaint alleges that in late August or early September 2002, King, at Respondent’s facility, gave the impression that employees’ union activities were under surveillance. Since there does not appear to be any evidence of record to support this allegation, it will be dismissed.

Paragraph 11 of the complaint alleges that on or about September 17, Respondent selected Gahman for a drug test and discharged him on September 25 because he formed, joined, and assisted the Union and engaged in concerted activities. The General Counsel on brief contends that the Respondent’s decision to terminate Gahman was discriminatory, pretextual, and violative of Section 8(a)(1) and (3) of the Act; that the results of the Gahman’s second specimen was reported on September 19 about 2.5 hours prior to the report of the third specimen and yet the Respondent did not take any action on it until Septem-

ber 25; that while the Respondent asserts that the lab report on the second specimen, namely,

THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE FOR A NORMAL URINE (32-38 C/90-100 F). SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL HUMAN URINE.

should be read as two separate statements, no evidence was adduced at the trial herein that this was not a single statement about the temperature and a descriptive statement that the temperature is inconsistent with human urine; that King admitted that he did not contact the medical review officer to explain the results of the second specimen;<sup>30</sup> that King did contact the medical review officer to explain the results of the second test on Evans specimen; Respondent's knowledge of Gahman's union activity is admitted; that Gahman was the subject of several independent 8(a)(1) violations; that the Board has held that unlawful discrimination against one prounion employee based on antiunion animus supports an inference that same animus motivated its actions against other employees who supported the union, *Embassy Vacation Resorts*, 340 NLRB 846 (2003); that after Gahman participated in the Callahan peer review and renewed his open support for the Union, the Respondent used the report of the test of the second specimen to justify his termination; that the Respondent never explained the delay in learning the results of the second specimen; that Respondent perfunctorily and unlawfully took the opportunity to terminate Gahman; and that the Board has concluded that an employer's failure to conduct a fair investigation is evidence of discriminatory intent, increasingly so in the context of hostility toward the union, *Metal Cutting Tools, Inc.*, 191 NLRB 536, 542-543 (1971). The Respondent on brief argues that the General Counsel has failed to demonstrate a prima facie case of anti-union animus in the selection of Gahman for a random drug test and in the discharge of Gahman; that King's decision was made with the knowledge that all procedures were followed in Gahman's test and Gahman's falsification was a serious offense for which discharge was the proper course of action; that even assuming that General Counsel made a prima facie case, DTR has met its burden of demonstrating that Gahman was lawfully discharged for submitting a fraudulent specimen during his random drug test; that Gahman's testimony that his second specimen was discarded is belied by the fact that he signed the chain of custody form, and never told DTR or the Board about this assertion; that the only other case involving an employee, Evans, who submitted a fraudulent drug specimen during a random drug test, the employee was also terminated, only 2

<sup>30</sup> Counsel for the General Counsel cites Tr. 475. At p. 475 King was asked if he ever called Quest Diagnostics to determine what the analysis of Gahman's specimen test meant. He did not. But Quest Diagnostics and the medical review officer, Dr. Young, are not one and the same. Nonetheless, notwithstanding the fact that King did not understand what the Quest Diagnostic report meant regarding Gahman's second specimen, he only went to Weigt, who is a licensed practical nurse who has been trained to collect urine specimens. (Tr. 475.) There is no evidence of record that King contacted the medical review officer.

weeks after Callahan; and that Graham was treated no differently than Evans.

As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991),

In *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),<sup>4</sup> the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.<sup>5</sup> The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.<sup>6</sup> The finding may be inferred from the record as a whole.<sup>7</sup>

<sup>4</sup> Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>5</sup> *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966).

<sup>6</sup> *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

<sup>7</sup> *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Here Gahman had engaged in union activity, King unlawfully coerced him to stop his union activity, King—from Gahman's point of view—made the peer review on which Gahman sat on his own time a nullity, Gahman resumed his union activity, DTR's supervisors unlawfully told Gahman to stop certain of his union activity, and then Gahman was terminated at the end of the shift after he was told to take off his UAW hat and pin and challenged the directive. As noted herein, these were not the only indicia of antiunion animus on the part of DTR. Counsel for the General Counsel has made a prima facie case with respect to Gahman's termination. It has not been demonstrated that the selection of Gahman for a random drug test was in any way related to any union or concerted protected activity. Contrary to Gahman's belated assertion under oath, the evidence of record does not demonstrate that the second specimen was discarded. The evidence of record demonstrates that the second specimen was sealed and sent to the lab.

The burden of going forward has shifted to DTR to demonstrate that Gahman would have been terminated notwithstanding the protected conduct. As noted above, it is also well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. Here, DTR's business justification for Gahman's termination is the lab report on the second specimen. As indicated above, counsel for the General Counsel contends, with respect to the lab report on the second specimen, namely,

THE TEMPERATURE OF THE SPECIMEN AT COLLECTION WAS OUTSIDE OF RANGE FOR A NORMAL URINE (32-38 C/90-100 F). SPECIMEN SUBSTITUTED: NOT CONSISTENT WITH NORMAL HUMAN URINE[.]

that no evidence was adduced at the trial herein that this was not a single statement about the temperature and a descriptive statement that the temperature is inconsistent with human urine. As conceded by Weigt, the first of the two above-described sentences is based solely on her check mark regarding temperature on the chain of custody form. (In this regard, it is noted that the temperature on the third specimen was also outside the specified range but it was accepted for processing because Dr. Young indicated that he observed Gahman producing the specimen.) Quest Diagnostics could not and did not do any testing with respect to the temperature of Gahman's second specimen at the time of collection. As indicated on the chain of custody form the temperature reading must be made within 4 minutes of production. "OUTSIDE OF RANGE FOR NORMAL URINE" could be consistent with "NOT CONSISTENT WITH NORMAL HUMAN URINE." In other words, the lab may have concluded that since the second specimen at the time of collection did not register on the temperature gauge on the container, it was not consistent with normal human urine. The "SPECIMEN SUBSTITUTED" may be nothing more than a conclusion reached from the fact that the second specimen was outside the temperature range for normal urine. Apparently, no further testing, as in the case of Evans (which involved an adulterant), was done to determine what the substance was if it was not human urine. The second page of Respondent's Exhibit 11 shows that Gahman declined to have his third specimen, which produced positive test results, retested at his own expense (\$150). So an adulterated specimen (Evans) is further tested. With a positive test result on Gahman's third specimen he is offered the opportunity for retesting. But with Gahman's second specimen, which the Respondent is claiming is fraudulent and justifies his termination, he is not offered further testing of retesting. Unless the lab was relying on the lack of a temperature reading to reach the conclusion "SPECIMEN SUBSTITUTED," the Respondent has not shown why Gahman was not accorded the opportunity to have a second test or a retesting on the second specimen. King testified that he had to get an understanding what the lab report on Gahman's second specimen meant. In other words, by King's own admission the lab report is not clear on its face. King admitted that he did not contact Quest Diagnostics to explain its report on Gahman's second specimen. It was not established,

even with the name of the certifying scientist on the report, that Quest Diagnostics would have provided this information to King over the telephone. However, what was established is that King could get information by telephone about drug test results from the medical review officer, Dr. Young. King did contact the medical review officer to explain the results of the second test on Evans' specimen. But with the lab report on Gahman's second specimen, according to King's testimony, he went to Weigt, who—as here pertinent—is a licensed practical nurse trained and experienced in the area of collecting urine specimens for drug tests. It was not shown by DTR that Weigt is a certifying scientist like Darlene Manojlovski, whose name appears on the lab report of Gahman's second specimen. It was not shown by DTR that Weigt is a medical review officer like Dr. Young, who—after contacting Quest Diagnostics (if necessary), undoubtedly could have given King the understanding he was seeking with respect to what the lab report on Gahman's second specimen meant. Whatever doubt there was with respect to the lab report regarding Gahman's second specimen was resolved by King against Gahman without according him the same treatment that Evans received. Gahman was treated disparately and DTR did not explain what justified such disparate treatment. As the Board pointed out at page 3 in *Embassy Vacation Resorts*, 340 NLRB 846 (2003),

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity. E.g., *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

DTR has not shown that Gahman would have been terminated notwithstanding the protected conduct. With respect to Gahman's termination, DTR violated the Act as specified in paragraph 11(B) and (C) of the complaint.

Paragraph 12 of the complaint alleges that on or about August 30, Respondent suspended its employee John Callahan, on or about September 6, it discharged Callahan, on or about September 18, it suspended Callahan after an internal peer review group overturned Callahan's September 6 discharge, and on or about January 3, 2003, it failed to return Callahan to his former or substantially equivalent position of employment, engaging in this conduct because Callahan formed, joined and assisted the Union and engaged in concerted activities. The General Counsel on brief contends that the record is replete with incidents that DTR treated Callahan differently than other employees in that other employees were disciplined for making bad parts, but never discharged, suspended, or even suspended for almost 3 months; that no evidence was submitted to show that Callahan intentionally made bad parts; that a prima facie showing has been made in that Callahan engaged in union activity in plain view of King, Williams admitted that he knew that King was a union supporter in that he observed Callahan engage in union activity in the parking lot, DTR engaged in antiunion animus, and Callahan was suspended, terminated, and suspended; that King's decision to recommend that Callahan be dismissed was

made the day after the P/A meetings with associates; that the Respondent's unwillingness to follow the decision of its own peer review panel is further demonstrative of its unlawful motivation; that Respondent intended to get rid of Callahan in whatever fashion it could; that the severity of discipline issued to prounion Callahan is not only extraordinary but unparalleled, and it supports an inference of unlawful motivation; that Callahan was transferred to the second shift in the mixing department, and King's own notes indicate that he knew that the Union did not have support on the second shift; that DTR has submitted no explanation for the difference in treatment between Callahan and its employees Davis, Shine, Brown, Baldazo, Smith, and Worthy, beyond King's insistence that Callahan intentionally ran bad parts; that Williams testified that he did not conclude that Callahan intentionally ran pad parts until after Callahan's discharge and before his peer review; and that conveniently the parts run by Callahan were not available at the trial herein as DTR conveniently discarded all of the parts under the ruse that it immediately scraps all defective parts. The Respondent on brief argues that the General Counsel failed to prove that DTR was motivated by antiunion animus; that Callahan was discharged because DTR's investigation led only to one logical conclusion, namely, Callahan acted intentionally; that assuming the General Counsel did make a *pima facie* case, DTR met its burden under *Wright Line*, supra, in that Callahan would have been suspended and terminated for intentionally running bad parts even absent his union activities; that Board cases have held that impairing production, either intentionally or not, is a lawful reason for termination, *Meaden Screw Products*, 325 NLRB 762, 769-771 (1998), and *Kawasaki Motors Corp.* 268 NLRB 936, 940-942 (1984); that Callahan's explanation that he was too fast at running the part is not credible in view of the fact that this explanation was first offered at the trial herein, and Callahan is not credible since he lied on his DTR job application providing false dates for work experience when he was actually serving a prison sentence of over 5 years in the Ohio prison system as a convicted felon; that the argument that other employees were not terminated for running bad parts does not help Callahan because it was not shown that the other employees ran as many bad parts as Callahan and it was not shown that any of the other employees intentionally ran bad parts; that all of the other involved employees were counseled or disciplined but since their offense was less than Callahan's, their treatment was also less severe; that Callahan was placed in his new position upon his return to work due to valid concerns that he had intentionally run bad parts; that Callahan did not receive a cut in pay or benefits upon his return to work following his suspension; and that his placement on the second shift was due to the fact that it was the shift where he was needed in mixing.

Callahan engaged in union activity and DTR knew it. He was suspended, terminated, and then suspended again when the majority of the peer review panel that DTR set up did not go along with DTR's termination of Callahan. The violations of the Act found herein demonstrate the antiunion animus of DTR.

Has DTR demonstrated that Gahman would have been terminated notwithstanding the protected conduct? In his post-peer review panel decision letter suspending Callahan for about

3-1/2 months, King wrote "you destroyed critical safety parts supplied to our customers." This sentence makes it sound like Callahan sabotaged a critical part used in the fuel line of automobiles and the parts were "supplied to . . . [DTR's] customers." There was no showing that any part that Callahan assembled on August 27 or the 28 was supplied to a DTR customer. However, no one testified to deny Callahan's testimony that approximately a month earlier his supervisor, Risner, asked him to come in off vacation to run replacement parts on assembly line 3 for Honda after someone had run "thousands of bad parts," and someone had sent the bad parts to Honda. The Respondent did not deny Callahan's testimony that in that situation the larger piece of metal was bad. Staley admitted that if there is a problem with the large metal block, it could throw the small metal block off.

The burden has shifted to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. DTR could have saved a representative number of the parts assembled by Callahan on August 27 and 28, put the "NO GOOD, SAMPLE" DTR red tag it has on the parts as it did with Respondent's Exhibits 25 and 27, put them in a cardboard box, and taped a "NO GOOD, SAMPLE" DTR red tag to the outside of the box so that no one would mistakenly send them to a customer. Then DTR could have shown the parts at the trial herein so that they could be compared.<sup>31</sup> DTR chose not to take this approach. Instead DTR relies on testimony about the parts assembled by Callahan on August 27 and 28. But DTR does not have the inspectors, Schrader or Stewart, or the person who counted the alleged bad parts, Blossard, testify. Rather it relies on the testimony of supervisors King and Williams, and hourly employee Staley. It was conceded by Staley that he himself made a bad part or parts on the involved machine on August 28. On brief DTR claims that "Staley intentionally made a bad part but the angle was only slightly off and was attributable to improper use of the bar. (Tr. 510, 513.)"<sup>32</sup> This might refer to parts that Staley made after Callahan went to lunch but it does not refer to parts Staley made before Callahan went to lunch. Staley testified that he himself ran one or two parts, they were bad parts and he got engineering out there to "test run the machine to—try to figure this out." (Tr. 510.) Staley did not testify that he made the bad parts intentionally. And he certainly did not do this while Callahan was there and before Caldwell was called to the machine. Staley also testified that he and Caldwell concluded that if the assembler laid the part on the bar at a 90-degree angle to the bar, the angle of the part would be off resulting in a bad part; and that he and Caldwell found that if the part was placed at a 45-degree angle to the bar it would set up okay. Williams, on the other hand, testified that even if the hose was placed at a 90-degree angle to the bar, the angle should not be bad if the small metal block was properly resting on the bar.

<sup>31</sup> No one denied Callahan's testimony that there was a problem with the big metal part on parts shipped to Honda in July 2002. The tubes which extend from the large block and the small block and are inserted into the rubber hose are bent, and it appears that the angles are compound when the face of the block from which the tubes extend is taken into consideration.

<sup>32</sup> R. Br., p. 10.

Williams testified that when Staley came to the involved assembly machine on August 28, and Staley ran parts in his presence, the parts were good. This appears to contradict Staley's and Callahan's testimony. Williams then testifies that they talked with Caldwell who could see no problem with the machine. If, according to William's testimony, the parts that Staley made were good, it is not clear why there would have been any need to call Caldwell over. But Staley provided the reason when he testified that he himself ran one or two parts, they were bad parts and he got engineering, Caldwell, out there to "test run the machine to—to try to figure this out." (Tr. 510.) According to Staley, Caldwell was called "[a]fter I couldn't figure out why we're having these [bad parts]." (Tr. 509.) Staley also testified that he made some parts with Callahan and he did not remember Williams being present. Williams testified that Callahan was not there for the inspection process. And Callahan testified that Williams was not there when Callahan and Staley ran the bad parts. I conclude that when Staley first came to the machine Williams was not present. Callahan and Staley, and then Staley alone ran parts and they were all bad. Staley told Callahan that it was the machine and Callahan should go to lunch while Staley was going to get someone else to look at the machine. Callahan went to lunch. While Callahan was at lunch Caldwell looked at the machine with Staley and Williams present. During that period it appears that Staley ran some parts and it was finally determined that if the parts were laid on the bar a certain way the parts would be good. When Callahan returned he was told to change the way he laid the parts on the bar while they set.

In his memorandum prepared at the behest of Ream for the peer review panel, Williams wrote "[c]ame to the conclusion that there was nothing wrong with the fixture, but *it was the way the parts were being laid on the bar after assembly*. Moved the bar to a distinct location and turned the pieces at an angle . . . . He ran good parts for the rest of the day. . . ." (GC Exh. 8, emphasis added.) There is no assertion in the memorandum that Callahan intentionally made bad parts. There is no assertion in the memorandum that the parts were so bad that Callahan had to be acting intentionally, and the problem could not be accounted for by the way he was laying the parts on the bar. Indeed William's memorandum seems to indicate just the opposite. Yet Williams testified that he, in effect, told Huffer and King before they met with Callahan on August 29 that the parts were so bad that Callahan had to be acting intentionally, and the problem could not be accounted for by the way he was laying the parts on the bar. When asked on cross-examination when he came to the conclusion that Callahan made the bad parts intentionally, Williams answered that he was not sure of the exact date. When asked further if it was before or after the peer review, Williams testified, "I do believe it was before the peer review." (Tr. 412.) Williams lied about this material fact while under oath. This became DTR's strategy after King, et al., realized that employees who performed this kind of work, who knew that there was scrap, who knew that there were variations, and that machines do not always perform perfectly would not buy what DTR was selling. No one, including the named supervisor—Risner, denied Callahan's testimony that just a month before his termination thou-

sands of bad parts involving the larger metal block were run and they were sent to Honda.

It was not demonstrated that when Callahan was terminated, Williams had concluded that Callahan acted intentionally, and Williams had told his superiors that Callahan had acted intentionally. There is no mention of Callahan acting intentionally in the termination letter dated September 6 from King to Callahan. Only after a majority of the peer review panel, which was not shown the parts and which did not have the opportunity to speak with Staley, overturned Callahan's termination and found that Callahan should be reinstated with backpay, did King write to Callahan in General Counsel's Exhibit 20 falsely accusing Callahan by indicating that he "*destroyed critical safety parts supplied to our customers*." (Emphasis added.) King lied under oath about addressing the peer review panel in his attempt to have Callahan's termination confirmed. King took an extraordinary measure, he knew it, and he was not going to admit it at the trial herein even though he was under oath. King also lied to Callahan when he told him on August 30 that he had spoken with Staley as Callahan had requested. King did not deny Callahan's testimony that on August 30 King said, "we don't need your type running the machinery here anymore. I want you to turn your time card in. You can talk to your wife on the way out, tell her you . . . can pick her up and you'll hear from us in the mail shortly." (Tr. 118.) While Callahan's letter of termination is dated September 6, Callahan was effectively fired on August 30 with the above-described King statement. And this occurred before King spoke with Staley. There was no real need for King to speak with Staley before telling Callahan to get out. What occurred did not depend on what Staley would say. What occurred was occasioned by something else, namely Callahan's union activity. The Respondent did not meet its burden of demonstrating that Callahan's suspension, termination, and suspension would have taken place notwithstanding his protected conduct.

In January 2003, DTR did not return Callahan to his former or substantially equivalent position of employment. Obviously DTR did not return Callahan to his former position but the Respondent argues that the position to which it returned Callahan is substantially equivalent notwithstanding the fact that DTR denied Callahan bidding rights when he returned. The only employee who worked both in hose assembly and in mixing who testified at the trial herein was Callahan. Callahan testified that mixing was very dirty and physical work. King did not deny this. Rather, King testified that mixing is not the dirtiest, heaviest, and least attractive job in the plant. That is not, however, the issue. The issue is was Callahan returned to a substantially equivalent position of employment. The obvious answer is he was not. Callahan did not have bidding rights, he was placed on a different shift, and King did not deny that the work in mixing is dirty and physical. DTR violated the Act as alleged in paragraphs 12(A), (B), (C), (D), and (E) of the complaint.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) In early summer 2002 at its facility, by its representative Thomas King, giving Gahman the impression that his union activities were under surveillance.

(b) In early summer 2002 at its facility, by King, threatening Gahman with discipline if he continued his support and activities on behalf of the Union.

(c) On or about August 29, by King, at the Respondent's facility, threatening employees with layoff and job loss if the employees selected the Union as their bargaining representative.

(d) On or about September 25, by its representatives David Berry, Rick Mead, Roger Helms, and David Byglin, at Respondent's facility, disparately enforcing its uniform policy against Gahman who showed his support for the Union.

4. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

(a) On or about September 25, discharging its employee Daniel Gahman because he formed, joined, and assisted the Union and engaged in concerted activities.

(b) On or about August 30, suspending its employee John Callahan.

(c) On or about September 6, discharging John Callahan.

(d) On or about September 18, suspending John Callahan after an internal peer review group overturned John Callahan's September 6 discharge.

(e) On or about January 3, 2003, failing to return John Callahan to his former or substantially equivalent position of employment, engaging in the conduct described above in (4)(b), (c), (d), and (e) because John Callahan formed, joined, and assisted the Union and engaged in concerted activities.

5. The above-described labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

6. Respondent has not committed any other unfair labor practices alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Gahman and Callahan, it must offer Gahman reinstatement, and make Gahman and Callahan whole for any loss of earnings and other benefits, computed on a quarterly basis, from Gahman's date of discharge to date of proper offer of reinstatement to Gahman, and from August 30, 2002, to January 6, 2003 for Callahan, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]