

**United States Postal Service and National Association of Letter Carriers, Sunshine Branch 504, AFL-CIO.** Cases 28-CA-18682(P), 28-CA-18742(P), 28-CA-18819(P), 28-CA-18940(P), 28-CA-19002(P), 28-CA-19036(P), 28-CA-19038(P), 28-CA-19050(P), 28-CA-19051(P), 28-CA-19052(P), 28-CA-19053(P), 28-CA-54, 28-CA-19126(P), 28-CA-19204(P), 28-CA-19205(P), 28-CA-19223(P), and 28-CA-19269(P)

July 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On April 21, 2005, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent and the General Counsel filed exceptions and a brief in support of their exceptions. The Respondent and the General Counsel filed answering briefs, and the Respondent filed a reply brief to the General Counsel's answering 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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> only to the extent consistent with this Decision and Order.<sup>3</sup>

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

<sup>2</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to provide and failing to timely provide relevant requested information, Chairman Battista and Member Schaumber note their concern regarding the voluminous nature of the Union's information requests in this case. They further note, however, that the Respondent failed to present evidence that it had made timely efforts to communicate with the Union concerning its difficulty in keeping up with the information requests. Furthermore, the Respondent did not establish any effort to provide the Union with documents on an ongoing basis, instead waiting until the first day of the hearing to provide the Union with the bulk of its requested information.

In addition, in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by requiring Union President Dave Pratt to report to Labor Relations Manager Joel Wadsworth's office at the beginning of each tour and to perform any union business in Wadsworth's office, Chairman Battista notes that the Respondent has failed to establish that it initiated this change in policy as a result of the Union's violation of any "quid pro quo" agreement between the parties concerning the reduction of the grievance backlog.

<sup>3</sup> We have granted the Respondent's exception to the judge's conclusion, not fully rationalized in his decision, that a district-wide posting is appropriate in this case. Accordingly, we order the Respondent to post

I. ALLEGED UNILATERAL CHANGES IN THE APPLICATION OF THE RESPONDENT'S WORK RULES

A. *The Rule Pertaining to Solicitation of Grievances on the Workroom Floor*

On the morning of February 20, 2003,<sup>4</sup> while the letter carriers at Highland Station were sorting the mail that they would deliver later that day, Supervisor Herman Lovato announced that carriers would be required to carry a "third bundle" of mail that would not be sorted before delivery. Some carriers began complaining that they should be permitted to presort the "third bundle," and Union Steward Luis Chavez told Lovato that Lovato's instruction violated the parties' collective-bargaining agreement. Lovato informed Chavez that he disagreed and would not change his instruction. At that point, Chavez addressed the other letter carriers, who were sorting their mail, and stated that if anyone did not agree with carrying a "third bundle," they should see their steward. Following Chavez announcement, many carriers left their sorting stations in order to ask Chavez what to do. Chavez instructed the carriers to give their supervisor a written request to see a steward, "as soon as possible." It is undisputed that, as these events were taking place, Chavez had not asked for steward time.<sup>5</sup> Further, it is undisputed that the employees who left their stations to seek the counsel of Chavez had not asked a supervisor for permission to stop work.

Immediately after these events, several of the Respondent's managers met with Chavez and Union Steward Tina Segarra. At that meeting, Chavez was informed that he was disrupting work and that he was not to solicit grievances on the workroom floor.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) by promulgating and enforcing a rule prohibiting union stewards from soliciting grievances on the workroom floor. We agree.

As noted by the judge, the Respondent's rule at issue here pertains only to the activities of union stewards during their working time, and does not pertain to the stew-

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the attached order only in the six facilities involved in the instant case, as we believe that posting will provide sufficient notice to all affected individuals.

Member Liebman would adopt the judge's recommended District-wide posting requirement for the reasons he stated, that is, the Respondent's history of disregarding its duty to provide information and record evidence of the frequent transfers of managers and supervisors among the facilities in the District.

<sup>4</sup> All dates are in 2003 unless otherwise indicated.

<sup>5</sup> As the judge's decision sets forth in more detail, the Respondent had strict rules for accounting for employee time, including time spent working on steward duties. The rules required employees to swipe ID cards through electronic time clocks when changing from one work status to another.

ards' performance of union duties when they are "off the clock." The well-established rule is that the promulgation and enforcement of a rule prohibiting union solicitation during working time is presumed to be valid, absent evidence that the rule was adopted for a discriminatory purpose. *Our Way*, 268 NLRB 394 (1983). We agree with the judge that the evidence in the instant case does not rebut this presumption.

Further, we agree with the judge that the General Counsel has not established that the Respondent's rule constituted a unilateral change of an established past practice in violation of Section 8(a)(5) and (1). There is simply no evidence in the record to support a finding that the Respondent had a well-established, longstanding practice of allowing stewards to solicit grievances during working time on the workroom floor.<sup>6</sup> Instead, the record contains evidence to the contrary. Union Steward Segarra testified that she was aware of the rule before February 20, and the Union had not requested bargaining.

We recognize that the record establishes that, at times, some supervisors made comments regarding the solicitation of grievances that did not clearly specify the circumstances under which the solicitation of grievances was prohibited. We agree with the judge, however, that under the circumstances of this case, "all concerned understood that the rule was limited to work time on the workroom floor."<sup>7</sup>

Accordingly, we adopt the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by prohibiting stewards from soliciting grievances on the workroom floor during worktime.<sup>8</sup>

<sup>6</sup> Our colleague says that the judge determined, without challenge, that the "record does not show that the rules against stewards soliciting grievances was enforced at Highland Station prior to February 20." However, the burden was on the General Counsel to show a change, i.e. to show affirmatively that the Respondent's past practice was to permit the solicitation and that it changed from that practice.

<sup>7</sup> We agree with the judge that the facts at issue here are distinguishable from those presented in *Lenkurt Electric Co.*, 182 NLRB 510 (1970), *enfd.* 459 F.2d 635 (9th Cir. 1972). In *Lenkurt*, the Board found that the employer violated the Act by disciplining a steward for soliciting grievances. The employer argued that, under the terms of the parties' contract, the steward had exceeded his authority by soliciting grievances, but the Board found that the contract did not so limit the stewards' duties. In the instant case, by contrast, the Respondent was not seeking an absolute bar on the stewards' ability to solicit grievances, but rather sought to prohibit such activity during working time.

<sup>8</sup> Member Liebman would find that the Respondent unilaterally changed past practice in violation of Sec. 8(a)(5) based on the judge's unchallenged determination that the "record does not show that the rule against stewards soliciting grievances was enforced at Highland Station prior to February 20." In her view, invoking a long-dormant rule in reaction to Chavez's attempt to police the terms of the collective-bargaining agreement was tantamount to imposing a new rule. See, e.g., *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005),

### *B. The Respondent's Rules Pertaining to "Stand Up Meetings"*

Prior to the events at issue, the Respondent had a practice of holding "stand up meetings" with the mail carriers at Highland Station approximately once a week. Stand up meetings were called by management when it needed to convey information to the carriers, including safety instructions. These meetings took place on the workroom floor, occurred on paid time, and were scheduled without consultation with the Union. Respondent's policy was to attempt to limit the duration of stand up meetings to 10 minutes, in order to avoid having to schedule overtime. Respondent's policy was also to allow union stewards to speak at stand up meetings, and stewards had used the meetings to make announcements about club functions, elections, meetings, births, marriages, retirements, and get-well cards. Under the established practice, union stewards were not required to obtain pre-approval from management before making such announcements.

On March 27, Supervisor Susan Tofoya conducted a stand up meeting. At the end of Tofoya's remarks, Union Steward Tina Segarra asked for the opportunity to speak, and was recognized by Tofoya. Segarra made "extended remarks" focused on alleged contract violations by the Respondent, and refused to comply with Tofoya's request that she conclude her remarks. Ultimately, Tofoya cut off Segarra and ended the meeting, which lasted approximately 27 minutes.

Later that same day, Manager Lorrel Grosse promulgated a new rule pertaining to stand up meetings, providing that in the future, the Union would be required to obtain preapproval from management concerning remarks to be made at stand up meetings. In addition, the new rule prohibited the Union from using stand up meetings to solicit grievances, and mandated that the meetings adhere to the 10-minute time limit.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) by promulgating the new rules pertaining to union stewards' ability to participate during stand up meetings. The judge reasoned that the General Counsel did not establish that the Union had a protected right "to engage in the conduct addressed by the challenged rules" and, therefore, did not establish a violation of Section 8(a)(5) and (1). We agree with the judge that the General Counsel did not establish a violation of Section 8(a)(5) only in part, and we reverse in part.

*enfd.* 468 F.3d 952 (6th Cir. 2006) ("change from lax enforcement of a policy to more stringent enforcement is matter that must be bargained over"). In the absence of evidence that the restriction was enforced, the Respondent's past practice is established implicitly.

An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In order to prove a violation, the General Counsel must establish that an employer's action has changed existing conditions. Thus, where an employer's actions do not alter the status quo, the employer does not violate Section 8(a)(5) and (1). *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). An established past practice can become part of the status quo. *Katz*, 369 U.S. at 746. Accordingly, where an employer simply follows a well-established past practice, the Board will not find a violation of Section 8(a)(5) and (1). See, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *enfd.* 772 F.2d 421 (8th Cir. 1985).

Here, we agree with the judge's finding that the Respondent's promulgation of a rule prohibiting union stewards from using stand up meetings to solicit grievances did not constitute an unlawful unilateral action. As the judge found, the Respondent's established past practice was that stand up meetings were wholly controlled by Respondent's management, without input from the Union regarding scheduling or topics to be discussed. As a courtesy, the Respondent had established a practice of allowing the union stewards to make brief announcements on various topics. Prior to March 27, however, the Union had never attempted to use stand up meetings to solicit grievances, nor had the Respondent ever allowed the Union to use stand up meetings for that purpose. Thus, there is no evidence establishing that, under the existing status quo prior to the promulgation of the March 27 rule, the Union had the ability to use stand up meetings to solicit grievances.<sup>9</sup> Accordingly, the Respondent's promulgation of the rule prohibiting soliciting grievances at stand up meetings did not constitute a change of the status quo.<sup>10</sup>

We find, however, that the Respondent's new rule *did* change the status quo insofar as the rule required union stewards to obtain preapproval of statements that they wished to make at stand up meetings. It is undisputed that, prior to March 27, union stewards had been permitted to speak at stand up meetings without having to obtain any managerial approval regarding the content of their planned announcement. It is also undisputed that the rule promulgated by the Respondent on March 27,

changed this practice so that, in the future, union stewards would be required to obtain preapproval of any statements that they wished to make at stand up meetings, including all announcements that, under established practice, they had always been permitted to make without such prior approval. We find that this change of the status quo constituted a "material, substantial, and significant" change in the stewards' ability to carry out their duties. See *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001).<sup>11</sup> Accordingly, we find that Respondent's promulgation of the March 27 rule requiring stewards to obtain preapproval for statements to be made at stand up meetings violated Section 8(a)(5) and (1) of the Act.<sup>12</sup>

#### II. ALLEGATIONS ARISING FROM THE INTERACTIONS BETWEEN SUPERVISOR MCCANN AND STEWARD GILL

We next examine the three alleged violations pertaining to interactions between Supervisor Curtis McCann and letter carrier (and steward) Mike Gill during the period of mid-September to early October 2003. At that time, McCann, a former letter carrier, was participating in the Respondent's supervisor training program, pursuant to which he worked as a supervisor at Highland Station and attended classroom training. From McCann's first day as a supervisor at Highland Station, Gill made no effort to hide his contempt for and hostility toward him. As the judge found, "Gill's conduct was consistent with a determined effort by him to undermine McCann's efforts to become a supervisor." Thus, the incidents at issue occurred in the context of the openly hostile relationship between McCann and Gill.

##### *A. The September 30 Warning Letter Issued to Gill*

The first incident arose in the context of a scheduling error. Prior to the events at issue, McCann's superiors had directed him to limit letter carriers to 60 hours work in any week, and the carriers were aware of this limit. On September 12, McCann assigned Gill to a mail route and allotted him 6 hours to complete the route. At that time, however, Gill had already worked nearly 54 hours and had used nearly 2 hours of sick leave. Thus, by assigning Gill to a 6-hour route, McCann had erroneously

<sup>11</sup> The issue is not whether the Respondent had a right to limit and control meetings. The issue is whether the Respondent had a right to change, without bargaining, a prior practice of union participation.

<sup>12</sup> Member Schaumber would adopt the judge's finding that the Respondent did not violate Sec. 8(a)(5) by promulgating and enforcing the rule requiring stewards to obtain preapproval of statements for stand up meetings. As noted above, the stand up meetings are management meetings on paid time at which stewards were permitted, as a courtesy, to make statements. In Member Schaumber's view, the Respondent had the right to limit and control statements at the meetings so that the meetings' purposes could be achieved within the time allotted.

<sup>9</sup> Furthermore, as the judge noted, the rule promulgated on March 27, was consistent with the Respondent's existing rule prohibiting solicitation of grievances on the workroom floor.

<sup>10</sup> Similarly, the new rule's reinforcement of the existing 10-minute limit did not change the status quo.

assigned Gill to work that, if completed, would have put him over the 60-hour limit.

Gill left for his route without informing McCann that the assigned route would put him over the 60-hour limit. While he was out on his route, Gill realized that he was over the 60-hour limit, so he called McCann for instructions. According to credited testimony, McCann instructed Gill to “bring the mail back” without completing his route.

On September 30, McCann issued a warning letter to Gill, citing him for failing to follow directions, based on Gill’s failure to finish his route and his exceeding 60 hours for the week.

We agree with the judge that Respondent’s issuance of the warning letter to Gill violated Section 8(a)(3) and (1). In order to establish a violation under Section 8(a)(3) and (1) in accordance with our decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must first prove, by a preponderance of the evidence, that the employee’s protected conduct was a motivating factor in the employer’s decision. See *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (unpublished table decision). The General Counsel can meet this burden by proving the employee’s union activity, the employer’s knowledge of the union activity, and the employer’s animus against the employee’s protected conduct. Once this showing is made, the burden of persuasion “shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, 251 NLRB at 1089.

We find that the General Counsel carried his initial burden of establishing discriminatory treatment here. Gill’s protected activity as a union steward, and the Respondent’s knowledge thereof, is established and not disputed. We further find that the General Counsel has sufficiently established antiunion animus on the part of the Respondent. This antiunion animus is demonstrated by McCann’s unlawful refusal to provide the Union with his notes about incidents involving Gill on September 18,<sup>13</sup> as well as by McCann’s unlawful threats to Gill on October 2, discussed below, which were made just 2 days after McCann issued the disciplinary letter at issue.<sup>14</sup>

<sup>13</sup> The judge found that McCann’s refusal to provide the Union with his notes about Gill on September 18, violated Sec. 8(a)(1) of the Act, and the Respondent did not except to that finding.

<sup>14</sup> We reject the Respondent’s argument that we may not properly consider the October 2 incident as evidence of antiunion animus. To the contrary, Board law recognizes that postdiscipline statements and events may be used to establish antiunion animus under *Wright Line*. See, e.g., *KW Electric, Inc.*, 342 NLRB. 1231 (2004). As discussed

We further agree with the judge that the Respondent’s explanation for the September 30 discipline, as set out in the disciplinary letter, was pretextual.<sup>15</sup> The disciplinary letter states that the charge against Gill is a “failure to [f]ollow [i]nstructions,” and then indicates that Gill failed to follow instructions “to leave 4 relays for other carriers” and “to complete what was left of your route.” As the judge found, however, the credited record evidence establishes that McCann did not issue those instructions to Gill; rather, the credited evidence establishes McCann directed Gill to return to the station prior to completing his route, and that Gill followed that instruction.

Finally, we agree with the judge that, even if the reasons set forth in the disciplinary letter were not pretextual, the Respondent has failed to rebut the showing of discriminatory treatment made by the General Counsel. The Respondent has not established, by record evidence, that it would have taken the same action against Gill even if he had not engaged in protected activity.

For all of the reasons above, we affirm the judge’s finding that the Respondent’s issuance of the September 30 disciplinary letter to Gill violated Section 8(a)(3) and (1) of the Act.

#### B. McCann’s October 2 Threats to Gill

On October 2, Gill told McCann that he had an appointment with Union President Bill Prestien that day at the union office. McCann refused to grant Gill permission to leave work to meet with Prestien. Gill, however, had already received approval for the meeting from a different supervisor and had obtained a PS Form 7020 authorizing his trip to the union office. After consulting with labor relations, McCann allowed Gill to leave for the meeting with Prestien.

When Gill returned to the workroom floor following the meeting, he presented the PS Form 7020 to McCann, so that McCann could record his time away from work on the form. At that time, McCann told Gill that he was not going to allow Gill to go back to the union office again. McCann also told Gill, “I’m going to dock you for the time in which you spent over at the Union Hall.”

We agree with the judge that these statements by McCann constituted unlawful threats of reprisal based on Gill’s trip to the union office, in violation of Section

below, Member Schaumber would dismiss this allegation. He finds, however, that the required showing of animus was established by McCann’s unlawful refusal to provide the Union with his notes concerning Gill on September 18.

<sup>15</sup> The Respondent does not argue that McCann’s decision to issue the disciplinary letter was based on personal animus toward Gill, rather than antiunion animus, nor did the Respondent present evidence at the hearing sufficient to support such a finding.

8(a)(1). Although we are mindful of the personal animosity between McCann and Gill,<sup>16</sup> McCann's statements were clearly and directly tied to Gill's protected conduct, and would reasonably tend to interfere with Gill's exercise of his protected Section 7 rights.<sup>17</sup>

*C. The October 4 Placement of Gill on Off-Duty Status*

On October 4, in his capacity as steward, Gill delivered a stack of information requests (requests) to McCann. McCann began reviewing the requests and asked Gill questions about some of them. McCann became irritated, and the exchanges between Gill and McCann became heated. Eventually, McCann stood up, said he had more important things to do, and took the requests to a management office. In so doing, he failed to provide Gill with a signed copy of the requests. Gill's usual practice as steward was to obtain a signed copy of all requests submitted to Respondent, in order to have a record of the Respondent's receipt of the requests.

Gill followed McCann into the office and picked the stack of requests off of a table, telling McCann that he was going to make copies of them. McCann said that he was not through with them, angrily asserted that he could not believe that Gill would take something off of his "desk," and directed Gill to put the requests back on the table. Despite these directions, Gill walked out of the office with the requests and began copying them. Thereafter, McCann twice directed Gill to give him the requests, and Gill refused. McCann left.<sup>18</sup> After speaking with the station manager about the incident, McCann placed Gill on off-duty status.

The judge found that Respondent violated Section 8(a)(3) and (1) by placing Gill on off-duty status. We disagree.

We agree with the judge that the General Counsel carried his initial burden of showing discriminatory treatment toward Gill. Unlike the judge, however, we find that the Respondent has satisfied its burden of establishing that it would have taken the same action against Gill, even absent Gill's protected activity.

<sup>16</sup> It should be noted that the Respondent does not assert that McCann's remarks were based on personal, rather than antiunion animus.

<sup>17</sup> As noted above, Member Schaumber would dismiss this allegation. He finds merit in the Respondent's argument that McCann's comments that Gill's time would be docked for his trip to the union office and that he would not be permitted to go there again were related to McCann's impression that Gill had not presented the appropriate documentation for the trip and was refusing to discuss the matter with him. In light of Gill's recalcitrant attitude toward McCann's supervisory authority, there is no basis for bypassing this lawful interpretation of McCann's statements in favor of an unlawful one.

<sup>18</sup> After Gill finished copying the requests, he brought the originals to Supervisor Anthony Perez, who signed them.

As the judge noted in his decision, the Respondent proffered evidence that it had placed another individual who had refused to follow McCann's direct instructions on off-duty status. The judge rejected that evidence as "inapposite" on the grounds that the other employee was not performing steward duties at the time that he was disciplined. We disagree and find the evidence relevant. In carrying out his steward duties, Gill was repeatedly insubordinate to McCann, both by removing the documents from McCann's table and by ignoring McCann's direction to return the documents. The fact that Gill was engaging in steward duties at the time does not prevent the Respondent from taking the same action in response to Gill's insubordination that it would have taken toward any other employee committing similar insubordinate acts. *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977).

We agree that Gill was engaged in protected activity when he presented the information requests to the Respondent. However, that did not give him a license to engage in clearly insubordinate conduct. The past practice was that Gill would present the requests, McCann would sign them in due course, and McCann would return the signed documents to Gill for copying. In the instant matter, because of the sheer volume of documents and because McCann was busy with other matters, McCann took the documents for later signing. The documents were then in the possession of McCann. Gill removed them from McCann's table and refused McCann's order to return them. Those acts were insubordinate.

*Union Fork & Hoe Co.*, 241 NLRB 907 (1979), cited by our dissenting colleague, is clearly distinguishable. In that case, the Board concluded that there should be no deferral to an arbitral award because the arbitrator set forth a standard that was clearly at odds with Board law. By contrast, in the instant case, there is no issue of deferral. Further, on the merits, the judge in *Union Fork*, affirmed by the Board, found that there was disparate treatment of the stewards. There are no such facts here.

Accordingly, we find that the Respondent has met its burden to establish that, even absent Gill's protected conduct, it would have taken the same action against Gill in response to his insubordinate conduct. Therefore, we reverse the judge and find that the Respondent did not violate Section 8(a)(3) and (1) by placing Gill on off-duty status.<sup>19</sup>

<sup>19</sup> Contrary to her colleagues, Member Liebman agrees with the judge that Supervisor McCann's placing Gill on "off duty status" was unlawful. Gill was on union time and carrying out one of his regular responsibilities as steward when he presented McCann with a number of union information requests. McCann's unique and protracted

## ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide National Association of Letter Carriers, AFL-CIO, or a designated local union, with information that is necessary for and relevant to the Union's performance of its duties as the exclusive-bargaining representative of the collective-bargaining unit herein found appropriate.

(b) Failing and refusing to provide the Union, on request, information that includes confidential medical information without first bargaining in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure.

(c) Threatening to withhold permission for an employee to meet with a union officer that would otherwise be granted, in retaliation for the employee's activity protected by Section 7 of the Act.

(d) Threatening to reduce the pay of any employee after the employee has met with a union officer on the clock with the permission of the Respondent, in retaliation for the employee's activity protected by Section 7 of the Act.

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method of receiving such documents, coupled with an underlying contentiousness between the two, impeded completion of the task. McCann ultimately halted the process, took the Union's papers with him to another room, and placed them on a table. Gill followed and told McCann that he was going to make copies of the requests. Gill's standard practice was to make a copy of such requests in order to have a record of the Respondent's receipt of the requests. Declining McCann's direction to stop, Gill made photocopies of the requests. Gill then presented the information requests to another supervisor, Perez, obtained Perez' signature on the photocopies, and delivered the signed documents to the Union for its records. Almost immediately thereafter, McCann told him to leave.

In Member Liebman's view, the critical fact is that this entire sequence occurred during Gill's protected role as union steward. He did not disobey an order connected with his job duties as an employee of the Respondent, but simply continued to perform his duties as steward. It is long established that an employer cannot discipline a steward for performing a steward function. *McGuire and Hester*, 268 NLRB 265 fn. 1 (1983). In this regard, Member Liebman finds *Guardian Ambulance Service*, supra, cited by her colleagues distinguishable: the conduct for which the employee in that case was disciplined did not involve the performance of steward duties or any other protected activity. In cases comparable to this one, the Board has not hesitated to find discipline of a steward unlawful, despite an employer's claim of insubordination. See *Union Fork and Hoe Co.*, 241 NLRB 907 (1979) (reaffirming principle that stewards retain protection of Act except for extreme misconduct in performance of union duties and finding unlawful discharge of steward who took employee's timesheet from grievance meeting with supervisor).

(e) Issuing warning letters to employees or otherwise discriminating against them because they have engaged in activities on behalf of the Union.

(f) Threatening to withhold the opportunity to work overtime in retaliation for an employee's activity protected by Section 7 of the Act.

(g) Unilaterally changing the practice of allowing the President of Sunshine Branch 504, National Association of Letter Carriers, AFL-CIO, to work on paid union time at the Local's office.

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

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

(a) Promptly, upon request, furnish the Union with the information found in this decision to have been unlawfully withheld from the Union, to the extent it has not already been provided.

(b) Promptly, upon request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the previously requested information regarding the work restrictions for Carl (Carlo) Montano, while safeguarding it from unnecessary disclosure.

(c) Within 14 days from the date of this Order, remove from its personnel records any reference to the unlawful warning letters issued to employees Michael Gill and Karl Pecora, and within 3 days thereafter notify the employees in writing that this has been done and that the warning letters will not be used against them in any way.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"<sup>20</sup> at Highland Station, Uptown Station, Airport Mail Facility, Main Office Carrier Annex, Vehicle Maintenance Facility, and Five Points Station. Copies of the notice, on forms provided by the Regional Director for Region 28, 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 any of the

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<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

affected facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the closed facilities at any time since February 14, 2003.

(e) 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.

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

#### 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 fail and refuse to furnish National Association of Letter Carriers, AFL-CIO, or its designated local unions, with information that is necessary for and relevant to the Union in the performance of its statutory representative duties as the exclusive bargaining representative of the nationwide collective-bargaining unit.

WE WILL NOT fail or refuse to provide the Union, on request, information that includes confidential medical information without first bargaining in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure.

WE WILL NOT unilaterally promulgate and enforce a rule requiring stewards to obtain preapproval for statements made at "stand up meetings."

WE WILL NOT threaten to withhold permission for an employee to meet with a union officer that would otherwise be granted, in retaliation for the employee's activity protected by Section 7 of the Act.

WE WILL NOT threaten to reduce the pay of any employee after the employee has met with a union officer on the clock with our permission, in retaliation for the employee's activity protected by Section 7 of the Act.

WE WILL NOT issue warning letters to employees or otherwise discriminate against them because they have engaged in activities on behalf of the Union.

WE WILL NOT threaten to withhold employees' opportunities to work overtime in retaliation for the employees' activity protected by Section 7 of the Act.

WE WILL NOT unilaterally change the practice of allowing the President of Sunshine Branch 504 to work on paid union time at the Union's office.

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 National Labor Relations Act.

WE WILL promptly, upon request, furnish the Union with the information that has been found to have been unlawfully withheld from the Union, to the extent it has not already been provided.

WE WILL promptly, upon request, bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the previously requested information regarding work restrictions for an employee, while safeguarding it from unnecessary disclosure.

WE WILL remove any and all references in our personnel records to the unlawful warning letters issued to employees Michael Gill and Karl Pecora and notify them in writing that such has been done.

#### UNITED STATES POSTAL SERVICE

*Liza Walker-McBride, Esq.*, for the General Counsel.  
*Cynthia Estee, Esq.* and *Kimberly C. Blanton, Esq.*, of Dallas, Texas, for the Respondent.

*David Pratt* and *William J. Prestien*, of Albuquerque, New Mexico, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried in Albuquerque, New Mexico. The hearing opened on March 9, 2004, and was completed on May 12, 2004.

The charges were filed by National Association of Letter Carriers, Sunshine Branch 504, AFL-CIO. The initial charge in Case 28-CA-18682(P) was filed on April 23, 2003. The final charge was filed in Case 28-CA-19269(P) on January 15, 2004.

The initial complaint issued on July 31, 2003. The final sixth consolidated complaint issued on February 19, 2004, and was extensively amended during the hearing. The final

amended answer to the sixth consolidated complaint was filed with the administrative law judge and served on March 25, 2004, and has been added to and made a part of the record as GC Exhibit 1(xxx). The complaint alleges violations of Section 8(a)(1), (3), (4), and (5) of the Act. The Respondent filed answers denying any violation of the Act.

Following the close of the hearing the General Counsel submitted and moved to receive Joint Exhibit 5, which is consistent with an agreement of the parties made during the hearing. The motion is granted and the exhibit has been added to the record. Following the close of the hearing the Respondent moved to add subpoena B-423473 to the record. That motion is granted and the exhibit has been added to the record as Respondent Exhibit 29.

On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses and after considering the briefs and arguments of counsel, make the following findings of fact,<sup>2</sup> conclusions of law and recommended order.

#### I. JURISDICTION

The United States Postal Service (the Respondent, the USPS, or the Postal Service) provides postal services for the United States. I conclude that the Board has jurisdiction over the Postal Service by virtue of Section 1209 of the Postal Reorganization Act (PRA).

#### II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the answer admits and I conclude that the National Association of Letter Carriers, AFL-CIO (the NALC) is a labor organization within the meaning of Section 2(5) of the Act. The complaint alleges, the answer admits and I conclude that Sunshine Branch 504 (herein Branch 504 or the Local) is a labor organization within the meaning of Section 2(5) of the Act and a constituent NALC local. The NALC and the Local are referred to individually and collectively as the Union.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Collective-Bargaining Relationship*

The record evidence, the pleadings and reported Board decisions show that the NALC represents a nationwide unit of USPS letter carriers. I conclude that the unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and Chapter 12 of the PRA. The NALC negotiates a national contract and designates affiliated local

unions to administer the contract at designated postal facilities. The most recent national contract (the Agreement) is effective from November 21, 2001, through November 20, 2006. I conclude that based on Section 9(a) of the Act and Chapter 12 of the PRA the NALC has been the exclusive collective-bargaining representative of the contract unit (the unit) at all material times. The letter carriers in Albuquerque work at USPS facilities including those known as Highland Station, Uptown Station, Airport Mail Facility, Main Office Carrier Annex, Vehicle Maintenance Facility, and Five Points Station and are members of the unit. Branch 504 is the designated NALC local union responsible for administering the Agreement at those facilities.

##### B. *Background*

In February 2003,<sup>3</sup> Manager Steven Hardin, manager of customer service operations in Albuquerque assigned Supervisors Steve Manning and Herman Lovato to work at Highland Station on temporary detail as a "recovery team."<sup>4</sup> Their assignment was to improve delivery operations, including the elimination of time wasting practices. Albuquerque personnel have historically spent a significantly higher number of paid hours related to labor-management issues than was the case in other cities. The amount of paid time employees and supervisors spent on labor-management issues was a significant concern to management.

##### C. *Findings and Conclusions*

###### 1. February 3 and 12 denial of steward time

Complaint paragraphs 7(e) and (f) allege that on February 3 and 12, Supervisor Patti Manous did not grant steward time requested by Tina Segarra and thereby violated Section 8(a)(1) and (5) of the Act.

As discussed in detail *infra*, stewards have a contract right "to interview aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied."

On Monday, February 3, Segarra submitted a request for steward time to Manous that stated she requested 40 minutes total steward time to take statements from five employees. The form used for the information request did not specify a grievance number and a box indicating "To investigate a possible grievance" was checked.

Segarra testified that the February 3 steward time request had not been granted and she submitted a second request on Wednesday, February 12. The second request was addressed to Manous, but was given to Supervisor Terry Hartsfield. The February 12 request was for 20 minutes steward time with each of the five employees named in the February 3 request, for a total of 100 minutes. The February 12 request states "2nd request, first copy attached." The form specified a grievance number and a box was checked indicating that request was to process a grievance. Segarra testified that the request was not

<sup>3</sup> Unless otherwise noted, February–December dates are 2003, and January is 2004.

<sup>4</sup> Unless otherwise indicated, the USPS acknowledges that persons identified in this decision as supervisors and managers were supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

<sup>1</sup> The sentence in the transcript beginning at p. 647, ll. 11 is corrected to read, "I was a mail handler." In the transcript p. 1054, ll. 3, the words "in aggrieved layer" are corrected to read "and grieve later."

<sup>2</sup> In assessing credibility, testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Because of the length of the record in this case and the multiple and varying versions of events it was not practicable to recount all testimony about every incident. The facts regarding several incidents are a composite of the more credibly offered and more probable testimony of several witnesses. The testimony that has not been recounted was not critical to deciding the issues or has been discredited. See *Daniel Finley Allen & Co.*, 303 NLRB 846 fn 1 (1999).

granted. The record does not show that the steward time request was explicitly denied or was the subject of a grievance or any further discussion. The subsequent investigation and disposition of the related grievance is not of record.

Supervisor Manous was called as a witness by the General Counsel. She initially testified that she did grant Segarra the steward time requested on February 3. She was then impeached with documentary evidence. Manous had submitted a statement to the Board on May 30, regarding the February 3 steward time request that stated the steward time had been granted.<sup>5</sup> Attached to the statement were time records of employees that seemed to support her contention. Manous was then questioned about a different steward time request by Segarra dated February 4, which asked for steward time to interview the employees named in the February 3 steward time request. That request was addressed to Manous, but received by Supervisor Susan Tofoya, who granted the requested time in a handwritten note to Segarra on a copy of the request.

Manous seemed surprised when she was questioned about the February 4 steward time request and she conceded that the time records she submitted during the administrative investigation may have reflected the time requested on February 4, rather than the February 3 request. Manous observed, "There were many, many of these types of requests from [Segarra] . . . ."

Segarra was very active in performing her steward duties. Segarra filed many grievances and regularly requested and used substantial amounts of paid steward time. It was not unusual for Segarra to spend most of the workweek on steward time. The workweek began on Saturday. Sunday is not a workday. Segarra used the following paid steward time during the 2 work weeks beginning February 1:

DATE	HOURS	DATE	HOURS
02/01	Off	02/08	2/14
02/03	5.43	02/10	Off
02/04	5.57	02/11	5.55
02/05	7.93	02/12	3.75
02/06	3.64	02/13	3.41
02/07	None	02/14	7.71

Based on the probabilities and Segarra's credibly offered testimony on this issue, I conclude that the steward time requested on February 3 and 12, was not granted. In reaching this conclusion I find that Manous was mistaken in her testimony, but based on her demeanor and the probabilities, I do not find that the evidence shows that she knowingly testified falsely or that she intentionally disregarded the requests. It is not improbable that a steward time request might be unintentionally overlooked. This conclusion is based on the numerous steward time requests by Segarra and other union representatives reflected in the record, as well as the number of requests by Segarra that is implicit in the amount of steward time she used. Moreover, the evidence does not show that there was a pattern or practice of the Respondent ignoring steward time requests.

<sup>5</sup> An unfair labor practice charge was filed on May 9, alleging that the Respondent had refused to grant the requested steward time.

In view of the foregoing, the evidence does not establish that the Respondent acted in bad faith by not responding to the February 3 and 12 steward time requests. At most, there was a contract violation that is not a per se violation. I conclude that complaint paragraphs 7(e) and (f) have not been proven and I recommend that they be dismissed.

2. February 20 restriction on soliciting grievances

Complaint paragraph 5(a) alleges that on February 20, Supervisors Herman Lovato and Steve Manning promulgated an overly-broad and discriminatory rule prohibiting stewards from soliciting grievances on the workroom floor at Highland Station, in violation of Section 8(a)(1) and (5) of the Act. The following is a composite of the most credibly offered and probable testimony and the documentary evidence.

On the morning of February 20, the letter carriers at Highland Station were sorting the mail they would later deliver, a process called casing the mail. The carriers were working at their assigned sorting cases in the same general area. Lovato announced to all the carriers that they would also be carrying a "third bundle" of *Shoppers Guides*. This instruction meant that the *Shoppers Guides* would not be cased. Instead, the carriers would sort the *Shoppers Guides* as they delivered the other mail. Some carriers expressed dissatisfaction to one another that they would not be allowed to case the third bundle before they left to deliver the mail. When Lovato made the announcement regarding the third bundle he was standing near the rework case, a location where he could address the carriers. Union Alternate Steward Luis Chavez was one of the carriers who was casing mail. Chavez' case was adjacent to the rework case. Chavez expressed to Lovato his opinion that under the contract the *Shoppers Guides* should be cased. Lovato told Chavez, in substance, that the instruction stood and that the *Shoppers Guides* would not be cased. Chavez then addressed the other letter carriers who were working at sorting cases, stating that if anyone did not agree with carrying a third bundle they should see their steward.<sup>6</sup> Supervisor Steven Manning was standing about 20 feet away and heard Chavez' remarks. Manning worked at Highland Station from about February through April or May. Chavez testified that carriers left their sorting cases and came over to him, asking what they should do. Chavez told the carriers that they needed to give their supervisor a written request in writing to see a steward, "as soon as possible."

Lovato told Chavez that he wanted to talk with him in the office. Chavez walked to another area of the facility where Steward Tina Segarra was located. Lovato followed Chavez and it was agreed that Segarra could attend the meeting. Segarra and Chavez conferred briefly before the meeting, although they did not have 5 minutes that Chavez opined that they should have been allowed.<sup>7</sup> Present at the meeting were Lovato, Chavez, Manning, and Segarra. Manning asked Chavez to repeat what he said and Chavez stated that he had told the carriers that if anyone wanted to file a grievance on carrying a third bundle,

<sup>6</sup> See particularly the testimony of employee Phillip Carabaja.

<sup>7</sup> I do not credit Segarra's testimony that she asked for and was denied any opportunity to confer with Chavez before the meeting, based on considerations of demeanor and the probabilities.

they should see a steward. Lovato then told Chavez that he was disrupting work and that he was not to solicit grievances on the workroom floor. Segarra protested that the Union was not being permitted to represent the letter carriers at Highland Station. The evidence is that the meeting became tense. Chavez testified, "Well, after we were going back and forth with the issue of stewards being able to talk to their carriers and a third bundle, which was getting us nowhere, he told us, . . . get out of my office."

Manning described the February 20 meeting in a memo to Postmaster John Tuleja, but did not describe the incident on the workroom floor. The memo notes that there had been a realignment of management at Highland station and that employees were being required "to perform to the requirements in the M-41 Carriers Duty and Responsibilities and also the . . . [NALC] Contract."

Manning testified that Chavez created a disruption on the workroom floor, while the General Counsel presented testimony that there was no disruption. The word "disruption" appears to have been used by Manning as a synonym for "interruption." Lovato, who was working at a different postal facility at the time of the hearing, did not testify. The weight of the evidence that the carriers were distracted from their work by the third bundle instruction and by Chavez' urging them to file grievances. The evidence does not show that the mail was delayed or overtime incurred because of the incident.

Lorrel Grosse was manager of customer services at Highland Station from January 2003 through June. Grosse had instructed the supervisors at Highland Station that stewards were not to be permitted to solicit grievances from employees on the workroom floor. The record does not establish when the Union was first told that stewards were not to solicit grievances on the workroom floor, but it was clearly prior to February 20. Segarra testified that she became aware of what she described as management's "desire" regarding soliciting grievances prior to February 20. There is no evidence that the Union at any time requested bargaining regarding the limitation on stewards soliciting grievances. The record does not show that the rule against stewards soliciting grievances was enforced at Highland Station prior to February 20.

The Joint Contract Administration Manual (JCAM) is a joint Union-Employer manual to guide the parties in the application of the Contract.<sup>8</sup> The JCAM explicates a panoply of contract-based rights for stewards. The JCAM provides, in part:

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

....

The steward . . . shall have the right to interview aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

....

A steward may conduct a broad range of activities related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include . . . interviewing a potential grievant. . . . A steward has the right to conduct all such activities *on the clock* . . . . [Emphasis in original.] Supervisory permission to engage in paid steward time is required, and must not be unreasonably denied. If management delays granting steward time, the reasons for the delay must be explained and the steward must be told when time will be available. Permission to leave the steward's work area and go to another work area is required, but cannot be unreasonably denied.

The Postal Service has strict rules for accounting for employee time that require employees to swipe their ID cards through an electronic timeclock and input their status change when they move from one status to another. Whenever employees are not engaged in production, they clock over to a nonproduction status. When employees run out of work they clock over to standby time, which is paid time, and remain at their duty stations. When employees go on breaks, they clock over to breaktime and repeat the process before returning to their duty stations. There is no contention and no evidence that employees are permitted on the workroom floor when they are on break or clocked out. In contrast, the evidence, including the testimony of Station Manager Thomas Jack, shows that employees who are clocked out of pay status are not allowed on the workroom floor. When a steward has been given permission to perform steward duties on the clock, the steward must clock over to steward time, a different pay status. Steward time requests are in writing and describe the steward duties that will be performed. The testimony does not establish the pay status of employees while they are interviewed by stewards who are on steward time, but I infer that they clock over to a nonwork pay status. The record does not show where such interviews are conducted at Highlands Station. The Union did not have an assigned office for its exclusive use. Segarra used a training room for other steward work when she was on steward time and may have been used by her to meet with unit employees, including grievants and potential grievants. The training room was also used to perform postal work.

At the time of the events that preceded the meeting on February 20, Chavez had not asked for steward time and the employees who sought his counsel had not asked a supervisor for permission to stop work and see a steward.

All parties acknowledge, and a preponderance of the testimony shows, that Chavez was acting in an official steward capacity on the morning of February 20. When Segarra protested at the February 20 meeting that the Union was not being permitted to represent the letter carriers at Highland Station, she implicitly took the position that Chavez had acted as a representative of the Union that morning. Chavez described the issue as one of "stewards being able to talk to their carriers." The employees demonstrated that they viewed Chavez to be their steward by going to him for further counsel on what they

<sup>8</sup> The entire contract and the JCAM were not offered into evidence.

should do regarding the third bundle instruction. On brief the General Counsel argues that Chavez had the right to solicit grievances on the workroom floor based on past practice respecting steward activity. On brief the Employer argues that the instruction issued to Chavez was in his steward capacity. Moreover, other incidents, discussed infra, eliminate any doubt that the rule against soliciting grievances on the workroom floor was directed at steward activity. There is no evidence that the Employer attempted to restrict the solicitation of grievances off the workroom floor or during nonwork time. There has been no contention that the rule restricts stewards when they meet with employees on paid steward time to investigate potential grievances, following the procedures as described in the JCAM. The weight of the evidence is that the rule was directed only at stewards soliciting grievances during worktime on the workroom floor, without following the JCAM procedures.

The Employer did not have a general rule against letter carriers talking to one another while they worked and there was no restriction on the subjects that they could discuss. There was an outstanding written instruction identified as the M-41, which required letter carriers to work quietly and diligently and refrain from loud talking. The evidence does not show that the Employer has attempted to prevent employees from engaging in protected conversation with other employees while they are working, including conversations where one of the employees is a steward.

The evidence shows, and the parties apparently agree, that the February 20 meeting was a "discussion," which is defined in Article 16.5 of the Contract. The JCAM refers to such a meeting as an "official discussion." The contract provides:

#### Section 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

The General Counsel urges findings that the Employer violated the Act on February 20, by prohibiting stewards from soliciting grievances on the workroom floor, as alleged in paragraph 5(a) of the complaint. The General Counsel contends that the soliciting of grievances is protected activity and that restricting the soliciting of grievances by stewards violates Section 8(a)(1), based on the decision in *Lenkurt Electric Co.*, 182 NLRB 510 (1970), enfd. 459 F.2d 635 (9th Cir. 1972).

*Lenkurt Electric Co.* involved the discipline of a steward for soliciting grievances from two employees. There was a collec-

tive-bargaining agreement that contained the following provision:

Article III, Section 2. Stewards shall report to their immediate supervisors and request permission to leave the job before leaving work to conduct Union business. Permission will always be granted unless such action would seriously interfere with operations. In such instances, the supervisor will make arrangements for the steward to leave the job as promptly as possible.

Stewards will be allowed to conduct their Union business within their regularly scheduled working hours, within their assigned areas of representation. Union business for this purpose is defined to mean the investigation of complaints that may lead to grievances, handling and adjustment of grievances, and attendance at meetings with representatives of the Employer.

The Board noted that in each situation where the steward in *Lenkurt Electric Co.* had solicited a grievance, the employee had requested and received permission to speak with the steward and permission had been granted. Thus, the steward was disciplined for soliciting grievances during contractual steward time, not worktime.

The employer's position in *Lenkurt* was that the collective-bargaining agreement prohibited a steward from soliciting a grievance during a contract-sanctioned conference with the employee during paid worktime. The Board noted that a disciplinary notice issued to the steward stated:

On April 28, 1969 you overstepped the role of departmental steward as defined in Sect. 2, Article III of the labor agreement. You did this by specifically soliciting a grievance. The role of a steward at Lenkurt is that of investigating and adjusting grievances, not soliciting them! We will expect you to conduct yourself as a steward as established by practice and called for by the labor agreement. Failure to do so in the future will mean disciplinary action, including termination.

Thus, the central issue in *Lenkurt Electronic Co.* was whether the Section 7 right of a union steward to solicit grievances had been forfeited by the contract language. The Board rejected that contention, noting that a waiver of the right to engage in such protected activities must be clearly and unequivocally set forth in the contract. The contract provision at issue did not meet that standard. The Board found a violation, noting that the decision was based on the particular circumstances of that case.

The essential facts of the present case are different from those in *Lenkurt Electric Co.* The Postal Service has not been shown to have prohibited stewards from soliciting grievances when they are on steward time and are meeting with "a potential grievant" as provided in the JCAM. Rather, the Employer only attempted to prohibit the stewards from soliciting grievances during the work time of the steward or the solicited employee. At times the supervisors only said that stewards were not allowed to solicit grievances, without spelling out the specific circumstances when grievances might and might not be solicited. Viewed in isolation and taken literally, this articula-

tion of the rule would prohibit stewards from soliciting grievances at any time and under any circumstances. Viewed in context, however, it is clear that all concerned understood that the rule was limited to work time on the workroom floor.

The General Counsel has cited no dispositive authority and has advanced no convincing rationale why the Employer should be found to have interfered with employees Section 7 rights by the restrictions at issue. The promulgation and enforcement of a rule prohibiting union solicitation during working time is presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. *Our Way, Inc.*, 268 NLRB 394 (1983). The evidence in the present case does not establish a discriminatory purpose. Rather, the rule is consistent with the negotiated JCAM procedures regulating the performance of steward duties on the clock. I therefore conclude that the rule against soliciting grievances during working time on the workroom floor at Highland Station has not been shown to be an unprivileged regulation of the conduct of employees. Accordingly, the rule did not violate Section 8(a)(1). See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Peyton Packing Co.*, 49 NLRB 828 (1943).

The General Counsel also argues that the rule at issue was an unlawful unilateral change in an established practice in violation of Section 8(a)(5) and (1) of the Act. A past practice that will support a finding of an unlawful unilateral change must be shown to be a well established, longstanding practice. See *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited there; *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 355 (2003), and cases cited there. The burden of proof is on the General Counsel. There is an absence of substantial evidence of a well established, long standing practice of stewards being allowed to solicit grievances during working time on the workroom floor. Moreover, assuming without finding that the Employer had a duty to bargain, Segarra acknowledged that she was aware of the rule prior to February 20, and there was no request by the Union for bargaining. The General Counsel has not established that the notice was insufficient.

Based on the foregoing, I conclude that the Respondent did not violate the Act by prohibiting stewards from soliciting grievances on the workroom floor during worktime and I recommend that paragraph 5(a) of the complaint be dismissed.

### 3. Threats of reprisals on February 20

Complaint paragraph 5(b)(1) alleges that on February 20, in violation of Section 8(a)(1) of the Act, Lovato threatened its employees with unspecified reprisals if they violated the rule against soliciting grievances during work time on the workroom floor, discussed above. The General Counsel has not stated the basis for this allegation. There is no substantial evidence that Lovato threatened Chavez or anyone else with reprisals for violating the rule. Moreover, the rule has not been shown to be unlawful. Accordingly, I conclude that this allegation has not been proven and I recommend that paragraph 5(b)(1) of the complaint be dismissed.

### 4. Refusal to allow employees to confer with a union representative

Complaint paragraph 5(b)(2) alleges that on February 20, Lovato refused to allow its employees time to confer with their union representative before a potential disciplinary meeting, in violation of Section 8(a)(1) of the Act, a reference to the official discussion with Chavez addressed above. This allegation is based on a contention is that Chavez had the right to have his union representative accompany him to an investigatory interview that he reasonably believed might lead to discipline, based on *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The JCAM also describes the employees' *Weingarten* rights, including the right to a steward's assistance at an investigatory interview. The February 20 meeting was not an investigatory interview. Manning's question to Chavez as to what he had said was rhetorical. Manning was present and had heard what Chavez said. Chavez, a steward, did not claim that he thought the meeting was anything more than an official discussion. The Union and the Employer agree that official discussions are not considered to be discipline and cannot be grieved. The JCAM, to which the Union is signatory, specifically provides, "[A]n employee does not have Weingarten representation rights during an official discussion." Accordingly, I conclude that this allegation has not been proven and I recommend that paragraph 5(b)(2) of the complaint be dismissed.

### 5. Closer supervision of Chavez

The complaint alleges in paragraph 5(b)(3) that on February 20, Lovato more closely supervised its employees because they had engaged in union activities, in violation of Section 8(a)(1) and (5) of the Act. On February 20, following the official discussion Lovato stood near Chavez' workstation on and instructed Chavez to turn to his case and to not talk to the other letter carriers. The General Counsel contends that by his actions Lovato thereby engaged in surveillance of Chavez' union activity, in violation of Section 8(a)(1) of the Act.

The instruction regarding the third bundle affected a group of as many as 64 carriers.<sup>9</sup> Chavez could have asked for paid steward time or to see Steward Segarra, who was working in a different area of the facility.<sup>10</sup> Instead, he encouraged all the affected carriers to see a steward and file individual grievances, "as soon as possible."<sup>11</sup>

In its recent decision in *Exxon Mobil Corp.*, 343 NLRB 287 (2004), the Board panel of Chairman Battista and Member Schaumber, with Member Walsh dissenting, reversed the judge and found that the employer had not violated the Act by imposing discipline on a steward whose improper use of the griev-

<sup>9</sup> The record does not disclose how many carriers were present. There were 64 carrier routes, but carriers sometimes covered more than 1 route.

<sup>10</sup> Steward Tina Segarra was on limited or light duty and did not cover a route.

<sup>11</sup> The Union sometimes solicited individual grievances from all affected employees, rather than filing a class grievance, when the Union wished to challenge an Employer instruction or action affecting a group or class of letter carriers. The Union would sometimes follow-up the multiple grievances with a separate information request for each grievance.

ance procedure was found to be unprotected. The Board wrote:

The Board has long made clear that the grievance activities of union stewards are especially important to the effectiveness of grievance-arbitration machinery. *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976).

The Board also has made clear, however, that the protections afforded to grievance activity do not extend to harassing conduct. "While Section 7 shields employees from potential employer discipline or other adverse action in the exercise of Section 7 rights, it does not permit employees to use grievances as a sword to gain immunity from the consequences of harassment." *Caterpillar Tractor Co.*, 242 NLRB 523, 530 (1979), *enfd.* 638 F.2d 140 (9th Cir. 1981).

If the letter carriers had followed Chavez' suggestion on February 20, and had stopped their work to inundated their supervisor with separate steward requests, followed by the filing of individual grievances, there would have been a foreseeable and potentially significant impact on the mail delivery and overtime. At the official discussion Segarra's tone was hostile and she did not acknowledge that the Union would comply with the third bundle instruction, subject to a challenge to the rule in the grievance procedure. The meeting ended on an angry note. In these circumstances there was a reasonable basis for Lovato to be concerned that Chavez would disregard the instructions he had been given in the official discussion. Lovato's actions immediately following the official discussion was not interference with protected Section 7 activity nor did it amount to a refusal to bargain as alleged in complaint paragraph 5(b)(3). See *Exxon Mobil Corp.*, *supra*. Accordingly, I conclude that this allegation has not been proven and I recommend that paragraph 5(b)(3) of the complaint be dismissed.

#### 6. February 21 route count on Chavez

The General Counsel also contends that the Employer violated the Act on February 21, by Lovato performing a route count on Chavez. The asserted route count is not alleged in the complaint. The General Counsel relies on complaint paragraph 5(b)(3), addressed *supra*, to support this contention.

Chavez initially testified, in response to a leading question, that Lovato told him on February 20 that he would be subjected to a "route count" the next day. However, he volunteered in the next sentence, "I'm gonna count you tomorrow is what he told me." In his volunteered testimony, there was no mention of a "route" count. There followed a series of questions that continued to refer to the putative route count and Chavez adopted the General Counsel's assumption that there was a route count. However, when asked directly on cross-examination whether there was a route count on February 21, Chavez admitted that it was only an office count. I conclude that the evidence does not prove that there was a route count on or about February 21. In reaching this conclusion I have not credited the inconsistent testimony of employees, including Phillip Carabaja and Denise Trujillo.

A route count is different from an office count. On a route

count a supervisor accompanies a carrier throughout the carrier's shift, both in the facility and out on the street, recording all pertinent aspects of the carrier's job performance. Union representative and former Local 504 president William Prestien testified that there were three types of route counts. One type is initiated by management to adjust the routes at a facility. A second type is made at the request of a carrier to determine if the individual carrier's route should be adjusted. The third type of route count is a performance review done by management on an ad hoc basis. Because of the amount management time involved, it is clear that such an ad hoc performance review of a single carrier would be used sparingly and would be threatening to the employee under review.

In contrast to a route count, an office count is a more frequently used management tool that is not considered discipline. An office count is merely a measurement of tasks such as casing mail in the facility, to determine whether or not established production standards are being met. The Employer acknowledges that an office count was done on Chavez. The General Counsel has not contended the Employer violated the Act by announcing and executing an office count of Chavez' work.

The General Counsel was aware that there would be testimony regarding the claimed route count on February 21, since the testimony was initiated by a leading question. Nevertheless, the complaint was not amended to allege the violation. In these circumstances I find that the merits should not be addressed for considerations of procedural due process.

Assuming, without deciding, that the merits should be addressed, Chavez acknowledged that his testimony to the effect that he was subjected to a route count was not accurate. Moreover, his volunteered description of what was actually said to him on February 20 makes no mention of a route count. Accordingly, I find that Chavez was not told that he would be subjected to a route count and that a route count was not conducted on or about February 21. The General Counsel has not contended that there was a violation based on an office count, the issue was not fully litigated and the record evidence is insufficient to establish a violation.

In view of all the foregoing, I conclude that the evidence regarding an office count is insufficient to support a finding of a violation.

#### 7. Mid-March threat

Complaint in paragraph 5(c) alleges that the Respondent violated Section 8(a)(1) of the Act in mid-March by Manning threatening employees at the Highland Station with stricter enforcement of the Respondent's dress code policy because they had engaged in union activities.

This allegation concerns a conversation between Manning and Segarra on the loading dock at Highland Station. The conversation occurred on Segarra's break the day following a union-management meeting attended by Manning and Segarra. Also present at that meeting were Steven Hardin, manager of customer service operations in Albuquerque and Local 504 president Bill Prestien. That meeting had addressed complaints Segarra had registered with Prestien concerning Manning's availability to meet with her regarding grievances. The meeting had not gone well, with anger on both sides and Hardin had

terminated the meeting.

Segarra credibly testified that Manning approached her on the loading dock and said, regarding the meeting the day before, “I had made him so mad that he was—had thought about coming into work that day and getting onto carriers that didn’t have stripes on their socks.”

There is no evidence of anything else that was said on the dock and there is no persuasive testimony regarding Manning’s demeanor. Manning did not say specifically what had made him angry. There was a dress code for carriers that included a requirement that carriers wear striped socks. The striped socks requirement was not enforced. There is no other relevant evidence regarding the wearing of striped socks.

On March 11, a day or two following the remark about socks, there was a special labor-management meeting to address problems at Highland Station. This meeting was clearly related to the lack of success at the angry meeting a few days earlier, which Manning had commented on to Segarra. There is no evidence that the March 11 meeting was in response to the remark Manning made to Segarra on the dock.

The union representatives at the March 11 meeting included Local 504 President Bill Prestien, Local 504 Vice President Dave Pratt, Steward Tina Segarra, and Steward John Metz. The Employer representatives were Manager Steve Hardin, manager of customer service operations for Albuquerque, Manager Jerry Garcia, district labor relations specialist, Manager Lori Grosse, manager at Highland Station and Supervisor Steve Manning. Prestien testified that at this meeting the parties agreed to a procedure for handling problems when there was a breakdown in communications. As described by Prestien:

If problems occurred, if there was a breakdown in communications, if there was an incident developing, all the parties committed that the Union representative would call up myself or Mr. Pratt. The management representative would call up Mr. Garcia. He and I would give any answers jointly to any contract questions that might come up, and we would also try to diffuse any potentially problematic situations, that we would actually go out to the station together and prevent things from escalating or becoming more problematic and resolve the issue.

The General Counsel contends that the remark made by Manning to Segarra on the dock violated Section 8(a)(1) of the Act. In support of this position the General Counsel argues, “The threat was made to the Union’s steward as a result of her attempt to discuss a grievance with management. Such a threat to enforce the dress code more strictly in retaliation for legitimate union activity by a steward clearly violates Section 8(a)(1) of the Act.” The Employer does not address this allegation on brief.

The words uttered by Manning were not a threat; they were a statement of how he had felt in the past. He said that he had thought about enforcing the socks rule before going to work. A reasonable employee would understand from Manning’s statement that he had rejected the notion of enforcing the striped socks rule to assuage his anger. Manning’s acknowledgement that the meeting had caused him anger was not news to Segarra. The evidence does not show that Manning’s remark

on the dock was more than an ill-considered attempt by him to open an informal discussion with Segarra of the tension between the Postal Service and Union at Highland Station.

Assuming, without deciding, that Manning’s remark on the dock technically violated Section 8(a)(1), it would not effectuate the purposes of the Act to find a violation. Segarra’s testimony was that the conversation was brought up at the March 11 meeting. The parties agreed at the second meeting to a process for addressing problems like the one that had led to the initial meeting where Manning had become angry. Given these circumstances, a remedial order regarding Manning’s remark would be inconsistent with encouraging the future resolution of similar problems by collective bargaining, rather than litigation.

Based on the foregoing, I conclude that this allegation has not been proven and I recommend that paragraph 5(c) of the complaint be dismissed.

#### 8. March 27 restrictions on union participation at standup meetings

The complaint alleges that on March 27, Manning threatened employees with unspecified reprisals for soliciting grievances and filing Board charges, in violation of Section 8(a)(1); promulgated an overly-broad and discriminatory rule prohibiting union stewards from filing grievances unless employees initiated the grievances, in violation of Section 8(a)(1) and (5); and promulgated an overly-broad and discriminatory rule prohibiting union stewards from soliciting grievances in violation of Section 8(a)(1) and (5). These allegations are in complaint paragraphs 5(d)(1), (2), and (3), respectively.

On March 27, the Employer called a stand up meeting of letter carriers on the workroom floor at Highland Station. Such a meeting is held about once a week. The meetings are paid time and are scheduled without consultation with the Union. The target time for stand up meetings is 10 minutes, to avoid scheduling overtime.

The standup meeting on March 27 was conducted by Supervisor Susan Tofoya.<sup>12</sup> Tofoya had just returned to duty at Highland Station from a detail and had noted that in her absence a stand up had taken 30 minutes. She conferred with her supervisor, Manager Lorrel Grosse, about this before the March 27 meeting. Grosse emphasized to Tofoya the need to adhere to the 10-minute time limit.

When Tofoya concluded her remarks at the March 27 meeting, Segarra said that she had some things to say and was recognized by Tofoya. There followed extended remarks by Segarra to the employees regarding purported contract violations by the Employer. Segarra encouraged the carriers to see their

<sup>12</sup> There was extensive testimony regarding standup meetings, including the March 27 meeting. Much of the testimony is consistent. Supervisors and managers who testified regarding standup meetings included Hardin, Jack, Grosse, Tofoya, and Manning. Employee and union representatives testifying included Pratt, Segarra, Copeland, Metz, Gill, Manual Madrid, Joel Wadsworth, and Phillip Carabaja. The facts in this decision regarding the stand up meetings generally and the facts regarding the March 27 meeting and the events later that day are a composite of the credible and probable portions of the testimony. To the extent that some testimony is inconsistent with my findings, it has not been credited based upon the probabilities and the demeanor of the witnesses.

steward and file grievances and to write up statements regarding overtime incidents for use in filing grievances. During the course of these remarks by Segarra, Tofoya told Segarra that she needed to conclude her remarks. Segarra replied, "You know, I sat here and listened to you, now you're going to sit here and listen to me." Segarra continued her remarks to the employees. Eventually Grosse motioned to Tofoya to cut Segarra off by drawing her finger across her throat and Tofoya ended the meeting. The employees had clocked onto training time for the meeting. Segarra clocked off training time at the conclusion of the meeting. Segarra's time records show that she was on training time for 27 minutes.

During the course of standup meetings the union stewards are typically are invited to offer input. The Union is a participant in the facility safety programs and safety is a subject sometimes addressed by the union members of the safety committee. Prior to March 27, stewards had asked for and received permission to make remarks without prior review by management.

There is no substantial evidence that the Union exercised any control over stand up meetings or that they were considered joint labor-management meetings. On brief the General Counsel contends that Prestien on occasion conducted standup meetings. The evidence does not show that Prestien was ever in charge of a stand up meeting or that his participation warrants a conclusion that he ever conducted a standup meeting. In this regard, the General Counsel contends on brief that Prestien, Pratt, Gill, and Metz testified, un rebutted, that union officials have for years, without censorship, addressed letter carriers at stand ups about union issues, including the filing of grievances. After reviewing the record, I find that it does not support a conclusion that prior to March 27, the Union solicited grievances or conducted internal union business at standup meetings. The General Counsel also asserts on brief that there is a history of union stewards and officers being allowed to suggest at standup meetings that aggrieved employees should see their union steward regarding the filing of grievances. That assertion is not supported by credible and probative evidence. While the Union had never been told in the past that the Employer's standup meetings could not be used to conduct union business or solicit grievances, the evidence also does not show that there was any relevant precedent for Segarra's remarks at the March 27 standup meeting.

Following the March 27 meeting, Grosse made a decision that in the future, the Union would be required to clear in advance topics that the Union wished to address at standup meetings, that the Union would not be permitted to solicit grievances at those meetings, and that the meetings would be held to the 10 minute target. Tofoya related the new rule to supervisors, including Manning. She also spoke to Stewards Michael Gill and John Metz that day. Tofoya told Gill and Metz that the stand up meeting that day was a management meeting and that management was not going to allow the Union to turn it into a forum regarding contract issues that had to be handled through the grievance process. Manning advised Segarra of the rule later that day.

Manning spoke with Segarra about the rule later in the day on March 27, in a room identified as a conference room. The

room had double doors and at least one door was open. The conference room was used for training and had tables and chairs. The room adjoined the workroom floor. Manuel Madrid, a letter carrier on limited duty, performed work duties there and Segarra used the room to work on grievances when she was on steward time. When Manning entered the room on March 27, the only other persons present were Segarra and Madrid. There ensued an exchange between Manning and Segarra. Manning, Segarra, and Madrid testified about what occurred. The following is a composite of the more credibly offered and probable testimony.

Manning initiated a conversation with Segarra by asking, "What's new?" Segarra testified that his demeanor was cordial. Segarra's response was not cordial. She asked, "What's new with what?" Madrid testified that Manning quit smiling. Manning replied, "Well, what's new with anything, you know." Segarra then asserted that she was not receiving steward time for grievances and that she had not received information from the Employer that she had requested. Segarra stated that she would be filing additional Board charges if she did not receive the information. Manning said he would get the information she needed. Manning then told Segarra that she would not be allowed to solicit grievances during stand up meetings. He told Segarra that in the future she would have to tell him or Grosse in advance what she wanted to talk about at stand up meetings and get their approval. He specifically told her that she was not going to be allowed time to tell employees at standup meetings to not volunteer for overtime and to take time to write statements if they were mandated to work overtime. I find that Manning's remarks regarding soliciting made in the training room addressed only soliciting at stand up meetings and that Manning did not tell Segarra at this meeting that she was not allowed to talk to carriers unless they asked to speak to her. In reaching this conclusion I have considered the testimony of Madrid and the demeanor of all the witnesses. Contrary to the contention of the General Counsel on brief, the credible and probative evidence does not show that Manning told Segarra that she was not to file a grievance unless the grievance was initiated by a letter carrier. Manning clearly was delivering an instruction to Segarra regarding standup meetings and did not seek to negotiate with her regarding the issue.

On August 19, then Branch 504 president Bill Prestien wrote a letter to Highland Station Manager Thomas Jack, in response to a letter Jack had sent to Prestien following a subsequent incident involving remarks Segarra wished to make at a standup meeting on August 14. In his letter Prestien described in detail the Union's position regarding the rights of the Union at standup meetings. As examples of past union and employee participation at standup meetings Prestien cited announcements of club functions, elections, meetings, births, marriages, retirements, and get-well cards. He made no claim of any right of the Union to solicit grievances or to conduct internal business at standup meetings.

On August 28, the Union filed a grievance over the restriction on union participation in standup meetings at Highland station that were imposed after the March 27 meeting. On September 23 the grievance was settled. Prestien signed the grievance settlement for the Union. The following is the remedy

provided by the settlement:

The Union shall be allowed to participate and make announcements at stand up talks. The parties mutually agree that stand up should not turn into debate forums where the parties go back and forth arguing, when management criticizes the carriers, however, the Union has the right to stick up for them.

The General Counsel contends that the Employer made a unilateral change in terms and conditions of employment on March 27, by prohibiting the solicitation of grievances at stand up meeting. The credible and probative evidence does not establish that there was a well established, long standing practice of union agents soliciting grievances at standup meetings that might support an argument that there was an unlawful unilateral change. See *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited there; *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 355 (2003), and cases cited there. Rather, the evidence establishes only that there was a history of the employer inviting input from the Union for routine announcements and safety committee reports.

The question of whether Segarra's remarks to the employees were protected concerted activity is a different issue. She asked for and was granted permission to speak and the content of her remarks before she was asked to conclude her remarks was protected.

Because Segarra's right to address the employees was based on the consent of the Employer and the stand up was held on work time, Tofoya did not unlawfully interfere with protected speech when she initially told Segarra that she needed to conclude her remarks. In this regard, the evidence does not show that Segarra was abruptly cut off or that Tofoya was other than polite in her request. Instead of concluding her remarks, Segarra rudely responded to Tofoya and ignored her request. Segarra effectively took control of the worktime meeting. Segarra's actions were not in the context of a labor-management meeting where employees appearing in a representative capacity do not lose their statutory protection because of offensive conduct. See *Caterpillar, Inc.*, 322 NLRB 674, 677 (1996). Segarra's statement to Tofoya would reasonably have the effect of undermining Tofoya in front of the employees and Segarra's refusal to conclude her remarks was not protected.

The complaint alleges that on March 27, in violation of Section 8(a)(1) of the Act, Manning threatened its employees with unspecified reprisals for soliciting grievances and for filing Board charges. There is no substantial evidence that on March 27, Manning threatened Segarra or any other employee with reprisals for soliciting grievances or for filing Board charges. Accordingly, I conclude that paragraph 5(d)(1) of the complaint has not been proven and I recommend that it be dismissed.

The complaint alleges that on March 27, in violation of Section 8(a)(1) and (5) of the Act, Manning promulgated an overly-broad and discriminatory rule prohibiting union stewards from filing grievances unless employees initiated the grievances. The credible testimony does not establish this allegation. Accordingly, I conclude that paragraph 5(d)(2) of the complaint has not been proven and I recommend that it be dis-

missed.

The complaint alleges that on March 27, in violation of Section 8(a)(1) and (5) of the Act, Manning promulgated an overly broad and discriminatory rule prohibiting union stewards from soliciting grievances. The evidence shows that the Respondent did promulgate on that date rules restricting union participation in standup meetings that required advanced approval of the subjects that would be addressed by the Union and which prohibited the solicitation of grievances at stand up meetings. I conclude that the General Counsel has not proven that the Union had a right protected by the Act to engage in the conduct addressed by the challenged rules regarding the Union's participation in stand up meetings. Moreover, Segarra's remarks at the March 27 standup meeting were inconsistent with the instructions she had received at the February 20 official discussion involving Lovato, discussed supra. Accordingly, I conclude that paragraph 5(d)(3) of the complaint has not been proven and I recommend that it be dismissed.

#### 9. March 27 personnel action against Segarra

The complaint alleges in paragraphs 6(a), (b), and (c) that on March 27, the Employer violated Section 8(a)(1), (3), and (4) of the Act by first discharging Segarra, then converting her discharge to emergency placement in off-duty status and thereafter again discharging Segarra in violation of Section 8(a)(1), (3), and (4).

At the March 27 meeting in the training room discussed above, Segarra told Manning she was allowed to solicit grievances any time because that was her duty, and asked if he was giving her a direct order to not solicit grievances at stand up meetings. Manning replied that he was giving her a direct order. Segarra told Manning that she wanted a witness to his order and she began calling out to the workroom floor for someone to come to the training room to be her witness. Manning told Segarra that she did not need a witness and began walking away, and motioned for an employee who had responded to Segarra's call for a witness to return to work. Segarra identified that employee as Jerry Martinez. Jerry Martinez did not testify. As Manning was walking away Segarra yelled after him, "Come back here you coward." Madrid was still in the room making a personal phone call and he testified that he did not hear the quoted remark. I do not credit Madrid's claim that he did not hear Segarra's challenge to Manning because it was not credibly offered and it is highly improbable that he did not hear Segarra. Given the timing of the events, I conclude that Jerry Martinez also heard Segarra's shout. The door to the training room was open when Segarra yelled at Manning. Customer Service Supervisor Patricia Manous was walking toward the training room at the time of this incident and heard Segarra yell at Manning. Manous spoke with Madrid in the training room regarding a delivery away from the facility. Manous and Madrid left the training room.

Manning did not stop or respond to Segarra and walked to Grosse's office, to discuss what had just happened. Grosse was not in her office. Manning then asked Manous to accompany him back to the training room to be a witness. Manning had determined that he was going to discuss the incident with Segarra. When Manning and Manous arrived at the training

room, Segarra was on the phone. She had called union president David Pratt at the Union's office, located away from Highland Station. When Manning returned to the training room, he told Segarra that he was instructing her to come to the office. He heard Segarra say to Pratt, "He is now telling me to come to the office." Segarra told Manning that she was talking to Pratt and that he would be over in 5 minutes and that she was not going to the office without her union representative. Manning said that she did not need her union representative and that he was giving her a direct order to come to the office and if she did not follow his direct order, she could be disciplined, up to and including removal from the post office. Segarra began yelling at Manning, telling him to leave her alone and to get out. Manning told her to not tell him to leave and repeated his instruction that she come to the office. Segarra began chanting loudly, "Leave me alone, sir." Manning walked away for a moment, and returned to ask Segarra if she understood that she could be terminated if she did not follow his instruction. Segarra was crying and yelling repeatedly that she was waiting for her representative, that he would be there in 5 minutes and that she was invoking her *Weingarten* rights. Manous credibly described Segarra's demeanor as hysterical. Manning did not raise his voice and did not approach closer than four or five feet from Segarra. At this point Manning told Segarra that she was being placed on 16.7 emergency leave status instructed her to clock off and leave the facility. Segarra initially refused and the instruction was repeated. Segarra said she would leave, but claimed Manning was blocking her way. Manning moved well away from the training room door and Segarra left the room and clocked out.

Segarra testified on direct examination that Manning told her both that she was fired and that she was being placed on 16.7 emergency leave status. I do not credit Segarra's testimony that Manning told her that she was fired because it was not credibly offered and is improbable. Article 16, section 7 of the contract, is titled "emergency procedure" and provides that an employee may be placed on emergency off-duty status. An employee on 16.7 emergency leave status has not been fired and is entitled to the procedures that must be followed before the employee may be discharged. It is improbable that Manning would have told Segarra that she was fired and, at the same time, told her that she was being placed on 16.7 emergency leave status. Detailed procedures must be followed before a letter carrier is discharged and a proposed discharge must be reviewed and concurred in by the installation head or a designee. It is improbable that Manning would have told Segarra that she was fired or that Manous would not have corrected him if he had.

Segarra described a dramatic and emotional scene as she went toward the timeclock, walking backwards, telling Manning to quit following her, running into an eyewash stand and falling to the floor while repeating, "I can't believe I'm fired. After 17 years, I can't believe I'm fired." This evidence is of marginal relevance to the issues in this case. Her testimony concerning her supposed excited utterance about her being fired was uncorroborated. If she did repeatedly make such a statement, it was made despite her certain knowledge that she had not been effectively fired.

Later on March 27, Manning mailed a memorandum to Se-

garra confirming that she was on emergency off-duty status under Article 16.7 of the contract. The memorandum stated, "An employee may be immediately placed on an off-duty status by the Employer, but remains on the rolls, when the employee may be injurious to self or others." The memorandum also advised Segarra of her rights to file a grievance.

On April 3, the Employer conducted a fact finding meeting regarding the events of March 27. Present were Segarra, Pratt, Tofoya, and Manous, who took notes of the meeting. Subjects discussed included Segarra soliciting grievances and the March 27 events. The meeting began with Segarra asking what she was charged with. Tofoya replied, "Failure to follow a direct order, insubordination, failure to follow instructions, 16.7." There is no allegation and there has been no contention that any unfair labor practice was committed at the fact finding meeting.

On May 14, Tofoya issued a notice of removal to Segarra that summarized the Employer's version of the March 27 incident and the fact finding meeting. The notice of removal notified that she would be removed from the Postal Service effective June 18. The stated reason for her termination was insubordination based upon her repeated refusal to obey Manning's direct order to go to the office. A grievance was filed regarding Segarra's placement on off duty status and her removal. She was returned to work on July 25.

A March 22, 2002, memorandum to all Albuquerque managers addresses the placement of employees off-duty, either on paid administrative leave or in nonpay status. The memorandum states that a letter carrier "may be immediately placed in an off-duty status (without pay)" in the following situations:

1. Intoxication (use of drugs or alcohol).
2. Pilferage
3. Failure to observe safety rules and regulations
4. Cases where retaining the employee on-duty may result in damage to USPS property, or loss of funds.
5. Cases where the employee may be injurious to self or others.

The March 22, 2002 memorandum states that insubordination is a qualifying reason for placing an employee on off-duty status under Article 16.7 of the contract only if "the employee's behavior is caused by, or may result in" one of the five situations listed above. The memorandum states that if insubordination is not caused by or may result in one of the five conditions, management is limited to placing the insubordinate employee on paid administrative leave, pending further action.

The Employer's written policy, reflected in a March 30, 1998 memorandum, defines insubordination as a failure to follow a direct order and states that insubordination can be grounds for dismissal, even for a first offense. Segarra clearly understood the significance of an instruction being phrased as a direct order. The Employer defines the elements of insubordination as follows:

1. The employee was given a direct order.
2. The employee was aware that it was a direct order.
3. The order was clear and understandable.
4. The employee's failure to comply was intentional.
5. The employee was warned of the consequences of the failure to comply.

6. The order was reasonable and necessary to the safe, orderly, and efficient operation of the organization.

The memorandum provides that “except in emergency situations, the Labor relations office or Manager, Human Resources must be contacted for advice prior to placing an employee off duty, either with or without pay.” Manning credibly testified that he was not aware of this requirement at the time he placed Segarra off duty and he did not contact labor relations or human resources before placing Segarra off duty.

Article 16.7 of the contract permits an employee to be placed in nonpay status; however, the payroll records in evidence reflect that Segarra was paid during the period between March 27, and her return to work on July 25.

The credible evidence does not establish that Segarra was fired on March 27. Rather, she was on off duty status, pending a decision on what action would be taken.

The complaint alleges that Segarra was placed on emergency off-duty status on March 27, and was discharged on May 14, because she had engaged in Section 7 activity, had filed charges, had given testimony under the Act and had stated an intention to file charges with the Board, all in violation of Section 8(a)(1), (3), and (4) of the Act. The Employer contends that Segarra’s protected activities were unrelated to the actions taken against her.

In cases like this one, involving 8(a)(3) violations that turn on the employer’s motivation, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis requires the General Counsel to make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer’s action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004); *Naomi Knitting Plant*, 328 NLRB 1279 (1999). Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). However, if the evidence establishes that the reasons given for the Respondent’s action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden State Foods Corp.*, 340 NLRB 382 (2003).

There is usually not direct evidence of unlawful motive in discrimination cases. Unlawful motive may also be inferred from circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice, and shifting or pretextual reasons being offered for the action. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004); *Naomi Knit-*

*ting Plant*, 328 NLRB 1279 (1999); *Pacific Design Center*, 339 NLRB 415 (2003).

Segarra was very active and assertive in performing her steward duties and Manning was aware of her activities. Segarra filed many grievances and regularly used substantial amounts of paid steward time. In addition, she addressed labor-management issues when supervisors approached her during worktime regarding routine work issues. At the meeting in the training room Segarra was engaged in protected activity when she told Manning that she intended to file Board charges if requested information was not furnished, when she complained about having received insufficient steward time and when she challenged the rule regarding union participation in standup meetings.

Based on the probabilities and Manning’s credible testimony I conclude that when he told Segarra to go to the office he was responding to her shouted command to him. “Come back here you coward.” I attach little weight to the conclusory testimony by Madrid and Segarra regarding their subjective assessments that Manning’s demeanor became angry in response to Segarra’s statements in the training room regarding grievances, steward time, information requests and Board charges. Segarra acknowledged that Manning was cordial when he initially came into the training room and greeted her, saying, “What’s new?” Segarra’s unprovoked hostile reply, “What’s new with what?” did not encourage further cordiality. Her unprovoked hostility to a supervisor was not unusual. Manning did not, however, respond in kind. Rather, Manning told Segarra that he would get information she was seeking, and he did not attempt to dissuade her from filing grievances or charges and he did not otherwise respond to Segarra’s announced plans. He turned the conversation to the rule regarding standup meetings, the only apparent reason he would have wanted to initiate a conversation with Segarra at that time. Manning’s subsequent conduct before he walked out of the training room provides no substantial evidence of hostility to Segarra’s protected activities. It was not unusual for Segarra to register union-related complaints when a supervisor spoke with her.

Segarra’s shouted remark made to Manning as walked away from the training room was opprobrious and, viewed in isolation, unprotected. The General Counsel contends, however, that this conduct was part of the “res gestae” of Segarra’s protected activity in the training room, and as such was protected. The General Counsel relies on *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965), and its progeny, which hold that employees’ right to engage in Section 7 activity permits some leeway for impulsive behavior in the course of the protected activity, which must be balanced against the employer’s right to maintain order and respect. Thus, the contention is that the Employer was not privileged to discipline Segarra based on her refusal to go to the office to talk with Manning.

Segarra’s conduct occurred after the protected discussion in the training room had ended and Manning had left. Segarra did not claim that her behavior was impulsive. The evidence is that she considered unprovoked hostility and voicing her contempt for supervisors to be a legitimate labor-management tactic. She was disrespectful to Tofoya at the meeting earlier that day and

it was not exceptional for her to speak rudely to a supervisor. At the fact finding meeting regarding the March 27 incident, she stated that conflict was the nature of the business. The evidence regarding her phone call to Platt from the training room does not show that she was concerned about there being any consequences for her yelling at Manning. The weight of the evidence is that Segarra's conduct in a working area was not a continuation of her activity in the training room and was not protected activity. See *Potential School for Exceptional Children*, 282 NLRB 1087 (1987); *Postal Service*, 282 NLRB 686 (1987); *Postal Service*, 268 NLRB 274 (1983).

Assuming, without deciding, that Segarra's conduct was a part of her protected activity in the training room, the Board recognizes that an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act. Four factors are considered in making that determination. They are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979); *Trus Joist Mac Millan*, 341 NLRB 369 (2004), and cases cited there.

The locus of the opprobrious conduct was a work area. Two employees, Madrid and Martinez, heard the remark and there was a likelihood that other employees heard the remark and others would learn of the remark. This factor weighs heavily against Segarra's conduct being protected. The subject matter that was relevant to Segarra's opprobrious conduct was the directive regarding Segarra's future participation in standup meetings. This factor weighs in favor of Segarra's conduct being protected. The significance of this factor is attenuated by the fact that the discussion of the rule had clearly ended when Manning issued the directive as a direct order and the next step was a grievance or Board charges. The nature of Segarra's outburst was serious. Segarra's denigration of Manning went beyond insult and would have the foreseeable effect of undermining Manning's standing in the eyes of employees who observed or later learned of the occurrence. This factor weighs against Segarra's conduct being protected. The evidence does not show that Segarra's conduct was provoked by any unfair labor practices. The issue that prompted Segarra's opprobrious conduct was the rule regarding the Union's participation in standup meetings, which was not an unfair labor practice. This factor weighs against Segarra's conduct being protected. Balancing the *Atlantic Steel Co.* factors, I find that because of her conduct Segarra forfeited the protection of the Act. See *Trus Joist Macmillan*, supra; *Piper Realty Co.*, 313 NLRB 1289 (1994).

Assuming, without finding, that Segarra was protected from discipline for her opprobrious conduct on March 27, under *Atlantic Steel Co.*, the evidence is that she was disciplined for her refusal to comply with Manning's instruction that she go to the office. The evidence does not establish a reasonable belief by Segarra that Manning intended to conduct an investigatory interview. When Manning assured Segarra that she did not need representation he was committed to limiting the meeting to no more than an official discussion and there was really nothing to investigate. The issue of reasonable belief is judged

by an objective standard. I therefore attach no weight to evidence, stressed by the General Counsel that Segarra suffered from posttraumatic stress syndrome. *Weingarten*, supra at 257 fn. 5.

Even if Segarra had a reasonable belief under *Weingarten* that the meeting might lead to discipline, she was not privileged to refuse to comply with the directive until Platt arrived. As stated by the Board in *T.N.T. Red Star Express, Inc.*, 299 NLRB 894, 894-895 (1990):

[A]n employee's Weingarten rights, with all its attendant safeguards, matures at the commencement of the interview, be it on the production floor or in a supervisor's office. If the employer chooses to initiate its investigation in a work area, then it is bound to comply immediately with an employee's request for representation there. If, however, the employer . . . asks the employee to leave the production area and go to an office or some other location where further discussion is contemplated, then the employee acts at his or her peril if he or she declines to do so.

While an employee may, therefore, refuse to participate in an interview in the absence of requested representation, the employee is not privileged to ignore the employer's order to report to the office for such an interview. Accordingly, the Board in \*895 Roadway Express found that the employer did not violate the Act by suspending an employee for disobeying an order to leave the dock area and proceed to the company office for a Weingarten interview. See *Joseph F. Whelan Co.*, 273 NLRB 340 (1984); *United States Steel Corp.*, 253 NLRB 593 (1980).

Manning testified that he wanted Segarra to come to the office because there were other employees in the vicinity of the conference room and that he wanted to have a discussion with her about the name she called him to tell her that it was uncalled for. There is an absence of substantial evidence that Manning directed Segarra to go to the office for any other reason. It was an established policy that disobeying a direct order can be grounds for dismissal, even for a first offense.

In view of all the foregoing, I conclude that the General Counsel has not established, by a preponderance of the evidence, that Segarra was initially discharged on March 27, or that Segarra's protected activity was a substantial or motivating reason for the employer's action in placing her on off-duty status and thereafter issuing the letter of removal. Accordingly, I conclude that paragraphs 6(a), (b), and (c) of the complaint have not been proven and I recommend that they be dismissed.

#### 10. Promulgation of a discriminatory rule by Tofoya and enforcement by Manning after March 27

There was testimony that between March 27, the date of the stand up meeting incident involving Segarra, and September 23, the date of the grievance settlement regarding stand up meetings, Stewards Gill and Metz sought permission to address matters at standup meetings, as did Segarra following her return to work on July 25. In some instances permission was granted and in other instances permission was denied. The testimony provided little detail regarding the incidents. This evidence was offered in support of complaint paragraphs 5(h) and (i),

which allege the promulgation and enforcement of an overly-broad and discriminatory rule prohibiting union stewards from discussing grievances or other subjects relating to wages, hours, and working conditions at stand up meetings, without first obtaining permission from the Respondent. The rule addressed in those allegations was the rule promulgated on March 27, which was not unlawful. Accordingly, I conclude that paragraphs 5(h) and (i) of the complaint have not been proven and I recommend that they be dismissed.

11. Promulgation of a discriminatory rule  
by Lovato since in or about April

The complaint alleges in paragraph 5(e) that since in or about April 2003, on an unknown number of occasions and on unspecified dates, Lovato promulgated an overly-broad and discriminatory rule prohibiting its union stewards from discussing grievances or other subjects relating to wages, hours, and working conditions on the workroom floor at Highland Station. This allegation appears to be based on the rule Lovato and Manning enforced against the Union soliciting grievances on the workroom floor during worktime, which I have concluded was not violative. Accordingly, I conclude that paragraph 5(e) has not been proven and that it should be dismissed.

12. Surveillance and creating the impression of surveillance  
by Lovato since in or about April

The complaint alleges in paragraphs 5(f)(1) and (2) that since in or about April 2003, on an unknown number of occasions and on unspecified dates, Lovato engaged in surveillance of employees' union activities and created the impression of surveillance of employees' union activities at Highland Station. This allegation appears to be based on the enforcement of the rule against the Union soliciting grievances on the workroom floor during worktime, which I have concluded was not violative. Accordingly, I conclude that paragraphs 5(f)(1) and (2) of the complaint have not been proven and I recommend that they be dismissed.

13. Surveillance and creating the impression of surveillance  
by Tofoya, Grosse, Jack, and Perez since in or about April

The complaint alleges in paragraphs 5(g)(1) and (2) that since in or about April 2003, on an unspecified number of occasions, Manning, Tofoya, Grosse, Jack and Anthony Perez engaged in surveillance of employees' union activities and created the impression of surveillance of employees' union activities at Highland Station. Perez was a supervisor of customer service. In support of these allegations the General Counsel contends on brief that the evidence establishes that after March 27, Stewards John Metz and Michael Gill were repeatedly told by supervisors and managers that they could not talk to the letter carriers about union business.

Steward Metz testified that on an unspecified date after March 27, he had a conversation with an unidentified carrier who had stopped at the case where Metz was working. After the conversation was finished and the employee walked away, Supervisor Mel Sanchez initiated a conversation with Metz. According to Metz, Sanchez said that stewards couldn't be talking to carriers about union business unless they requested time to see a steward. Metz responded that they could do that,

but that generally the carriers just want to stop and ask a quick question and it's over. According to Metz, Sanchez "backed off." Sanchez did not question Metz about the content of the conversation he had just had with the carrier. Metz testified that on earlier occasions Sanchez had told Metz, without reservation, that carriers could not talk with stewards carriers about union business unless they ask to see a steward. Before this testimony was elicited the General Counsel asked Metz if he had any experience with Sanchez enforcing the rule against soliciting grievances, at which point the Respondent objected that the General Counsel was attempting to broaden the complaint and the General Counsel disclaimed any intent to amend the complaint and there has been no motion to amend the complaint to allege that Sanchez engaged in surveillance or creating the impression of surveillance of employees' union activities. Sanchez did not testify about the conversations Metz described.

Steward Michael Gill testified that after March 27, and prior to his transfer from Highland Station to the Airmail Facility in Albuquerque on September 6, Lovato, Tofoya, and Perez stated that stewards could not solicit grievances on the workroom floor. Gill testified, "Any time a letter carrier would approach my case, or I was having a discussion with any letter carrier at any time on the floor, they would always reiterate to myself 'I hope this is not union business. You can't talk your union business on the workroom floor.'" No details regarding the conversations were provided. The evidence does not show that Gill's conversations with other carriers were casual conversation while they performed their work tasks, rather than work interruptions. The evidence does not establish the identity of any of the employees Gill had spoken with. Because of the conclusory nature and lack of detail in Metz' and Gill's testimony, I find that the evidence is insufficient to support a finding of a violation based upon the particular wording of the remarks made by the supervisors. The evidence does not show that the employees were present at the times the supervisors spoke to Gill.

These allegations appear to be related to the enforcement of the rule against the Union soliciting grievances on the workroom floor during worktime, which I have concluded was not violative. Because of the conclusory nature and lack of detail in Metz' and Gill's testimony, I find that the evidence is insufficient to support a finding of a violation based upon the particular wording of the remarks made by the supervisors. Accordingly, I conclude that paragraphs 5(g)(1) and (2) of the complaint have not been proven and I recommend that they be dismissed.

14. Denying employee Gloria Baros union representation  
and requiring employee Clarence Ortega to represent Baros

The complaint alleges in paragraphs 5(j), (k), and (l) that on June 20, the Respondent violated the Act by requiring employee Clarence Ortega, who is alleged to hold "no office" with the NALC or the Local to represent employee Gloria Baros at an investigatory interview; that Baros had reasonable cause to believe the interview would result in discipline; and that the Respondent denied the request of Ortega to confer with Baros during the investigatory interview.

It is well established that a represented employee has the right to have a union representative present during an investiga-

tory interview, which the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There are general rules that define employees' *Weingarten* rights. The right to representation is an individual right of the employee, not the union, and must be invoked by the employee. The employer may advise the employee of the *Weingarten* right to representation, but such advisement is not required. The employee has the right to request a specific union representative and to have that individual be the representative, if the requested representative is available. The employer is not required to postpone the interview if the requested representative is unavailable. The union representative must be permitted to provide assistance and counsel to the employee during the interview, but does not have the right to disrupt or obstruct the interview. If the employee has not been given advance notice of the interview, the employer must allow the employee and the union representative to confer in private before proceeding.

Gloria Baros was a letter carrier assigned to the Albuquerque Main Office Carrier Annex (MOCA) and was represented by the NALC. Baros retired prior to the hearing and did not testify. At the time of the alleged violations Baros was temporarily assigned to work at the Vehicle Maintenance Facility (VMF) because of her physical limitations. The record does not reflect that any other NALC represented employee was then working at the VMF. The MOCA and the VMF are in separate buildings near one another. Baros worked under Michael Quintana, who supervised motor vehicle craft employees at the VMF. The American Postal Workers Union (APWU) apparently represents the regular employees at the VMF.

In June, Quintana had been assigned to conduct a fact finding meeting with Baros. The fact finding related to a Department of Labor investigation of workers compensation claims by Baros for paid time off for medical appointments. When Quintana learned that he would be conducting the fact finding, he advised his manager, a Mr. Smith, that they needed to arrange for NALC representation for Baros. Smith called Alfred Boca, the manager of the MOCA regarding the situation and told him that they might need a NALC representative for the fact finding meeting at the VMF and that they would call Boca and let him know when the meeting was scheduled. This call to Boca apparently was made on June 19.

On June 20, Quintana advised Smith that he would conduct the fact finding that day. Smith called Boca, who arranged for employee Clarence Ortega to go from the MOCA to the VMF and be available to attend the fact finding for Baros. Ortega went to the VMF and met Quintana. Quintana then summoned Boca and the three met briefly. Quintana told Baros there would be a fact finding. He also told her that Ortega was there and asked her if she would like a steward. She said she would. They then went to a different location where a fact finding meeting began. The participants were Quintana, Baros, and Ortega. Boca did not ask for a different representative and Ortega did not object to the conduct of the proceeding. The meeting was recessed by Quintana after about 30 minutes and was scheduled to resume on June 24.

The fact finding was clearly an investigatory interview. When Baros was summoned to join Quintana and Ortega and

was told that there would be a fact finding, she had a reasonable basis for believing that the interview might result in disciplinary action and she effectively invoked her *Weingarten* rights.

There is no contention that the Respondent violated that Act by conduct following the recess of the fact finding on June 20. The fact finding meeting was completed on June 24. Ortega did not attend the second meeting and Baros was represented by Richard "Smiley" Martinez. There is no evidence that Baros was disciplined as a result of the fact finding.

When Boca received the call from Smith on June 20, he went to the mail casing area to find a representative to participate in the fact finding meeting. The steward for the letter carriers at MOCA was John Trujillo and the alternate steward was Will Bowman. Both Trujillo and Bowman were not present, having apparently already left to deliver their routes. Boca asked Clarence Ortega to go to the VMF to participate in the fact finding for Baros. Ortega told Boca that he was not a steward, but he agreed to attend the fact finding. In the parlance of the Postal Service, Boca "instructed" Ortega to go to the VMF, but did not give him a "direct order" to do so. Boca testified that he picked Ortega because he was the only person then present at MOCA with official NALC ties.

In finding that Ortega told Boca that he was not a steward I have credited Ortega. His testimony on this issue was more credibly offered on this issue than the inconsistent testimony of Boca, which was elicited, in part, with a leading question. Moreover, it is probable that Ortega would have viewed participation in the fact finding as being a steward duty. Ortega had formerly been a steward for 15 years prior to 2002, and as such had participated in numerous fact findings. On June 20, however, he held another post with the Union. Boca was not sure of what post Ortega had with the Union, but he received faxes regularly from Ortega relating to grievance settlements and arbitrations. At the time of the hearing Ortega was a state NALC association vice president and a business agent for NALC Region 10, covering New Mexico and Texas. As a business agent he handles arbitrations. It is not clear what posts he held on June 20. On brief, however, the General Counsel acknowledges that Ortega was an NALC representative on June 20. It is probable that Ortega would be sensitive to the responsibilities and prerogatives of stewards.

Ortega's testimony that he told Boca that he was not authorized to represent Baros was not convincingly offered and is not credited. On cross-examination Ortega acknowledged that when he went to the VMF he did not voice any objection to participating in the fact finding. Considering his experience as a union representative, it is improbable that he would not have again raised the issue of his authority with Quintana or in some other way objected to proceeding with the fact finding, if his lack of authority was a concern or if he was otherwise not disposed to represent Baros.

In concluding that Bowman was not present when Boca asked Ortega to represent Baros, I have credited the testimony of Boca over that of Ortega. Boca's testimony on this issue was more credibly offered and the record does not establish any logical reason why Boca would have insisted on Ortega going to the fact finding, rather than Bowman. Ortega testified that Bowman was standing next to him while he was talking to

Boca. The failure of the General Counsel, without explanation, to call Bowman to corroborate Ortega lends further support to my credibility resolution.

Ortega testified in conclusory fashion that he had asked for an opportunity to meet with Baros before the meeting, which request was denied. Ortega testified that he made the request “when I got there.” The record does not establish that such a request was made after Baros joined Ortega and Quintana. Ortega also testified that he asked to “step out” and speak with her, suggesting that she was then still in the work area. Thus, the record evidence does not show that Ortega asked to meet with Baros at a time after Baros had expressed a wish to be represented. After Baros expressed a wish to be represented, Ortega did not renew his request to meet with Baros before the fact finding began. An employee has a right under Weingarten to consult with a union representative before any interview once a *Weingarten* right has attached and the request may be made by the union representative furnishing the representation requested. *Postal Service*, 303 NLRB 463, 467 (1989). The right does not arise, however, unless and until the employee has requested representation. Accordingly, the denial of a meeting in the present case was not violative.

Assuming, without deciding, that the premature request by Ortega to meet with Baros thereafter became effective when Baros requested representation, there was nevertheless no violation on the particular facts of this case. For the right to prior consultation to have any meaning, the employee and the union representative must have some indication of the matter being investigated because, without that knowledge, there is nothing about which to consult. *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982). The record does not establish that prior to the meeting Baros knew what the subject of the fact finding would be. Before beginning the questioning Quintana told Ortega that if at any time during the fact finding he wished to consult with Baros he could. Several times during the fact finding Ortega did ask to consult with Baros. Quintana each time left the room to permit Ortega and Baros to talk in private. On these facts, I conclude that the Employer satisfied the *Weingarten* obligation to permit consultation.

Quintana had a number of written questions he intended to ask Baros. Initially Ortega asked to see the questions before they were asked. Quintana declined to share the information at that time, but told Ortega that he could take notes and that when the fact finding was complete, he would provide the questions to Ortega, as well as a copy of what he wrote down as Baros’ answers. Ortega did not object to proceeding or ask for a continuance to permit some other agent to represent Baros. There is an absence of evidence that Baros wanted someone else to represent her. It became apparent after about 30 minutes that Baros needed to bring in records to answer the questions and the meeting was recessed until June 24.

Ortega testified, “Before the interview started he stated he was going to conduct an investigative interview and that I was there solely as, I guess you would call it a passive observer, and I was not to question any of the—his interview.” This conclu-

sory opinion by Ortega is not a substitute for an account of what was said and is insufficient to show what limits Quintana imposed on Ortega’s participation in the fact finding. Moreover, it is inconsistent with Quintana’s offer to take a recess whenever Ortega wanted to confer with Baros. The words “passive observer” are found in the JCAM, which correctly states that an employee’s *Weingarten* rights would be violated if the representative’s role is restricted to that of a “passive observer.” Ortega appeared to be attempting to make the evidence conform to the JCAM description of a *Weingarten* violation. To the extent his testimony supports a conclusion that he was told, in substance, that he was limited to the role of a passive observer, it is not credited.

The General Counsel contends that the union representative in a *Weingarten* interview must be an agent of the labor organization that is the exclusive representative of the employees, citing *Postal Service*, 277 NLRB 1382 (1985). In that case an employee asked to be represented at a *Weingarten* interview by the National Alliance of Postal and Federal Employees. The APWU was the Section 9(a) representative of the employee. The Board found that the employer was not obligated to honor a request for representation by an agent or spokesman of any labor organization other than the APWU. The Board stated, “Were it to do that, it would be bypassing the established union and violating the statute outright.”

The General Counsel goes on to argue that the contract states that the stewards investigate and process grievances and that the employees have a right to their steward’s presence during an investigatory meeting. The General Counsel argues,

However, the Respondent, in a continuing attempt to undermine the Union, sent someone who was not a representative of the Union when one of the stewards, or officers, were present or could have been had they been advised of the pending investigation. By disregarding and bypassing the Union on this occasion, the Respondent has engaged in another form of interfering with the Union and its ability to perform its statutory obligations. According, Respondent’s instruction to Ortega to serve as representative, in lieu of the elected steward, violates Section 8(a)(1) and (5) of the Act.

There are several problems with the General Counsel’s position. The NALC was Baros’ Section 9(a) collective-bargaining representative. The Employer accordingly did not bypass the bargaining representative by asking NALC representative Ortega to be available, should Baros wish representation or by allowing Ortega to participate in the fact finding. In this regard, the record does not establish that Ortega held “no office” with the NALC, as alleged in the complaint. The General Counsel argues that the contract clearly states that the stewards investigate and process grievances. While the JCAM provides that stewards have that right, it does not purport to limit the participation of other NALC agents.

In view of all the foregoing I find that the General Counsel has not established any violation of the Act regarding Baros’ interview. To the contrary, the Employer went beyond the requirements of the Act to insure that representation was available to Baros. Even if some technical violation were established it would hardly effectuate the Act to proceed further.

Accordingly, I conclude that paragraphs 5(j), (k), and (l) of the complaint have not been proven and I recommend that they be dismissed.

15. September threats of reprisal against Segarra by Jack

The complaint alleges in paragraph 5(m) that in early September Jack threatened employees at Highland Station with unspecified reprisals because of their union activities and for participating in Board processes, in violation of Section 8(a)(1).

This allegation relates to an encounter between Segarra and Jack on the morning of September 6. There were upcoming route inspections at Highland Station. The route inspections were to be conducted during selected weeks during a 7-week period. There was an established procedure for determining the weeks when the inspections would take place. The procedure was that the station manager would put numbers in a hat and the union steward drew numbers to identify the weeks.

Jack began as manager at Highland Station in August, having transferred from Alamogordo, New Mexico, where he had been Postmaster. I infer that these were the first route inspections after Jack began at Highland Station.

Jack approached the case where Segarra was working with the numbers in a hat and held out the hat to Segarra. Segarra initially just looked at him and said, "Well, what's the hat for?" Given her tenure and her experience as a steward, it is probable that her expressed puzzlement was feigned. Jack asked her to pull numbers for the route inspections out of the hat. In a sarcastic tone Segarra said "Thank you, sir. I'm surprised you're talking to me. You haven't talked to me. I appreciate that. This is the first courtesy you've ever shown me here." Jack said, "Okay Tina all I want you to do is to pick the numbers for me." Instead of drawing the numbers, Segarra launched into extended comments regarding the asserted mistreatment of carriers. Jack's response, hat in hand, was to continue to ask Segarra to draw the numbers. Jack credibly described Segarra as belligerent. Segarra's rant ended only after Jack told Segarra that she was bordering on insubordination, at which point she drew the numbers. Jack's statement that Segarra was bordering on insubordination is the alleged violation.

Segarra testified regarding a second conversation with Jack later in the day on September 6. Jack did not testify regarding this meeting. Jack invited Segarra to his office. Jack told Segarra that where he came from the Union worked with him. Segarra told him that she was "strictly by the book." Segarra testified in conclusory fashion that Jack apologized to her for threatening her that morning. Segarra also testified, without attempting to relate what was actually said, that Jack implied that where he previously worked the Union overlooked article 8 of the agreement. Article 8 governs overtime. This testimony regarding article 8 was not credibly offered and is totally improbable. Moreover, this testimony regarding article 8 would be entitled to little weight because of its conclusory nature.

Segarra was not seeking to resolve labor-management issues when she responded to Jack's request that she to draw numbers from the hat. Rather, she was using the occasion of her first interaction with the new station manager as an opportunity to speak to him in a harsh and insulting manner on the workroom floor, in the presence of other employees. Her conduct was

unprovoked. Such conduct does not advance collective bargaining. Assuming, without deciding, that Jack's remark technically violated the Act, it would not effectuate the policies of the Act to issue a remedial order, especially considering Jack's apology and his futile attempt to establish better relations with Segarra. Accordingly, I conclude that paragraph 5(m) of the complaint has not been proven and I recommend that it be dismissed.

16. September 12 letter of warning to Segarra

The complaint alleges in paragraph 6(d) that on September 12, the Respondent issued Segarra an undeserved and unwarranted disciplinary letter of warning in violation of Section 8(a)(1), (3), and (4). The record reflects that Segarra was issued a letter of warning on September 22, for an incident that occurred on September 12. The following is a composite of the more credibly offered and probable testimony.

On September 12, Segarra was working as a carrier technician, also known as a T-6. As a carrier technician Segarra was assigned as relief carrier on five routes that are normally covered by other carriers. Segarra ordinarily covered the regular carriers' routes on their scheduled days off.<sup>13</sup> Thus, Segarra usually carried one of the five routes on a predictable schedule. At times carrier technicians are assigned to work a route out of sequence. The local agreement provides that "a Carrier Technician should not normally be moved off of the scheduled route unless absolutely necessary, i.e., customer services reasons or if the Carrier Technician agrees. If there is more than one route available on the string, the Carrier Technician shall have the right to choose."

Mel Sanchez was the carrier supervisor on the morning of September 12. Route 821 was the route Segarra would ordinarily work that day, but the regular carrier for route 821 had been called in to work that day and the regular carrier for route 820 was to be absent. Sanchez planned to have Segarra work route 820.

Segarra arrived on the work floor prior to clocking in for her shift, which began at 7 a.m. Segarra was leaving union literature at carriers workstations when Sanchez approached her to talk to her about her assignments. When Sanchez began talking to Segarra, she told him she was not on the clock yet. Sanchez told her he would finish talking to her when she was on the clock. A little after 7 another carrier, Angela Kleinhenz, approached Sanchez and asked not to be scheduled for overtime that day. Sanchez told Kleinhenz that he would try to accommodate her, but that he could not make any promises. Kleinhenz then spoke with Segarra, who in turn came to Sanchez regarding Kleinhenz' request. Sanchez told her the same thing he had told Kleinhenz. Segarra told Sanchez that he was being unreasonable and that he didn't know how to supervise people and walked away. Segarra testified that she went to reworks before she began casing mail. Segarra (but not Sanchez) described two additional attempts Sanchez then made to talk to her about routes after she clocked in, when she returned from

<sup>13</sup> Letter carriers are scheduled for 5 days of the 6-day workweek, Sunday not being a workday. The normal workday is 8 hours, excluding breaks.

reworks and before she went to the cases. According to Segarra, she was getting her headphones out of her bag (apparently to listen to personal music). She testified that while she was doing this Sanchez attempted to speak to her about vacant routes and she said she was not going to talk to him unless he put her on steward time and she walked away. She testified that he followed and tried to talk to her, and she said "Sir, please don't follow me to the bathroom," and went into a restroom.

Segarra thereafter left the restroom and went to the cases and found the regular carrier for route 821 at his case. Segarra noted that route 819 was not being cased. Route 819 was one of the five routes Segarra normally worked. The carrier for route 819 had called in that he would be late to work and asked that his route be left for him. Segarra erroneously assumed that Route 819 needed to be covered and began casing mail for that route. If she had not refused to permit Sanchez to tell her what her assignment was that day, she would have known that Route 820 was the route she needed to cover.

Sanchez approached Segarra and asked her to move to route 820, because he had nobody to work the mail on that route. Sanchez tried to discuss the matter, but Segarra began saying that she did not want to talk to him, to just leave her alone. He told her again that he needed her to move routes. Segarra began getting loud and told Sanchez, "Don't talk to me any more." Sanchez then left to get Station Manager Jack.

Sanchez returned with Jack. Sanchez then told Segarra that he needed her to go 820 and case the mail there. Segarra told Sanchez that she was not going to talk to him and to leave her alone. Jack then asked her if she understood the instructions that Sanchez was trying to issue her and she responded that Sanchez never gave her any instructions and that both Jack and Sanchez needed to leave her alone. She began claiming that she was being harassed, that she needed a steward and demanding her *Weingarten* rights. Both Jack and Sanchez told her that she just needed to calm down and go to the other route. As the situation progressed, Segarra became quite loud. Alternate Steward Robert Woodley conferred with Segarra and Sanchez left to attend to other duties. Woodley and Segarra went outside to confer and Segarra then left on sick leave.

A fact finding was conducted on September 15, regarding this incident and on September 22, Segarra was issued a letter of warning. The General Counsel contends that this violated Section 8(a)(1), (3), and (4) of the Act.

The alleged violations will be addressed using the *Wright Line* analysis discussed in detail, *supra*. As previously noted, Segarra had been engaged in protected activity on an ongoing basis and the Employer was aware of those activities prior on September 12. There is an absence of direct evidence that protected activity was a substantial or motivating reason for the Employer's action. There is also no circumstantial evidence of unlawful motive based on such factors as shifting or pretextual reasons being offered for the action, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice or timing. The Employer does not have the burden to demonstrate that it would have taken the same action even if Segarra had not engaged in protected activity. Assuming, without finding, that the Employer had such a

burden, Sanchez credibly testified that he had letters of warnings to other carriers that failed to follow instructions and Segarra manifestly refused to follow Sanchez's reasonable instruction. Accordingly, I conclude that paragraph 6(d) of the complaint has not been proven and I recommend that it be dismissed.

#### 17. Disciplinary letter of warning to John Metz

The complaint alleges in paragraph 6(e) that the Respondent issued John Metz an undeserved and unwarranted disciplinary letter of warning on September 16, in violation of Section 8(a)(1), (3), and (4) of the Act.

John Metz, a steward at Highland Station, had an accident while driving a postal service vehicle on August 9. He backed into a parked vehicle. Supervisor Mark Herson went to the scene of the accident and prepared and signed a written report the same day. The postal vehicle was not damaged, but Herson estimated the damage to the parked vehicle at \$8000. In the report, Herson proposed formal discipline for the stated reason that Metz had another motor vehicle accident earlier in the year. The report did not indicate whether the first accident was Metz's fault. Station Manager Jack signed the report on August 11 and safety officer signed the report on August 20. The form states that by signing, Jack had reviewed the report and concurred in the recommended corrective action, i.e., the proposed discipline of Metz.

The report was routed to Metz's immediate supervisor, Anthony Perez. Perez conducted a fact finding with Metz on August 20. Perez submitted a proposed personnel action form on August 22, recommending a letter of warning. Jack approved the recommendation on August 25. The recommendation states that the accident was Metz' second at-fault accident in 6 months, with no prior discipline. A letter of warning dated August 28 was prepared and returned to Perez. He assumed labor relations prepared the letter. He gave the letter to Metz on September 16. The warning letter states, "This is your second vehicle accident this year and your forth [sic] accident in five years." The letter did not state that the first vehicle accident was an at-fault accident. The documentary evidence does not establish whether the first vehicle accident was an at-fault accident. The testimony is conflicting and insufficient to permit a resolution of the question. I do credit Perez's testimony that Supervisor Lovato told him that he had investigated the first accident and Metz was at-fault and that he relied on what Lovato told him. The other incidents involved dogs. Perez testified that the reference to the fourth accident in 5 years, which included the dog incidents, was not a reason for his decision. Perez had issued letters of warning to other employees for safety violations and there is no evidence that the discipline issued to Perez was inconsistent with the discipline of other employees.

The Employer followed normal procedures regarding Metz's accident and there is an absence of substantial and probative evidence that Metz's protected activities were a substantial or motivating reason for the action taken against him. The mere fact that he was given the letter the day after he had represented Segarra at a fact finding on September 15, stressed by the General Counsel, was not shown to be more than mere coincidental

correlation. The General Counsel has not satisfied the initial *Wright Line* burden. Accordingly, I conclude that paragraph 6(e) of the complaint has not been proven and I recommend its dismissal.

18. Refusal to permit Steward John Metz to take notes at a fact finding and refusing to provide copies of the Employers notes

The complaint alleges in paragraph 5(n) that on or about September 18, Supervisor Curtis McCann refused to allow Union Steward John Metz to take notes, in his capacity as union representative, during a fact finding meeting, in violation of Section 8(a)(1) and (5) of the Act. The complaint further alleges in paragraph 7(p) that on September 18, the Respondent refused to provide copies of the notes made by McCann at the fact finding to the Union. The facts necessary to decide this allegation are not in dispute.

On September 18, Curtis McCann conducted a fact finding meeting regarding possible misconduct by employee Mike Gill relating to two different incidents. Metz was then working at the Airport Mail Facility, having transferred from Highland station. Metz was a union steward and was Gill's union representative at the fact finding. McCann, Gill, and Metz were present. Metz initially testified that he took notes during the meeting. He then testified as follows:

Q. Did you take as many notes as you wanted to at the fact finding?

A. Well, I abbreviated them somewhat because the supervisor kept telling me not to take any notes and there was no need for me to take notes, and that he would provide his notes to me as soon as we finished.

Q. And did Mr. McCann give you copies of his notes after the fact finding?

A. No.

The notes made by Metz and McCann were not placed in evidence and neither Gill nor McCann testified about Metz' note taking at the meeting.

After the fact finding meeting concluded, Metz requested a copy of McCann's notes and McCann told Metz that he would have make the request in writing. On September 18, Metz gave to McCann a written request on a form customarily used by the Union for a copy of McCann's notes. McCann signed a copy of the request, acknowledging its receipt. The notes were not provided. McCann testified that the notes were placed in Gill's file. No explanation or justification for not furnishing the notes was given to the Union at the time or advanced by the Respondent at the hearing or on brief. Following the fact finding Metz filed a grievance regarding matters that were addressed in the subject. The notes were not provided until March 9, 2004.

The notes were clearly relevant to the Union's proper performance of its duty to represent Gill. The notes were also shown to be reasonably necessary, since Metz testified that he abbreviated his notes somewhat, in reliance on McCann's assurances that the McCann would make notes that would be furnished to Metz. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). Assuming, without deciding, that the Respondent has

some arguable basis for claiming that the notes were privileged, any such privilege was waived by McCann at the fact finding and in the present proceeding by failing to raise or prove privilege. Cf. *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

The General Counsel has not proven that the Respondent prohibited Metz from taking notes during the fact finding. The evidence shows that McCann only encouraged Metz to rely on the Employer's notes. Metz initially testified, without qualification, that he did take notes during the meeting. It was only after he was asked a leading question that he testified that he "abbreviated them somewhat." On redirect Metz testified:

Q. Were you prohibited from taking some notes?

A. Yeah, he constantly kept on telling me not to take any notes. I did not even take notes, . . . .

I do not credit this testimony on redirect because it was elicited by a leading question, it was inconsistent with his shifting earlier testimony, and the quoted testimony was not credibly offered.

Based on the foregoing, I conclude that the Respondent did not violate the Act by encouraging Metz to rely on the Employer's notes and I recommend that complaint paragraph 5(n) be dismissed.

I conclude that by refusing to provide McCann's notes the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in complaint paragraph 7(p).

19. October 2-3 incidents involving Gill and McCann

The complaint alleges in paragraph 5(o)(1) that on or about October 3, employees were threatened by Supervisor Curtis McCann with loss of pay in retaliation for their union activities and alleges in paragraph 5(o)(2) that on the same day employees were threatened by McCann with refusal to allow them to go to the union office in retaliation for their union activities, all in violation of Section 8(a)(1). The evidence presented is limited to incidents involving Supervisor Curtis McCann and Steward Mike Gill on October 2.

The Employer contends that there is no charge to support these allegations. Three factors are considered in determining whether otherwise untimely allegations can be included in a complaint based on their close relationship to the allegations in a timely filed charge: (1) whether the untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). The charge in Case 28-CA-19052(P) satisfies the *Redd-I* criteria. The merits of the allegations will be considered.

McCann was one of Gill's supervisors. McCann became a 204B acting supervisor at Academy Post in July 2002. McCann had 17 years experience as a letter carrier. He was accepted in to the Associates Supervisor Program (ASP) and reassigned to Highland Station in July 2003, where Gill worked. During his training program McCann worked as a supervisor and attended classroom training on alternate weeks. In early September McCann and several carriers, including

Gill, were reassigned to the Airport Mail Facility. The ASP program lasted through November 2003. At the conclusion of the training program he was transferred to Five Points Post Office as a supervisor, the post he held at the time of the hearing.

Gill exhibited considerable hostility and contempt toward Gill dating from the first day they worked together. When he initially began working at Highland Station McCann walked around the workroom floor and introduced himself to the carriers and shook hands with them. When he introduced himself to Gill, whom he had never met, Gill refused to shake his offered hand, laughed and walked away. There is no record evidence that offers any reason for Gill's behavior, other than the long-standing acrimonious relationship between the Union and the Employer at Highland Station.

Gill thereafter continued to exhibit his enmity toward McCann. As McCann credibly testified:

Mr. Gill would not even acknowledge me as being a supervisor. When I would speak with, or try to speak with him, he would look over me as if I was a ghost and he'd try to talk to somebody else. He never paid attention to anything I said. He consistently laughed [at] me the whole time. He berated me every chance he got. And he went as far as saying and laughing that I'll never get through my program, my Associate Supervisor Program.

Gill's conduct was consistent with a determined effort by him to undermine McCann's efforts to become a supervisor. In September McCann conducted routine street inspections as a part of his training. There was lengthy testimony regarding a street inspection McCann conducted on Gill. The testimony was offered only as background and any intent to expand the complaint was disclaimed.

Gill claimed that the street inspection was more extensive than usual, but the evidence does not show that McCann did not follow established procedures and the inspection is not alleged to violate the Act. McCann credibly related how Gill repeatedly obstructed the inspection and refused to cooperate. Gill's conduct was consistent with his attempts on other occasions to frustrate McCann. Gill was not disciplined for his conduct during the street inspection.

Gill testified that during the inspection, McCann told him, "I'm going to fire your black ass." McCann adamantly denied that claim, observing that saying such a thing to Gill, an African-American, could cost him his job and his future. On the one hand, it seems improbable that McCann would make such a potentially self-destructive statement, especially considering his limited authority, the virtual certainty that Gill would make an issue of such a remark and the possibility that McCann could be dropped from the training program. On the other hand, Gill attempted to frustrate McCann at every turn during the route inspection. In a fit of anger Gill might have spoken irrationally. Gill risked little by making the allegation, considering the job protection offered by the NALC collective-bargaining agreement, as well as EEO laws and regulations. Gill was open in his dislike of McCann and his opposition to McCann becoming a supervisor. McCann's denial was as credibly offered, as was that of Gill assertion. The evidence being in equipoise, the

General Counsel has not proven that McCann threatened to fire Gill or that he made the racial remark.

On about October 2, Gill was working at the Airport Mail Facility. He met with Prestien that day to amend an EEO complaint.<sup>14</sup> The meeting was at the union office, which was some distance away, near Highland Station and off USPS property. The meeting was on paid time. Following the meeting, Gill returned to work at the AMF.

Before he went to the meeting with Prestien, Gill told McCann that he had an appointment with Prestien at the union office. McCann told Gill that he would not allow him to go to the union office that day. Gill, however, had already asked Supervisor Perez for permission to go to the union office and Perez had secured approval for the trip from the manager of the Airport Mail Facility, Bobby Moulds (spelled Moulder in the complaint).<sup>15</sup> Gill had been given a PS Form 7020 that authorized the trip. The record does not identify who signed the form; inferentially it was either Perez or Moulds. McCann called labor relations to confirm that Gill could go to the union office based on the PS Form 7020.

The PS Form 7020 has blanks to record four times. They are the time the employee leaves the workroom area, the time the employee arrives at the destination, the time the employee leaves to return to the workroom floor and the time the employee arrives back at the workroom floor. In situations when an employee is authorized to leave the workroom floor to attend a meeting or to perform steward duties, the outstanding instructions, Handbook F-21, specifies that only the times of leaving and arriving back on the workroom floor are entered. In each case the times are to be entered by the supervisor. It is unclear whether Gill and McCann understood that only those two times needed to be filled in.

Gill was away from his work about 2 hours. When Gill returned to the workroom floor after meeting with Prestien, he presented the PS Form 7020 to McCann to record his time away from the AMF. Gill testified that when he approached McCann to give him the form, McCann told him that he was not going back to the union office again. Gill testified that he asked McCann whether he had the authority to do that and that McCann said that he did. McCann did not testify regarding the exchange and Gill's account is credited. The General Counsel contends that McCann thereby threatened employees with refusal to allow them to go to the union office, in violation of Section 8(a)(1).

McCann's statement was not a management decision of general application that might be permissible under the collective-bargaining agreement. Rather, it was announced by McCann that he would disapprove future requests by Gill for trips to the union office. McCann's announcement was in response to Gill's approved trip to meet with Prestien, which was protected Section 7 activity. McCann's statement reasonably tends to interfere employees' exercise of their Section 7 rights. I conclude that this statement by McCann's was a threat of future

<sup>14</sup> The record does not show when the EEO complaint was filed or whether it predated the racial remark Gill attributed to McCann.

<sup>15</sup> Gill described receiving permission from Perez and Moulds both before and after McCann told him he could make the trip.

reprisal for Gill having engaged in Section 7 activity and that the threat violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(o)(2).

Gill testified that after accepting the PS Form 7020 and entering the times, McCann said, as he was walking away, "Well, I'm going to dock you for the time in which you spent over at the Union Hall." General Counsel contends that this testimony establishes that McCann threatened employees with loss of pay in retaliation for their union activities, in violation of Section 8(a)(1).

McCann did not deny that he made the statement and Gill is credited. McCann's remark was not necessarily an idle threat that McCann did not have apparent means to carry out. The PS Form 7020 reflecting Gill's time for his trip to the union office was to be processed by him. McCann's statement reasonably tends to interfere with employees' exercise of their Section 7 rights, because it conveyed the message that McCann would arbitrarily dock Gill's pay for his Section 7 activity, even when he had management approval for his absence from the facility. I conclude that this statement by McCann's was a threat of reprisal for Gill having engaged in Section 7 activity and that the threat violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(o)(1).

#### 20. Letter of warning issued to Gill

The complaint alleges in complaint paragraph 6(f) that on or about October 3, the Respondent issued to Gill an undeserved and unwarranted disciplinary letter of warning in violation of Section 8(a)(1), (3), and (4) of the Act. This allegation refers to a warning letter McCann issued to Gill dated September 30, for his asserted failure to follow McCann's instructions on September 12. Initially Gill testified that he received the warning letter on about the date on the letter. Later he testified that he believed that he received it on October 3. Gill had refused to sign and date the letter to document its receipt.

Gill was assigned regularly to route 602. The standard shift for letter carriers was 8 hours. Mail to be delivered by a carrier is measured by the amount of time necessary to deliver it. The calculation of delivery time for a particular batch of mail takes into consideration the linier amount of mail organized in trays and the type of mail. Route 602 normally has a volume of mail that requires more than 8 hours for delivery. There was a "relief adjustment" that provided for supervision to routinely reassign .75 hours (45 minutes)<sup>16</sup> of the route 602 mail to another carrier each day to give Gill a nominal 8-hour route.

The amount of mail for a route varies each day. On any day when there is more than 8 hours mail on route 602 after the relief adjustment Gill may request reassignment of additional mail to reduce his assigned mail to 8 hours. On September 12, Gill made such a request by submitting a PS Form 3996 to McCann. Gill requested that an additional 1 hours of mail be reassigned. (The routine relief adjustment is not noted on the PS Form 3996.) Thus, Gill's position was that there were 9 hours of mail remaining to be delivered after the relief adjust-

<sup>16</sup> The Employer calculates time in hour and hundredths of an hour, although some of the forms in evidence use hours and minutes. The witnesses and the warning letter used both.

ment. McCann initially did not agree that Gill had 9 hours of mail to deliver and agreed to only reassign .50 hours. However, as discussed below, when the reassignments were actually made, the mail Gill was assigned to deliver that day was consistent with Gill's position as stated on the PS Form 3996.

McCann reassigned Route 602 mail to allow Gill 6 hours to complete his route. A route assistance worksheet shows that he reassigned a total of 3.75 hours of route 602 mail to other carriers, including the .75 hours relief adjustment. Thus, the amount of mail for route 602 after the relief adjustment, based on the route assistance worksheet, was 9 hours, which is consistent with Gill's PS Form 3996 request. The reassigned mail was "handed off" by Gill to other carriers and Gill thus knew the amount of mail that McCann had reassigned.

September 12 was Gill's final assigned workday for the week. McCann testified that he had been instructed to limit letter carriers to 60 hours in any workweek. McCann's understanding was that if an employee was worked over 60 hours in a week, it could be grieved and a monetary penalty assessed. Prior to September 12, Gill had worked 53.94 hours for the week and had used 1.97 hours of sick leave that week. Gill was familiar with the 60-hour rule and testified that sick leave time was added to worktime to determine when the 60-hour limit was reached. Thus, under Gill's understanding of the rule, he would work more than 60 hours if he worked more than 4.09 hours that day.

On direct examination McCann referred to a time printout (GC Exh. 27) and testified that Gill could have worked almost 7 hours on September 12, before the 60-hour limit was reached. On cross-examination, it was pointed out to him that the exhibit showed that Gill had used 1.97 hours of sick leave on the first day of the week. Twice McCann testified confidently that the sick leave should have been included in that week to determine when the 60-hour limit was reached. Later in his examination he testified that he was not certain that the sick leave was includable in the 60-hour calculation. This testimony occurred only after it became clear that if the 1.97 hours were included, McCann had assigned Gill to work almost 2 hours in excess of 60 hours. Shortly thereafter, he recanted his original testimony and asserted that sick leave was not included. Asked why he was correcting his testimony, he testified that it was the way he was currently doing it and that he does not include sick leave. Gill's revision of his testimony was not convincingly offered. In contrast, Gill's testimony regarding the inclusion of sick leave was credibly offered and was a matter he would be expected to be familiar with because he was a steward. For purposes of this proceeding, I conclude that sick leave is includable in the 60-hour calculation and that McCann failed to take account of Gill's sick leave that week.<sup>17</sup>

Gill was aware that the 60-hour limit was an issue on September 12, and was aware of the hours he had worked and his

<sup>17</sup> On brief the General Counsel references a handwritten notation of 61.93 on GC Exh. 27 that is the sum of the number of hours worked by Gill plus the sick leave of 1.97 units. At the top of the page is the handwritten notation, "Michael Gill Letter of War." The exhibit is a photocopy of a computer printout of employees' time records for the week and reflects that it was printed on September 5. There is an insufficient foundation to warrant giving any weight to the handwriting.

sick leave taken that week. While he was on his route that day Gill called McCann for instructions. Gill testified:

Our standard practice is if we're not going to make it back within the allotted amount of time, and I knew I was hitting the 60 for us to call. And when I called and spoke with Mr. McCann he told me to bring the mail back, and I was already at, I believe an hour over the 60.

Thus, Gill knew that McCann had erred in assigning him 6 hours of mail and that he would exceed the 60-hour limit. Moreover, I infer that Gill was aware of McCann's error before he left on his route. The evidence does not establish that Gill had any legally cognizable duty to alert McCann of the error.

When he called in, Gill was already beyond 60 hours, if his sick leave was included, but there was time to return and clock out within 60 hours if the sick leave was not included. McCann told Gill to return with the undelivered mail. Gill returned to the station with undelivered mail, which McCann reassigned to another letter carrier on double time pay for .75 hours. Gill clocked out with a total of 59.96 work hours for the week, excluding sick leave. Including sick leave, he had 61.93 hours for the week.

The record shows that based upon Gill's own assessment of the mail to be delivered, he had sufficient time to complete his assigned mail delivery in the 6 hours he had been allotted. The record does not show that there were any credible extenuating circumstances to excuse or mitigate his failing to timely complete his deliveries.

There was much evidence offered regarding Gill's performance as measured by the Employer's computer program, known by the acronym DOIS, that calculates how much time a route should take. DOIS indicated that Gill's 8-hour route should have taken less than 7 hours. McCann consulted DOIS in making his assignment to Gill on September 12, but did not share the information with Gill. Gill challenged the accuracy of DOIS, while McCann had no real understanding of the system, other than it generated required delivery times based on the input of types and quantities of mail to be delivered and other relevant information. The record evidence does not establish an objective basis for determining the accuracy of the program. The DOIS system is a management tool that is available to supervisors to assist them, in conjunction with other information, in making the ultimate assignments. Gill's assignment was to complete the delivery of his mail in 6 hours. The relevance of DOIS is limited to issue of whether Gill's assignment was unreasonable.

Gill was given a warning letter on September 30 that states:

This official letter of warning is being issued to you for the following reason(s):

Charge: failure to Follow Instructions

On 09/12/2003 you were reaching your 60-hour limit for work the week of 09/06/2003 through 09/12/2003. You were given Instructions to leave 4 relays for other carriers totaling 3.75 hours. You were then given instructions to complete what was left of your route and to be off the clock before going over 60 hours for the week. You were also given union time this day, about 15 minutes.

Rather than complete your route as instructed you chose to return back to the office with 45 minutes of your route left to complete. Your route was also 1.09 under for the day. With the relays that were given to you and the amount of under time you had on your route for 09/12/2003 there is no logical reason for you not completing your route on 09/12/2003. By you not completing your route you forced management to send other carriers to complete your route and use unnecessary double time to complete your route.

Your excuses do not overcome your responsibility to follow instructions. You have been informed previously of your responsibilities and you have acknowledged your responsibilities. Your continued failure to follow instructions could lead to further corrective action.

Your actions have violated the following Employee and Labor Relations section (s) Article 3e. 3c National Agreement M41-112.1, 112.21, 112.24.

The alleged violations will be addressed using the *Wright Line* analysis discussed in detail, supra. *Wright Line* requires the General Counsel show that the alleged discriminatee engaged in protected activity, that the Employer had knowledge of the protected activity and that the adverse employment action was motivated, at least in part, by the protected activity. Gill's protected activities and the Respondent's knowledge of the activities are established and not in dispute.

The unlawful statement McCann made to Gill regarding future trips to the union office and his unlawful threat to dock Gill's pay for the trip, discussed supra, were clear expressions of hostility to Gill's protected activity that occurred close in time to the warning letter. Further evidence of McCann's hostility to Gill's protected activity was McCann's encouragement at the September 18 fact finding for Gill that Metz rely on McCann's notes, followed by the unlawful withholding of the notes, discussed supra. One of the issues addressed at that fact finding was Gill's work performance on September 12.

The General Counsel's initial burden is thus satisfied as to the alleged violations of Section 8(a)(1) and (3). Accordingly, the Employer has the burden of persuasion to prove its affirmative defense that it would have taken the same action even if Gill had not engaged in protected activity. *Manno Electric*, supra. If, however, the evidence establishes that the reasons given for the warning letter are pretextual there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, supra.

McCann testified that the factual assertions in the first paragraph of the letter were accurate. The evidence presented by the Employer and Gill's own testimony show that Gill did not completed his assigned delivery within the allotted 6 hours. The weight of the evidence is Gill's completion of his assignment in the allotted time was not an unreasonable expectation. However, much of the balance of the warning letter is false or misleading.

The letter states and McCann specifically testified that he had instructed Gill to complete the tasks assigned and clock off before going over 60 hours for the week. Gill testified that he had not received those instructions. Based on the probabilities, McCann's discredited testimony regarding the inclusion of sick

leave in the 60 computation and the demeanor of the witnesses, I credit Gill.

The letter's statement that Gill returned "with 45 minutes of your route left to complete" is technically accurate, but misleading. The time that it would have taken Gill to complete his route would have been less than .75 hours, since the person that completed the route (on double time) would require travel time to and from the delivery area after Gill returned to the station.

The letter states, "Rather than complete your route as instructed you chose to return back to the office with 45 minutes of your route left to complete." This statement is untrue. Gill credibly testified that he was instructed to return with the mail. McCann claimed that he could not recall whether Gill called before returning. His claim of lack of memory was unconvincing.

Considering all the misleading statements and false reasons advanced in the warning letter, I conclude that the reasons given for the warning letter are pretextual. There is no need to perform the second part of the *Wright Line* analysis. Accordingly, I conclude that the warning letter violated Section 8(a)(1) and (3) of the Act as alleged in complaint paragraph 6(a).

Assuming, without finding, that the reasons given were not pretextual, I find that the Respondent has not proven its affirmative defense that it would have taken the same action even if Gill had not engaged in protected activity. On September 12, there were three other carriers—Martinez, Burns, and Begay—who went over 60 hours. The evidence does not show that they received comparable discipline or that their situations were distinguishable. Because the burden is on the Employer, I draw an adverse inference and infer that Gill was treated disparately. There is an absence of substantial and probative evidence that Gill was treated consistently with past practice. Accordingly, I conclude that the employer did not establish its affirmative defense.

The General Counsel has not made a prima facie showing that the warning letter was motivated by the Board charges. The evidence does not establish that there was more than a coincidental correlation between Board charges and the warning letter. Accordingly, I conclude that a violation of Section 8(a)(4) was not proven.

#### 21. October 4 incident involving Gill and McCann

The complaint alleges in paragraph 5(p) that on or about October 4, the Respondent harassed and intimidated employees in retaliation for their Union and other concerted activities in violation of Section 8(a)(1), (3), and (4) of the Act. The complaint further alleges in complaint paragraph 6(g) that on or about October 4, the Respondent suspended and discharged Gill in violation of Section 8(a)(1), (3), and (4) of the Act. This allegation refers to a series of related incidents involving McCann and Gill on October 4, at the Airport Mail Facility. At times Supervisor Perez was involved. Gill, McCann, and Perez testified regarding the incidents. Based on my observation of their testimony and considering the probabilities, I found none of the three was entirely candid and I am convinced that each adjusted his testimony to favor his interests. In addition, the recollection of each was flawed and much of the testimony was conclusory. The following is a composite of the

more credibly offered and probable testimony and other probative evidence, as well as reasonable inferences based on the evidence. I note that Perez and McCann did not corroborate one another regarding significant details and did not specifically address much of the testimony of Gill.

On October 4, Gill delivered to McCann a stack of information requests. Gill was on steward time. Gill testified there were about 30–35 requests, while McCann estimated there were 60–70. McCann was sitting at a desk on the workroom floor and Perez was at a nearby desk. Gill placed the requests on McCann's desk and asked him to sign them and then sat down on a stool near Perez and waited. Gill's prior practice was to prepare information requests in duplicate. The supervisor who accepted a request would sign a copy for the Union to acknowledge receipt and Gill would offer the duplicate copy to the Supervisor. McCann's practice was to not accept a duplicate that did not reflect his receipt of the request. Instead, he would take the copy he had signed to a photocopy machine and make a copy. He would retain one copy and give the other to the steward. Gill decided that it was a waste of resources for him to make duplicate copies of information requests that would not be used. On October 4, he prepared only the originals of the information requests he delivered to McCann. I infer that this was the first time that he had given information requests to McCann without having made photocopies.

McCann began going through the requests, signing some of the requests and making notes on some. McCann asked Gill questions about some of the requests and asserted that some of the information did not exist or had already been provided. Gill did not respond to McCann. McCann exhibited some irritation and asked Gill whether he had copied a posted work assignment sheet. Gill began a narrative answer and McCann interrupted him and asked for a yes or no answer. After some back and forth on this issue, with tension building, Perez entered the discussion and urged Gill to just answer McCann's questions. Gill said it was now two on one and he was not going to answer under those circumstances. Perez responded that it was not two on one and that he just wished Gill and McCann would try to get along. The significance, if any, of whether Gill had copied the posted work assignment sheet is unclear. Gill got up, said he had more important things to do, and walked to a management office with the information requests. McCann was responsible for entering a time sensitive report into the computer in the management office that was then due. He did not tell Gill specifically why he had to break off the discussion of the information requests. Gill asked Perez to get his information requests. Perez responded that he was staying out of it.

Upon reaching the office, McCann placed the stack of information requests on a table and sat down before a computer desk with his back to the door and began entering data. Gill walked into the management office and told McCann that he was going to make copies of the information requests and picked them up. McCann said that he was not through with them. Gill stated to McCann that he was going to make copies for himself and that he would return them and began to walk away. McCann immediately got up and angrily said that he could not believe that Gill had taken something off his desk and told Gill to put the requests back on the table. Gill replied that

he was going to get a witness and walked out of the office with the information requests.

Gill walked onto the workroom floor and asked Clint Waller, a letter carrier, to be a witness. McCann was close behind and ordered Waller back to work. Gill then walked to a large office area off the workroom floor room where there was a photocopy machine and began copying the requests. McCann followed and told Gill to give him the requests, but Gill continued to make copies of all the requests. McCann remarked to Gill that he felt threatened and Gill said that in that case he wanted a witness, but McCann blocked his way and told Gill to give him the information requests. McCann did not comply and resumed copying the requests. McCann left, but later returned before Gill completed his copying and made remarks to Gill to the effect that he had heard Gill used to be in management, but could not “cut the mustard,” an assertion Gill testified was not true.

Gill completed copying the information requests, but did not give the originals back to McCann. Instead, he walked to another part of the room and waited for Perez to finish a phone call. When Perez finished the call Gill gave the original information requests to Perez and Perez signed Gill’s copies. McCann was angry and told Gill that he was “so cute” and lectured him about taking the information requests. Gill then took his copies and went to an office the union was provided at the Airport Mail Facility. McCann called the station manager for instructions.

After making a phone call, Gill walked to where Perez was standing and asked, “do you think it was wrong of me to make copies of my information requests?” to which Perez replied, “No.” McCann then walked up and told Gill to give McCann his badge and key, to get off the clock and to not come back to the post office and that the Postal Service would contact him. McCann testified that the station manager had told him to send Gill home.<sup>18</sup>

McCann went to class the following week and was then transferred to a different facility. The October 4 incident occurred on a Saturday and Gill returned to work the following Tuesday. The March 22, 2002, memorandum to all Albuquerque managers, discussed supra, permits an employee to be placed off duty in either a paid or nonpay status. The record does not establish how Gill was treated.

All of the events relating to the October 4 incident occurred while Gill was on steward time and while he was engaged in processing information requests. Some of Gill’s actions were arguably inappropriate. McCann had signed some of the information requests that Gill took off the table and Gill knew that. From McCann’s perspective, if Gill was allowed to walk away with the requests, the Employer would be exposed to the possibility a Board charge of not furnishing information, if any

<sup>18</sup> I have not credited Gill’s testimony that he was told that he was “suspended” and “terminated.” I found Perez’s testimony on this issue to have been the most credibly offered account of what McCann said to Gill. Because of their background and experience, it is improbable that McCann or Gill would not be aware of the structured process, described in the record, that must be followed before a letter carrier is discharged. McCann testified that he did suspend Gill, but explained that to him, suspension meant sending Gill home.

of the signed requests were not returned. Gill gave little explanation to McCann before walking away with the requests without McCann agreeing that Gill could remove the requests to make a copy. Moreover, Gill was acting inconsistently with his past practice of providing McCann with a copy of information requests and cooperating with McCann making his own copy of accepted information requests. Nevertheless, Gill was engaged in protected activity on steward time, the Employer was aware of the activity and Gill was placed on off-duty status in response to that activity. Gill’s rudeness toward McCann occurred in the course of steward time and he accordingly had greater latitude. While Gill disobeyed McCann’s instruction to return the requests, this was not a job performance issue. Rather, it was a dispute regarding Gill’s performance of his steward duties. At the time Gill was placed off-duty, the information requests had been returned to McCann and the dispute regarding their possession had effectively ended. The General Counsel has made a strong initial showing under *Wright Line* that Gill was placed off-duty in reprisal for his performance of his steward duties. General Counsel having made this initial showing, the burden of persuasion is on the Respondent to prove that it would have taken the same action even if the Gill had not engaged in protected activity. *Manno Electric*, supra.

The Respondent cites an example of another employee who was placed on off-duty status for having refused to follow McCann’s instructions. That example is inapposite. The issue is whether Gill’s behavior while performing his steward duties was so egregious as to privilege discipline for the way he performed those duties. The Respondent has not carried its *Wright Line* burden. Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 6(g) when Gill was placed on off-duty status.

There is an absence of substantial and probative evidence to support the allegation that Gill was discriminated against in violation of Section 8(a)(4). I conclude that violation was not proven.

The complaint alleges in paragraph 5(p) that the Respondent violated Section 8(a)(1) by harassing and intimidating Gill during the conflict over the information requests. Gill chose to be confrontational and unpleasant in his dealings with McCann and had no right to expect that McCann would not sometimes respond in kind. In the context of what occurred, I conclude that the evidence does not establish an independent violation based on harassment or intimidation. Paragraph 5(p) also alleges that by harassing and intimidating Gill, Section 8(a)(3) and (4) was violated. The General Counsel has not articulated a theory of violation and I conclude that a violation of Section 8(a)(3) and (4) has not been proven. In view of all the foregoing, I recommend dismissal of complaint paragraph 5(p).

#### 22. September 18 restriction on paid union overtime by Pratt

The complaint alleges in paragraph 5(q) that on or about September 18, the Respondent promulgated an overly-broad and discriminatory rule prohibiting Dave Pratt from using union time while on overtime, in violation of Section 8(a)(1), (3), (4), and (5) of the Act.

This allegation refers to a statement that Pratt testified Joel

Wadsworth made to him at Highland Station. Wadsworth was a labor relations manager. Pratt initially testified that he did not recall when the conversation occurred, but that he thought it may have been in October. He testified that Wadsworth told him that he was not to perform union duties in overtime status. The hearing was recessed early before the direct examination of Pratt was completed, because Pratt was not feeling well. When the hearing resumed on later date, it was established that the charge in Case 28–CA–19002(P) was filed on September 17, and Pratt was then asked again about Wadsworth’s instruction. His memory seemingly refreshed, Pratt testified with certainty that the conversation with Wadsworth occurred on September 18, the day following the docketing and mailing of the charge in Case 28–CA–19002(P), filed by Pratt. He testified that he was at Highland Station to meet on grievances and “[Wadsworth] just sort of announced to me that I would no longer be allowed to perform union duties in the overtime status.” Pratt testified that he did not recall any further discussion about the subject with Wadsworth and he provided no other details regarding the conversation. There was no mention of the September 17 unfair labor practice charge and it was not shown that the Employer had actual knowledge of the charge at the time of the conversation. In response to a leading question Pratt testified, “I think he said he was told to tell me this, yes.” The purported rule was not issued in writing.

Notwithstanding the purported “rule” that was asserted to have been “promulgated” on September 18, Pratt worked 10.28 hours on union time Saturday, September 19, all of which was overtime. The General Counsel acknowledges on brief that Pratt worked overtime on union time every week thereafter through the end of the year, averaging approximately 12 hours of union overtime each week.<sup>19</sup> Pratt attempted to explain this seeming contradiction by testifying that the asserted rule was not “enforced” until January 5, 2004, following his election as Local president. The question of limitations on Pratt’s performing union duties on overtime after he was elected president is addressed *infra*.

In contrast to Pratt, Wadsworth testified that he told Pratt that he could not perform union duties in overtime status without permission. I credit Wadsworth. The General Counsel has not contended that the Union had a contract based right to unilaterally determine when and how much union time employees could work on overtime and the evidence does not convincingly demonstrate that the Union had such a right based on past practice.<sup>20</sup> Wadsworth’s testimony was more credibly offered and more probable.

The statement made to Pratt, as credibly described by Wadsworth, was not shown to be more than a claim by the Employer of a right to require Pratt to have permission before

performing union duties on overtime, a position that was consistent with the JCAM, to which the Union was a party. Pratt was not shown to have any presumptive right to perform union duties on overtime. Accordingly, I conclude that no independent violation of Section 8(a)(1) of the Act has been proven. The evidence does not establish that there was any change in Pratt’s hire or tenure of employment or any term or condition of his employment. Accordingly, I conclude that no violation of Section 8(a)(3) of the Act has been proven. There has not been shown to be more than a coincidental correlation between what Wadsworth said and Board charges or testimony. Moreover, Pratt was not discriminated against by the remark. Accordingly, I conclude that no violation of Section 8(a)(4) of the Act has been proven. The evidence does not establish that there was any change in wages, hours, or other terms and conditions of employment of any employee by Wadsworth’s remark to Pratt. Accordingly, I conclude that a violation of Section 8(a)(5) of the Act has been proven.

In view of all the foregoing, I recommend dismissal of paragraph 5(q) of the complaint.

### 23. Requiring the use of PS Form 7020

Complaint paragraph 5(r) alleges that on or about September 18, Postmaster Tuleja promulgated an overly broad and discriminatory rule requiring the use of PS Form 7020 to request and have union time approved. The complaint alleges that the promulgation of the rule violated Section 8(a)(1), (3), (4), and (5) of the Act.

On September 19, there was a negotiation meeting at which Tuleja, Hardin, Pratt, and Prestien addressed various labor-management concerns. At that meeting Tuleja hand delivered a letter addressed to Union President Prestien dated September 18. The letter stated in substance that it had come to his attention that PS Form 7020 was not being used for the purpose of requesting and approving paid union time by stewards and other union officers. The letter stated that it was Tuleja’s intent to insist at a management meeting the next day that the PS Form 7020 would be required. This letter was, however, discussed and Tuleja told Prestien that the form would not be required. Pratt acknowledged in his testimony that the requirement in the September 18 letter was never enforced. There is no evidence that the letter or its contents were generally announced to employees or to union representatives who were not at the meeting.

The PS Form 7020 is a form for recording and approving time when an employee is permitted to leave the workroom floor without clocking out. See *Postal Service*, 288 NLRB 500 (1988). One of the approved reasons noted on the form is steward time. In the past, when timecards were used, the form was routed to the timekeeper, who recorded the nonworking paid time. The form is still contained in the Employer’s management instructions, is available and is sometimes used in Albuquerque, but the form is not generally required. Stewards in Albuquerque typically request steward time in writing by submitting a union generated form to a supervisor for rejection or approval. The evidence does not show that there was a practice of steward time being verbally requested. Cf. *Postal Service*, 341 NLRB 684 (2004). Stewards record their steward time

<sup>19</sup> This is based on the spreadsheet summary made a part of the GC’s brief. The spreadsheet is derived from GC Exh. 114 and R. Exhs. 10 and 22.

<sup>20</sup> The JCAM provides that paid union time will not be unreasonably denied to stewards; that steward time requires supervisory permission; that the amount of steward time needed depends on the particular circumstances; that steward time will not be denied solely because a steward is on overtime status; and that the question of when steward time will be allowed is a subject to be decided mutually.

status themselves, using the electronic time clocks. The September 18 letter also referred to union officers. Then Union President Prestien worked full time on union business and then Union Vice President Pratt spent much of his paid time working on union business. Neither had ever used PS Form 7020 to perform their union duties on the clock and the evidence does not show that Prestien routinely submitted written requests to perform his union duties.

Despite the fact that the PS Form 7020 requirement proposed in Tuleja's letter was not implemented, was not disseminated to employees, and was withdrawn in the same labor management meeting where the letter was delivered to the Union, the General Counsel nevertheless urges that the letter be found to violate 8(a)(1), (3), (4), and (5) of the Act. The General Counsel argues that the timing of the September 18 letter was motivated by the charge in Case 28-CA-19002(P), which was placed in the mail to the Respondent on September 17. This bare contention is otherwise unsupported. There has not been shown to be more than a coincidental correlation between the charge and Tuleja's letter. The General Counsel has cited no authority and has not explained how Tuleja's letter affected the hire or tenure of employment or the terms and conditions of employment of employees. Accordingly, I conclude that the Section 8(a)(3) and (4) allegations have not been established. See *Postal Service*, 341 NLRB 684 (2004).

The evidence does not establish that there was any unilateral change in wages, hours, or other terms and conditions of employment of any employee. Rather, Tuleja announced at a labor-management meeting a plan to implement a requirement that PS Form 7020 be used. The Union objected and Tuleja abandoned the plan at the meeting. The letter amounted to a proposal to the Union, the proposal was discussed and was dropped by the Employer. Accordingly, I conclude that the 8(a)(5) allegation has not been established. See *Globe-Union, Inc.*, 245 NLRB 145, 147 (1979).<sup>21</sup>

In view of all the forgoing, I recommend dismissal of paragraph 5(r) of the complaint.

24. September 19 rule requiring Prestien and Pratt to be present and swipe their time at their assigned stations

At the September 19 meeting where Tuleja delivered his letter regarding PS Form 7020, discussed above, Tuleja also hand delivered to Prestien a second letter, dated September 19, addressing several issues. The complaint alleges in paragraph 5(s) that the September 19 letter promulgated an overly-broad and discriminatory rule requiring Prestien and Pratt to be physically present at their assigned stations when on steward time and requiring them to swipe their time at the assigned stations. The complaint alleges that the letter violated Section 8(a)(1), (3), (4), and (5) of the Act. The challenged portion of the September 19, letter reads as follows:

At present the Postal Service is best served by having available at the local stations all letter carriers. It is toward this end that space will be provided for you and your

stewards to conduct union activities at your respective assigned stations.

Both you and Mr. Pratt, like other City Letter Carriers, will report to your assigned stations at your assigned begin tours. When approved "Union Time" you will be afforded the aforementioned office area as well as access to telephone lines. When not on approved use of "Union Time," being physically present at your station of assignment, you will be available to fulfill your assigned duties of a City Letter Carrier. I make reference only to those days where you are compensated through the Postal Service and are required to "swipe" your time.

It is expected that both you and Mr. Pratt will begin clocking in and reporting to your duty stations on a daily basis effective Saturday, September 27, 2003. Subsequent to this date you will be expected to begin your tour of duty and end your tour of duty at your assigned stations, as well you will be expected to fulfill the contractual language regarding the request of "Union Time" and when approved for "Union Time" go to the designated office area provided you to conduct such union business. When not approved for "Union Time" you will report to your assigned routes and perform your City Letter Carrier duties.

The letter was discussed at the union-management meeting. Prestien sent a written reply to Tuleja on September 22, with a copy to Pratt. The text of Prestien's reply was as follows:

I have just read the letter which you hand delivered to me at our meeting late last Friday afternoon. I am somewhat confused as the discussions, agreements and understandings which we reached during that meeting are in conflict with the written text of your, referenced, letter.

Since we discussed and disposed the matters raised in your letter in our meeting I will take the agreements reached during our meeting as your final word and continue our standing past practice so long as I do not hear differently from you. Thank you.

Notwithstanding the statement in Prestien's letter that he "just read" the letter, Tuleja credibly testified that the letter was discussed at the meeting. Tuleja testified that he agreed that the September 19, letter given to the Union at the meeting did not reflect agreements reached at the meeting. Prestien volunteered on direct examination that the changes proposed in Tuleja's letter were never implemented as to him. Prestien also testified that he had no knowledge that the proposed changes were implemented as to Pratt. Prestien certainly would have known if the changes had been implemented as to Pratt. Pratt did not testify that the proposed changes were implemented as to him.

Despite the fact that the requirements proposed in Tuleja's letter were not implemented, were not disseminated to employees and were withdrawn in the same labor-management meeting where the letter was delivered and discussed with the Union, the General Counsel urges that the letter be found to violate 8(a)(1), (3), (4), and (5) of the Act. The General Counsel argues that the timing of the letter was motivated by the charge in Case 28-CA-19002(P), which was placed in the mail to the Respondent on September 17. There has not been shown to be more than a coincidental correlation between the charge and

<sup>21</sup> A different conclusion is not warranted because a PS Form 7020 was used by management to document its approval for Gill to go to an offsite union office to attend to his EEO charge without clocking out.

Tuleja's letter. The General Counsel has cited no authority and has not explained how Tuleja's letter affected the hire or tenure of employment or the terms and conditions of employment of employees. Accordingly, I conclude that the 8(a)(3) and (4) allegations have not been established. See *Postal Service*, 341 NLRB 684 (2004).

The evidence does not establish that there was any unilateral change in wages, hours, or other terms and conditions of employment of any employee. Rather, Tuleja announced a labor-management meeting a plan for changes that would have affected Pratt and Prestien. The Union objected and Tuleja abandoned the plan at the meeting. The letter amounted to a proposal to the Union, the proposal was discussed and was dropped by the Employer. Accordingly, I conclude that the 8(a)(5) allegation has not been established. See *Globe-Union, Inc.*, 245 NLRB 145, 147 (1979).

In view of all the forgoing, I recommend dismissal of paragraph 5(s) of the complaint.

25. September 30 use of a stopwatch during a letter carrier route inspection

The complaint alleges in paragraph 5(u) that on September 30, Supervisor Bernie Martinez harassed and intimidated employees at the Uptown Station, by using a stopwatch during a letter carrier route inspection, in an effort to interfere with their Union and other concerted activities, in violation of Section 8(a)(1).

Bernie Martinez was Postmaster at Cuba, New Mexico. Martinez was a member of a team of outside supervisors and managers who conducted route counts of all the carriers at Highland Station where Pratt worked. Martinez did a route count on Pratt on September 30. Route counts involve accompanying a carrier throughout the day measuring the amount of work done by the carrier and the times taken to perform various tasks. In addition to Pratt, Martinez performed route counts on about five other letter carriers on other days.

While he was conducting the route count on Pratt and the other letter carriers he evaluated, Martinez used a wristwatch that had a digital stopwatch function to time some of the tasks performed. The watch was clipped on top of his papers on a clipboard. To utilize the stopwatch function, Martinez pushed a button on the watch. Each time he pushed the button, the watch beeped. Pratt was aware that it was a stopwatch. I credit Pratt's testimony that when he remarked on beeping he heard, Martinez said it was his stopwatch. I found Martinez' testimony to the contrary less convincing.

Upon being assigned to work on the route count, Martinez had inquired of his supervisors if he could use a stopwatch. He was referred to an arbitrator's decision that issued on July 18, 2002. The arbitration was of a grievance filed in Albuquerque that challenged the use of a stopwatch. The arbitrator sustained the grievance. The award stated:

Management is directed that the use of stopwatches not be utilized for route evaluation purposes or for the purpose of filling out Form 1838-C and/or Form 3999. The stopwatch shall not be utilized in a manner that is obvious to the carrier.

Martinez did not read the arbitration decision. He testified

that based on the instructions he had received, it was his understanding that wristwatch stopwatches were acceptable, but more traditional stopwatches worn hanging around the neck were not acceptable because they made the carriers uncomfortable. The evidence does not show that his assignment to do a route count for Pratt was more than a coincidence.

The record shows that Martinez used his wristwatch stopwatch was for route evaluation purposes and the times he measured were destined to be incorporated into Forms 1838-C and/or Forms 3999. The Respondent contends that there was no violation of the arbitration decision, but does not explain why I am unable to see a meaningful distinction between using a beeping wristwatch stopwatch recognized as such by an employee and using a more traditional stopwatch. For the purposes of this decision, I conclude that Martinez violated the arbitration award by his use of the wristwatch stopwatch.

The only violation alleged and urged is that Martinez' use of the stopwatch was an independent violation of Section 8(a)(1). The General Counsel contends that because Martinez' disregard of the arbitration decision was close in time to other alleged unfair labor practices, the stopwatch use should also be found to be part of an effort designed to target Pratt to interfere with his protected activities. I find this argument unconvincing. It is well established that in measuring an employer's conduct under Section 8(a)(1) the Board applies an objective test to determine whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with employees' exercise of their Section 7 rights. *American Freightways Co.*, 124 NLRB 146, 147 (1959). It is well established that violation of an arbitration award is not a per se violation.

The use of the stopwatch has not been shown, in the context of the facts in this case, to have a tendency to interfere with employees' exercise of their protected rights. Accordingly, I conclude that the stopwatch use did not violate Section 8(a)(1) of the Act and I recommend dismissal of complaint paragraph 5(u).

26. October 2 rule prohibiting Pratt from using his cell phone

The complaint alleges in paragraph 5(v) that on October 2, Manager Rosarita Archuleta promulgated an overly-broad and discriminatory rule at Uptown Station prohibiting Pratt from using his union cell phone while in the station, in violation of Section 8(a)(1), (3), (4), and (5).

Pratt testified that following the route count on September 30, Rosarita Archuleta was responsible for conducting a routine final meeting with Pratt to review the results of his route count. The meeting is called an exit interview. According to Pratt, Archuleta addressed Pratt's use of his cell phone during work time. Pratt regularly carried a cell phone that he used to transact union business. He testified that he received calls from carriers and stewards. In response to a leading question, he also testified that management called him on his cell phone. The record does not establish that management called him while he was on worktime.

Pratt testified that during the exit interview Archuleta instructed him that he was "no longer" allowed "to answer" his cell phone on the workroom floor. According to Pratt, he told Archuleta that he had always been allowed to do that, but she

did not yield on the issue. The General Counsel also elicited testimony that Archuleta told Pratt that he would have to have a PS Form 7020 to use the office phone. Testimony regarding the PS Form 7020 and the office phone was objected to and the General Counsel disclaimed any intent to expand the complaint.

Archuleta acknowledged that she had a conversation with Pratt regarding his cell phone. She testified that the conversation occurred at his case after she observed him having a conversation on his cell phone. She testified that she asked Pratt to not use his cell phone on the workroom floor and he got upset and told her that he could use the cell phone on the workroom floor because he was the union steward.

Archuleta testified that employees were not allowed to use their cell phones on the workroom floor and that she had enforced the rule against other employees, naming several stewards and nonstewards. She testified, in substance, that when stewards are performing union duties, they should be swiped over to 613 union time or use a Form PS 7020. Archuleta came from the clerk unit. Clerks, unlike the carriers, more often used the Form PS 7020.

Based on the demeanor of the witnesses and the probabilities, I conclude that what occurred is a composite of the testimony of Pratt and Archuleta. The conversation between the two about the cell phone occurred during the exit interview, based on Archuleta's observation of Pratt talking on his cell phone at his case during worktime. She instructed Pratt to not talk on his cell phone on the workroom floor. She did not say that he would "no longer" be allowed to engage in that practice. She did not limit her instruction to Pratt not being permitted "to answer" the cell phone. Pratt asserted to Archuleta that he had the right to use the cell phone for union duties. Archuleta told Pratt that if he needed to talk on the phone he needed to swipe over to 613 union time of submit a Form PS 7020. The General Counsel does not contend and the evidence does not show that Pratt was unreasonably denied union time to talk on the cell phone and no significant impingement on Pratt's protected activities has been shown.<sup>22</sup>

There is an absence of substantial evidence that Pratt had a protected right to transact union business on his cell phone during worktime. He was subjected to the same rules applicable to all employees, including stewards. It has not been shown that there was more than a coincidental correlation between Archuleta's instruction and Gill's protected activities. Accordingly, I conclude that the General Counsel has not established a violation of Section 8(a)(1) and (3). *Wright Line*, supra. It has not been shown that there was more than a coincidental correlation between Archuleta's instruction and Board charges and testimony. Accordingly I conclude that the General Counsel has not established a violation of Section 8(a)(4). *Id.* The General Counsel also argues that Archuleta's instruction was an unlawful unilateral change in an established practice in violation of Section 8(a)(5) and (1) of the Act. A past practice that will support a finding of an unlawful unilateral change must be shown to be a well established, long standing practice. See

<sup>22</sup> The record does not show that Pratt did not have voice mail and caller ID, features common experience teaches are ordinarily found on cell phones.

*Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited there; *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 355 (2003), and cases cited there. The burden of proof is on the General Counsel. There is an absence of substantial credible evidence of such a well established, long standing practice. Accordingly, I conclude that the General Counsel has not established a violation of Section 8(a)(5). In view of all the foregoing, I recommend dismissal of complaint paragraph 5(v).

#### 27. October 7 denial of overtime to Pratt

The complaint alleges in paragraph 6(h) that on October 7, the Respondent denied overtime work to Pratt in violation of Section 8(a)(1), (3), and (4). On October 7, Archuleta told Pratt that she was not going to furnish information he had requested. Later that day, while Pratt was working at his case, Archuleta spoke with Wadsworth by telephone. During that telephone conversation Archuleta called Pratt to the phone and he also spoke to Wadsworth. Wadsworth discussed the pending information request with Pratt and asked about the Union's need for the information. Wadsworth expressed satisfaction with Pratt's responses and Pratt gave the phone back to Archuleta. Pratt returned to his case. When Archuleta ended the conversation with Wadsworth, she walked to Pratt's case. She appeared to be very upset. I infer from the circumstances that Wadsworth had told Archuleta to provide the information to Pratt. She told Pratt in a loud and angry voice that he was not going to receive any overtime on his route that day. The record does not establish that Pratt actually was actually deprived of overtime that day. Accordingly, I conclude that the alleged violations of Section 8(a)(3) and (4) are not established and I recommend that those aspects of paragraph 6(h) be dismissed.

I conclude that the evidence does establish a violation of Section 8(a)(1). The clear implication of Archuleta's remark was that Pratt would be denied the opportunity to work any overtime on his route that day because Pratt had requested the information. Accordingly, I recommend that Archuleta's statement that Pratt would be denied overtime because the Union requested information be found to violate Section 8(a)(1).

#### 28. December 16–17 interrogation and discrimination against Steward Karl Pecora

Complaint paragraph 5(bb) of the complaint alleges that on or about December 16, Manager Rosarita Archuleta and Supervisor Troy Montoya interrogated employees at Uptown Station about their union activities in violation of Section 8(a)(1). Complaint paragraph 6(i) alleges that on or about December 17, the Respondent issued employee Karl Pecora an undeserved and unwarranted disciplinary letter of warning in violation of Section 8(a)(1) and (3).

Karl Pecora is a letter carrier at Uptown Station and has been a steward since July 2003. Pecora submitted a grievance to Montoya on the morning of December 16, citing a "Joint Agreement on Violence and Behavior in the Workplace" and referencing "incident on 12/15/03—continuing to date." Pecora also gave Montoya an information request for the Employee Everything Report and the Hours Analysis for the Uptown station for December 15. In addition, Pecora submitted a written steward time request for 15 minutes, steward time for union phone time, and to fax documents. When Pecora gave

the information request to Montoya they discussed whether the Union would be required to pay for copies. Archuleta joined the conversation and told Montoya to charge for the copies. Pecora left briefly to get a copy of the contract to support his position that the documents should be provided without charge. When Pecora returned with a copy of the contract, Archuleta, Montoya and Pecora discussed the issue of paying for copies. The documents were provided later that day and the evidence does not show that the Union was charged for the copies.

The following is a composite of the credibly offered and probable testimony of what occurred next on December 16. There was discussion of the amount of union time Pecora used. Archuleta opined that Pecora used an excessive amount of union time and Montoya said that Pecora should organize his union time better. Pecora stated that he thought he did a very good job in conducting his steward time and that compared to a lot of other stewards in Albuquerque, he did not use that much union time. Regarding the steward time request, Pecora was asked whom he needed to call and how long it would take. The record does not show Pecora's response, if any, or any further discussion of that subject. The request for union time for phone calls and faxing was approved. Archuleta asked Pecora why he was filing the grievance. Pecora replied that it related to her treatment of him the day before. Pecora said that he had received complaints from other carriers, that he had witnessed other incidents involving her on the workroom floor and that he wanted to do something about it within the contract grievance guidelines. Archuleta suggested that they discuss the grievance in the office. Pecora declined to discuss it further at that time and he returned to work.

Pecora was issued a letter of warning by Archuleta on December 17. The General Counsel contends that the warning letter was in retaliation for the December 16 grievance. The warning letter stated that it was issued for failure to follow instructions, unauthorized overtime and disrupting the workroom floor. The supporting particulars described in the letter were as follows:

On December 11, 2003, you were instructed to have an eight (8) hour day on your route. You were instructed to curtail mail. I negotiated with you on this day you committed to being back.

On December 12, 2003, I asked you why you were out so late. Your reasons were that we had a standup and you had preapproved union time.

On December 15, 2003, I again asked to have an eight (8) hour day. I made sure that you had no reason not to be back on time.

On December 16, I asked you why you were out so late. Your reasons you said, "You have no right to try to control me or my union time. During this conversation you began to get loud and disrupt the workroom floor. I asked you to go the office if you wanted to continue discussing the unauthorized overtime. You told me no. Yet you continued to subject me to your very loud voice on the workroom floor. At that point I turned and walked away so that you would stop.

On December 15, 2003, you failed to following instruction. Your eight (8) hour day turned into a 10 hours and 31 unit day. You used unauthorized overtime and disrupted the workroom floor.

The warning letter cautioned Pecora that a continued failure to follow instructions could lead to further corrective action, up to and including removal from the Postal Service. The letter was the subject of a grievance and the letter was rescinded and removed from Pecora's file.

The dates in the warning letter are not consistent with the other evidence, including the testimony of Respondent's other witnesses and Employer records. Archuleta testified that the principle reason she issued the warning letter was loud and disruptive behavior by Pecora. Archuleta acknowledged in her testimony that there were problems with the dates in the warning letter. The evidence, discussed below, shows that in other several respects, the particulars described in the warning letter were inaccurate. The following is based a composite of the credibly offered and more probable testimony concerning the relevant interactions between Archuleta and Pecora during the period December 11-17.

On December 11 there was an encounter between Archuleta and Pecora at Montoya's desk when Pecora returned to the station after completing his route. Montoya was present. At the request of Archuleta, Montoya prepared a memorandum on December 15, describing what occurred. Pecora, Archuleta, and Montoya were at Montoya's desk. Pecora had completed his route. Archuleta asked Pecora about taking unauthorized overtime. The discussion became heated and Pecora was loud and assertive. Archuleta ended the encounter and walked away.

A written overtime request (PS Form 3996) had been submitted by Pecora on the morning of December 11. Supervisor Dave Lohkamp had approved overtime of 1 hours. The justification Pecora cited in the request were that 20 minutes that had been spent in a standup meeting, 25 minutes would be needed for union time and an added 20-30 minutes was required because of the mail burden that day.

Payroll records show that on December 11, Pecora's had 11.01 paid hours, including 3.01 hours of overtime and 1.83 hours of union time. Disregarding the additional 1.41 hours union time Pecora actually used, he still took .60 hours more than the time he had negotiated with Lohkamp.

The description in the warning letter of overtime caused by a standup meeting and Pecora's claim of having approved overtime on December 12, is consistent with the evidence regarding December 11.

The statement in the warning letter that Pecora worked 10.31 hours on December 15 is incorrect. Payroll records show that he worked 9.81 hours on December 15.

The events described in the warning letter as having occurred on December 16, are Archuleta's version of what occurred on December 15. When Pecora returned from his route at the end of the workday December 15, he went into the station to get a cart to unload his vehicle. As he entered the station, Archuleta approached him and in a loud and aggressive manner told him to hurry up and get off the clock. Pecora responded in a loud and aggressive manner to Archuleta, and after some back and

forth Archuleta walked away and Pecora clocked out as instructed.

On brief the General Counsel contends that the questions that Archuleta and Montoya asked Pecora were unlawful interrogation as alleged in complaint paragraph 5(bb). The particular unlawful questions are not identified. Archuleta asking Pecora why he was filing the grievance was not coercive, especially since the grievance did not identify specifically what Employer actions were being challenged. The only other relevant questions Pecora was asked concerned his written request for paid steward time, for union phone time, and to fax documents December 16. Pecora was asked whom he needed to call and how long it would take. There is no substantial and probative evidence regarding the criteria for approving paid union phone time. The questions were not per se violative. The Employer was not necessarily foreclosed from making inquiry before approving Pecora's request to be paid for making union phone calls on the clock. The General Counsel has not advanced a theory of violation regarding those questions and I decline to construct one. Accordingly, I recommend dismissal of complaint paragraph 5(bb).

The analysis set forth in *Wright Line*, supra, will be used to consider the December 17 warning letter given to Pecora. Pecora was engaged in protected activity when he filed the grievance on December 16. The Based on circumstantial evidence, I conclude that the General Counsel has proven that Pecora's protected activity was a substantial or motivating reason for the warning letter. The day before the warning letter issued and at the time he filed his grievance, Montoya and Archuleta evinced their hostility to Pecora's protected right to file a grievance by complaining about the amount of his union time. Union time is a right provided by the collective-bargaining agreement. The factual errors in the warning letter are evidence that little consideration was given to the specific incidents mentioned, warning letter, and that the letter was hastily drafted after Pecora filed the December 16 grievance. The most credible reason for disciplining Pecora was his conduct on December 11, but there is no evidence that discipline was contemplated until the grievance was filed.

The evidence is insufficient to establish that the reasons advanced by the Employer for the warning letter were pretextual. Cf. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden State Foods Corp.*, 340 NLRB 382 (2003). Accordingly, the Employer has the burden of proving its affirmative defense that it would have taken the same action even if Pecora had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). The Employer has not presented any substantial and probative evidence to carry that burden. Accordingly, I conclude that the warning letter issued to Pecora violated Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 6(i).

29. December 17 discrimination against Steward  
Robert Woodley

Complaint paragraph 6(j) alleges that on or about December 17, the Respondent issued to employee Robert Woodley an undeserved and unwarranted disciplinary letter of warning in violation of Section 8(a)(1), (3), and (4).

Woodley is a letter carrier at Highland Station and a steward. On December 12, there was a standup meeting at Highland Station. Supervisor Mike Mishall stated the Employer's expectations and requirements regarding letter carriers' work during the first hour of their shift. As discussed in more detail later, the Union took the position that the Employer was implementing a management plan known at postal facilities in other areas of the country as the "Golden Hour."

On the morning of December 16, Woodley gave Mishall three documents. First, he gave Mishall a grievance-filing request that asked for an informal Step A discussion regarding "1 hour Golden Rule." Mishall initialed and dated the document and wrote on the grievance filing request, "No—Golden Hour not Used—Stand up given to all carriers on instructions for this station."

Woodley also gave Mishall an information request for "A complete and entire copy of Supervisor Mike Mishall's written instructions that were hand carried and read to Highland carriers in regards to the reimplementation of "1 hour Golden Rule." Mishall initialed and dated the document and wrote on the information request, "Refused to give copy of my notes to anyone."

The third document Woodley gave to Mishall was a request for steward time to meet with "every single Highland carrier" to obtain statements, investigate and process grievances regarding "1 hour golden Rule." Mishall initialed and dated the document and wrote on the steward time request, "No—not allowed—This was a stand up and Golden Rule was not mentioned."

Mishall then handed the documents to Woodley. Woodley stated he would file another Labor Board charge and walked away with the three documents toward his case. Mishall followed Woodley and told him to give him the documents. Woodley gave them back to Mishall. Mishall walked to an office with the documents, accompanied by Woodley. The record is incomplete as to what transpired in the office, but I infer that Mishall made photocopies, since it was the practice for the Union and the Employer to each have identical copies of such documents.

Later that morning, before Woodley left the station to deliver his mail, Mishall determined that he should provide the notes Woodley had requested. Mishall made a copy of the notes and approached Woodley. Mishall testified:

He was walking away from me when I was trying to give him the notes, and he wouldn't stop, and I told him, Robert, so I raised my voice a little louder, and I said, Robert, and he kept walking, and I was following him. And finally, I almost yelled, and I said, Robert, stop, and he still wouldn't stop. I said, Robert, I'm giving you a direct order to stop right now. So, then he did stop and I said, here's a copy of my notes. And I was within arms length of him and I said, here you go, and that was it.

Jack, who was some distance away observed the incident and corroborated Mishall. Woodley testified that he had heard Mishall call out to him only once. Based on the probabilities and the demeanor of the witnesses, I conclude that Woodley heard Mishall asking him to stop and disregarded the instruc-

tion until it was worded as a direct order. Disobeying a “direct order” subjects an employee to dismissal.

Mishall scheduled a fact finding for the next day and then issued a letter of warning to Woodley for failing to follow instructions for refusing to stop until he was given a direct order. The evidence does not establish that the warning letter was motivated by Woodley’s protected activities. Moreover, assuming, without finding, that the evidence is sufficient to satisfy the General Counsel’s initial burden under *Wright Line*, the evidence shows that Woodley engaged in a deliberate act of insubordination on the work floor that would have resulted in discipline, even in the absence of protected activity. The discipline imposed was not disproportionate. Mishall issued 11 other letters of warning for failure to follow instructions from October to December 2003. The other 11 were not issued to stewards. Five warnings were for failing to have badges, five were for express failures, and one was for failing to secure a vehicle. Accordingly, I conclude that the warning did not violate the Act and I recommend that complaint paragraph 6(j) be dismissed.

#### 30. January 5, 2004 changes in Pratt’s work as Local president

The complaint alleges in paragraph 5(cc) that on January 5, 2004,<sup>23</sup> the Employer violated Section 8(a)(1), (3), (4), and (5) of the Act by promulgating a rule prohibiting Pratt from performing union duties on overtime and on nonscheduled days, and requiring Pratt to obtain approval from Wadsworth to perform union duties.

Prestien went on extended leave November 8, a status he maintained until he resigned his position and retired on January 3. Prestien had been Local president for the preceding 7 years. During Prestien’s extended leave, Pratt performed the duties of both vice resident and president. As Local vice president, Pratt succeeded to the office of union president on January 3. Pratt then appointed Richard “Smiley” Martinez to replace him as vice president. Pratt’s first day at work after becoming Local president was January 5.

When Prestien was Local president he clocked in at Highland Station and then went to the Local’s nearby off-site office without first securing permission from management. The evidence does not show that the Employer provided the Local’s office. Prestien’s workday was spent at the Local office, unless he had a meeting to attend at a postal facility. At the end of the workday, he clocked out at Highland station. Prestien testified that he kept a log of his activity and turned it in to the Employer each day. Prestien worked only on union business while on the clock and was paid by the Employer as a letter carrier. Prestien testified that he also worked off the clock on unidentified union business. As union president, Prestien was also paid by the Union the equivalent of 2 days letter carrier pay at the top step. On occasion Prestien worked some overtime on the clock in excess of 8 hours without advance permission. He averaged 0.28 hours overtime per week during the 52-week period before he began his extended leave. There is no evidence that any of the overtime he incurred was disapproved or that he was criticized for the overtime he incurred. The record

does not exclude the possibility that the overtime was incurred when he was meeting with management. If that was the reason, the overtime would have been implicitly approve when it was incurred. Accordingly I attach little significance to the negligible amount of overtime incurred by Prestien.

Before January 5, Pratt typically worked on the clock in excess of 40 hours each week and incurred substantial amounts of overtime. Pratt, like the other letter carriers, was scheduled for a 5-day workweek. In 38 of the 52 weeks prior to January 3, all of Pratt’s work was on union time and the greater part of his time in all but one of the other weeks was union time. Pratt was assigned to Uptown Station, which was more distant from the union office that was Highland Station. In May 2001, Pratt was given permission to clock in and out at Highland Station, rather than at Uptown Station, on days when he would be working on union time away from Uptown Station. Much of his union time was worked away from Uptown Station, including work at the union office. Pratt testified that he kept a log of his work on union time, but that the log was not requested by management and was never submitted to the Employer. The record does not make clear what rules and procedures Pratt followed prior to January 5, regarding permission to work on union time. Pratt, unlike Prestien, did do unit work. I infer that his union time was subject to management oversight and scheduling.

Pratt testified regarding a January 5 conversation with labor relations Manager Joel Wadsworth concerning Pratt’s overtime and his working on union time on his nonscheduled day as Local president. Wadsworth had been made Pratt’s immediate Supervisor. Wadsworth also testified about the conversation. A composite of the credible and probable testimony establishes that Wadsworth told Pratt that union time by him on overtime had to be approved by Wadsworth and that Pratt would not be allowed to work on union time his nonscheduled day without Wadsworth’s approval. Pratt called Postmaster Tuleja, who restated the instructions and told Pratt that he was expected to comply. There are payroll records in evidence for Pratt reflecting his work during the 10 weeks period beginning January 4. Those records show that Pratt worked on union time on his nonscheduled day during 3 of those weeks. He worked union time on overtime in each of the 10 weeks.

The evidence does not show that the Employer promulgated or enforced a rule prohibiting Pratt from performing union duties on overtime and on nonscheduled days overtime when he became union president on January 5. The evidence does show that his hours on union time on both overtime and on nonscheduled days were subject to approval by Wadsworth and the number of such hours he worked was reduced beginning on January 5. There is no evidence that Pratt requested or was denied unit work that would offset any union time that Pratt may have been denied.

The record does not reflect any specific denials of requests by Pratt for union overtime or for union time on his nonscheduled day. The record also does not disclose the extent to which Richard “Smiley” Martinez, Pratt’s replacement as vice president, used union time to perform the duties performed by Pratt prior to January 5. There was no collective bargaining regarding the limitation imposed on Pratt’s union time on January 5.

<sup>23</sup> Unless otherwise indicated, all January dates are 2004.

The General Counsel asserts that the limitation imposed on Pratt's union time when he became union president violated Section 8(a)(1), (3), (4), and (5) of the Act. The Respondent contends that the evidence does not show that the limits imposed on Pratt will support a finding of an unlawful unilateral change based on past practice. As discussed supra, a past practice that will support a finding of an unlawful unilateral change must be shown to be a well established, long standing practice. See *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988), and cases cited there; *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 355 (2003), and cases cited there. In the present case there is an absence of substantial credible evidence of a well established, long standing practice that was changed. Rather, the limitations imposed on Pratt when he became local president were consistent with the work hours and schedule Prestien had been permitted to work. In this regard, the evidence does not show that Prestien had the option to work overtime or on union time on his nonscheduled day without management permission while he was president. The fact that the limitations were not imposed on Pratt during the 2-month period when Prestien was on extended leave before he retired does not warrant a different conclusion. Under the Union's rules, Pratt was not permitted to appoint an acting vice president before Prestien retired. Pratt continued to work as vice president, as well as president.

In view of the foregoing, I conclude that the General Counsel has not established a refusal to bargain in violation of Section 8(a)(1) and (5) of the Act by the limitations imposed on Pratt's union time on January 5. I further conclude that the evidence does not show that the limitations were unlawfully motivated by protected activities. Accordingly, the General Counsel has not established a violation of Section 8(a)(3) or (4) of the Act. I recommend that paragraph 5(cc) be dismissed.

31. January 7, 2004 limitations on Pratt's work as  
Local president

The complaint alleges in paragraph 5(dd) that on January 7, the Employer violated Section 8(a)(1), (3), (4), and (5) of the Act by requiring Pratt to report to Wadsworth at the beginning of each tour and requiring Pratt to perform any union business in Wadsworth's office. The following is a composite of the more credibly offered and probable testimony regarding what was said and done on regarding the issue.

At a September 19 negotiation meeting at which Tuleja, Hardin, Pratt, and Prestien addressed various labor-management concerns, discussed supra in connection with paragraphs 5(r) and (s) of the complaint, the parties also addressed grievance processing. Tuleja complained that there was a large backlog of second step grievances, called Formal Step A. He asserted that the backlog was inconsistent with the amount of paid union time that was being used. Prestien attributed part of the problem to each station manager handling Formal Step A grievances. Tuleja announced that he was assigning Wadsworth to work full time on resolving the grievance backlog, either by adjustment or moving the grievances on to the next step and proposed that Prestien also spend 8 hours a day on working through the grievances. Prestien opined that much more than 8 hours a day of work would be necessary to accomplish the task. He stated that he was not willing to per-

sonally work full time with Wadsworth on the grievance backlog, pointing out that he had designated several employee representatives to handle grievances at Formal Step A. Prestien agreed to have someone available to meet with Wadsworth regarding the Formal Step A backlog. Tuleja thereafter assigned additional management representatives to work on the backlog and the Local named additional Formal Step A representatives.

There had been a reduction in the Formal Step A backlog at the time Pratt became Local president on January 3, but Tuleja was not satisfied with the progress. On January 7, Tuleja spoke with Pratt and directed that in the future he would report to Wadsworth's office after he clocked in, rather than going to the off-site union office. Pratt was then working full time on union time. Tuleja told Pratt that he would work each day with Wadsworth on the Formal Step A backlog. This arrangement was a unilateral decision by Tuleja and Pratt did not agree to the arrangement. The following day Pratt protested Tuleja's action in a letter to Tuleja and stated his intention to file Board charges if the changes were not rescinded. The changes were not rescinded at that time, but were later rescinded on an unspecified date and Pratt resumed clocking in at Highland Station and going to the Local's offsite office.

The evidence does not show that there was more than a coincidental correlation between the unilaterally changes and Pratt's protected activities. Accordingly, I conclude that the General Counsel has not established a violation of Section 8(a)(3) and (4) of the Act.

The long-standing practice of permitting the Local president to perform his duties in the Local's office was a mandatory subject of bargaining. Tuleja unilaterally required Pratt to report to Wadsworth at the beginning of each tour and requiring Pratt to perform union business in Wadsworth's office. The Employer's motive is immaterial. The fact that the Union's office was not on the Employer's premises and was not shown to be controlled by the Employer is not a material distinction. I conclude that the Employer violated Section 8(a)(1) and (5) of the Act as alleged. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985).

32. Changes to the time limits for grievance disposition

The complaint alleges in paragraph 5(ee) that on January 12, the Employer changed the time limit in which pending grievances had to be disposed. The complaint alleges that this violated Section 8(a)(1) and (5) of the Act. On brief the General Counsel also argues that the Respondent engaged in violations of Section 8(a)(3) and (4) by this alleged conduct. The complaint does not allege such violations. Assuming, without deciding, that the merits of those contentions should be addressed, the violations of Section 8(a)(3) and (4) were not proven.

Complaint paragraph 5(ff) alleges that by letter dated January 14, the Employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively about changes to the time limit. Paragraph 5(gg) alleges that by letter dated February 6, 2004, the Employer violated Section 8(a)(1) of the Act by refusing to bargain collectively about the subject. On brief the General Counsel argues that the conduct alleged in Paragraph 5(gg) also violated Section 8(a)(5). While that conduct is not

alleged as an 8(a)(5) violation, it was fully litigated and the failure to reference that section of the Act in the complaint was an obvious inadvertence and it will be addressed.

As discussed supra, there was a meeting on September 19, where Tuleja assigned Wadsworth to work full time on the backlog of Formal Step A grievances. Prestien testified that Wadsworth's assignment followed a change in the handling of Formal Step A grievances. Under the revised procedures, a central Albuquerque management representative responds to Formal Step A grievances for all stations, rather than the individual station managers. That change is not alleged to have been unlawful.

The collective-bargaining agreement provides for a grievance procedure with several steps. The first step is Informal Step A. At this first step an employee who feels aggrieved must discuss the grievance with the immediate supervisor. The time limit is 14 days. The time limit for an appeal is 7 days and the contract does not provide for an extension of that time limit.

The second step of the grievance procedure is Formal Step A. The contract provides:

The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date.

The Union may appeal an impasse at Formal Step A. The third step of the grievance procedure is Step B. The agreement provides for extensive review and permits the evidence and the issues to be supplemented at Step B. Union and Employer representatives at the national level, following multifaceted alternative procedures, can consider the merits of the grievance. Ultimately a grievance may be arbitrated.

After the September 19 meeting, Prestien and Wadsworth met to consider the pending Formal Step A grievances. The backlog of Formal Step A grievances was much greater than they would be able to address within the 7 days permitted under the contract and many were already overage. The backlog amounted to several hundred grievances. Prestien and Wadsworth agreed that the time limits on the pending Formal Step A grievances would be waived, as permitted under the agreement. They also agreed that the 7-day time limit on all new Formal Step A grievances would be waived, while they worked through the backlog. They agreed to consider discipline grievances first. The record does not show that either the Union or the Employer had refused to meet and consider the grievances in a timely fashion and there has been no contention that the backlog was caused by unfair labor practices. The Employer and the Local continued to waive the 7-day time limit for meeting on Formal Step A grievances, until January. On January 14, Pratt wrote a letter to Tuleja that stated as follows:

We have a mutually agreed upon extension of time limits for all Formal Step A grievances. On January 12, 2004, you announced to me your intension [sic] of the elimination of that agreement and enforcing 7 day time limits on all Formal Step A grievances.

As this amounts to a unilateral change, I hereby request you rescind these changes and request bargaining on

this matter. It is necessary that we meet to discuss this matter ASAP as it will soon affect the numerous grievances we now have at the step of the grievance procedure. Absent any action on your part, I will file yet additional charges with the National Labor Relations Board for these unilateral changes. I look forward to hearing from you soon.

After reviewing the letter, Pratt testified that he could only recall speaking to Wadsworth about the 7-day time limits.<sup>24</sup> In response to a leading question, he testified that he believed that Wadsworth had said the change was coming from Tuleja. Pratt testified that his recollection was that Wadsworth had told him "they were ending all time limit extensions and any grievances they would consider untimely after, I believe, it was the 20th of January." Tuleja credibly testified that the instruction that he issued was not that the existing backlog of several hundred grievances would be addressed in 7 days. Rather, his instruction was that his announced plan was that the Employer and the Union would do their best to meet the 7-day time limit for new grievances. I credit his testimony that he never issued a directive that no extension of time limits on Formal Step A grievances would be agreed to.

There is an absence of evidence that the Employer denied any specific extensions of time on Formal Step A grievances. Moreover, in the context of the Union's rights at Step B, discussed above, the evidence does not show that the Union would be materially prejudiced if grievances were sent on to Step B.

Pratt testified that a few days after January 14, he and Union Vice President Martinez met with Steve Hardin, Wadsworth's supervisor, to discuss the time limit issue. According to Pratt, "[Hardin] basically said that we would keep—just keep working on the grievances, trying to catch them up, and that they wouldn't enforce the time limits." I infer that this meeting was prior to the date when Tuleja indicated that he no longer wished to routinely waive the 7-day time limit (January 20, according to Pratt).

The General Counsel has not advanced any convincing argument why the Employer would not have been privileged to cease routinely waiving the 7-day time limit, especially considering the advanced notice given the Union. The Employer was willing to make several management representatives available to address the grievances. The Union had several Formal Step A representatives who would be entitled to meet on the clock to address the grievances. It is unclear why the attempt by the Employer to more promptly address employee grievances could be considered a refusal to bargain.

In any case, the evidence shows that the Employer met for bargaining regarding Tuleja's announced plan, as requested by the Union and Hardin agreed to not enforce the time limits. There was no unilateral change and no refusal to bargain. I conclude that complaint paragraphs 5(ee), (ff), and (gg) were not proven and I recommend that they be dismissed.

<sup>24</sup> The record does not show that the letter was a past recollection recorded and the letter was not received into evidence as such.

33. Rule regulating letter carriers' work during their first hour each day

The complaint alleges in paragraph 5(z) that on December 5, at Five Points Station and on December 12, at Highland Station the Employer prohibited employees at Five Points and Highland Stations from engaging in any activities except casing mail during the first hour of work each day. The complaint alleges that this violated Section 8(a)(1) and (5) of the Act.

The General Counsel contends that in December 2003, Hardin instructed the Albuquerque managers to reimplement a "Golden Hour" rule that had been the subject of an unfair labor practice charge and a grievance in 2002.

On December 13, 2002, the Pratt filed a charge against the Employer in Case 28-CA-18365(P), relating to the alleged implementation of a "Golden Hour" rule in Albuquerque. The body of the charge states:

On or about November 27, 2002, the above named employer orally announced and implemented a "Golden Hour" rule precluding letter carriers in the city of Albuquerque from any activities except casing mail during the first hour of work each day. The new rule prohibits letter carriers from talking while working, taking breaks, restroom breaks, immediately reporting safety hazards to the attention of the supervisor, discussing route problems with T-6 (replacement) carrier, report to the supervisor any intruding strangers who enter the building (as required by management), discussing route problems with the regular carrier, drinking coffee while working or to meet with their union representative. The rule also prohibits the union from representing the letter carriers by prohibiting making or receiving phone calls necessary in the administration of the National Agreement, speaking to the supervisor, official steward duty time to investigate grievances or making announcements to letter carriers over the P.A. system.

In December 2002 the Local filed a class action grievance regarding the letter carriers' work requirements during their first hour each day. The grievance stated that the issues presented and the affected contract provisions as follows:

Did management violate the National Agreement when they announced and implemented a new First Hour Rule (Golden Hour) in the city which unilaterally changed the terms of employment for all carriers who are allowed to "only" case during the first hour of work each day restricting them from, inter alia, talking while working, taking breaks, restroom breaks, reporting unsafe conditions, discussing route problems (T-6 & Reg), reporting intruders, drinking coffee while working, official stewards duty time, union officials making or receiving phone calls, union officials talking to supervisor, union making announcements over the PA system? If so, what is the appropriate remedy? Articles 3.5, 15, 17, 19, 31, 30, 41.A, 3+4; LMOU, NLRA

The grievance was settled on January 24, 2003, and the charge was apparently withdrawn. The grievance settlement was in writing, signed by Union and Employer representatives. The settlement terms were as follows:

We agree there is no longer a "First Hour Rule" (Golden

Hour) in the city per letter dated January 10, 2003 and signed by Steve Hardin, Mgr. Customer Service Operations (see attached copy of letter).

The document referenced in the grievance settlement was a memorandum dated January 10, 2003, from Hardin addressed to Albuquerque city station managers, supervisors, shop stewards, and carriers. The memorandum shows copies to various named managers, including Tuleja and Eric Martinez, Albuquerque district manager. The memorandum is signed by Hardin and Prestien. The memorandum includes the following:

Please find this correspondence acceptable as my written acknowledgement where I agree that the Albuquerque installation does not have a policy for the first hour of the workday known as "The Golden Hour." We met and agreed that for the sake of clarity it was better that my office redefine management's philosophy regarding the first hour of the workday without prejudice to either side.

Let me be clear that this entire discussion evolves from the fact that I wish to merely return our workforce to the basics that once made the United States Postal Service a great entity. I believe that we can once again return to such through our mutual respect and cooperation. The "Golden Hour" was a philosophy whereby the admonitions found in the M-41 "City Delivery Carriers Duties and Responsibilities Handbook, Section 1, Subsection 11 duly entitled "Responsibilities of Carrier" Paragraph 112.2 entitled "Diligence and Promptness" Item 112.25 where it states in relevant part: "Be prompt, courteous, and obliging in the performance of duties. Attend quietly and diligently to work and refrain from loud talking and the use of profane language. Further, item 112.27 where it states in relevant part: "Do not engage in any time wasting practices before placing mail in the proper separation. Further, item 112.24 where it states in relevant part: "Display a willing attitude and put forth a conscientious effort in developing skills to perform duties as assigned." These were the backbone components of the philosophy I espoused as the "Golden Hour," where my instructions were only intended to minimize the interruptions a City Letter Carrier suffered in attempting to carry out the duties charged them.

Of course, carriers must be allowed access to their shop stewards. If the matter can wait please contact them at a more conducive time. (See Article 17 Section 3: Right of Stewards, "the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.")

I know you and your officers endorse my intentions that comprised this aforementioned philosophy and believe that I can expect you and your officers, and stewards to be pace setters in my bringing about the transition described herein; however, I recognize that this philosophy was laden with many an addendum that was not intended to be a part of my instructions.

To prove that the "Golden Hour" rule was reimplemented in Albuquerque in December 2003, the General Counsel relies on evidence of two events. One was on December 5, at Five

Points Station and the other at Highland Station on December 12.

Letter carrier Anthony Romero testified about an incident that occurred on the morning of December 5, at Five Points Station. Romero testified that he was at his case and letter carrier Susie Gonzalez came to his case and asked him about overtime stops for the month of December. He related that Supervisor Mary Jane Martinez immediately approached and asked them what they were speaking about. Romero testified that after he told Martinez what they were talking about, Martinez said that they were not supposed to be out of cases for 1 hour and Romero replied that the golden hour rule didn't apply. According to Romero, Martinez repeated that yes it did. Romero testified that he and Martinez repeatedly several times their position that the golden hour rule did or did not apply. Romero testified that when Martinez at one point said in an aggressive tone that the golden hour rule applied, he walked away and went looking for the union steward.

The steward was JoAnn Brown. She related a version that differed from that of Romero. Brown testified that she was standing behind Martinez and heard Martinez tell Romero and Gonzalez that they were not allowed to be out of their cases for the first hour that they were at work, that there was a Golden Hour Rule and they were expected to abide by it. She testified that Romero replied that there was not a Golden Hour Rule. Brown related that the two carriers came to her that same morning and asked for steward time, she asked them to fill out the paperwork and a grievance was filed.

Martinez worked the Postal Service District Office. Martinez' duties included visiting Albuquerque facilities to audit performance, including the job performance of letter carriers. She visited the Five Points Station regularly to audit performance. On the morning of December 5, she was at the Five Points Station. Martinez' version of what occurred that morning is at odds with the testimony of both Romero and Brown. According to Martinez, she observed Romero and Gonzales engaged in a conversation away from their cases at a time when they had not completed casing their mail. She estimated that the conversation lasted about 5-10 minutes. Martinez related that because the employees' immediate supervisor was busy, she approached the employees and asked, "Is this a postal-related issued? Is there anything I can help you with?" According to Martinez, Gonzales just left and went directly to her case, which was on the other side of the casing area and Romero said something to the effect "this isn't the Golden Hour." Martinez testified that she asked Romero, "What are you talking about?" at which point Romero walked to where Brown was and they went to a meeting room and Brown asked for and received steward time to file a grievance.

Based upon my assessment of the demeanor of the witnesses and the probabilities, I conclude that none of the three witnesses were entirely candid and accurate in their testimony. Brown's testimony was not convincingly offered. I am convinced that Brown tailored her testimony to fit the theory of the case. Moreover, it is improbable that Martinez would have said that there was a Golden Hour Rule the employees were expected to follow. The weight of the evidence is that the Employer carefully avoided the term Golden Hour Rule following

the January 24, 2003, grievance settlement. Martinez' account that Romero raised the Golden Hour Rule without Martinez having made any reference to Romero and Gonzalez not being at work in their cases is improbable. Romero's claim that there was an extended back and forth argument between him and Martinez on the issue of whether there was a Golden Hour Rule is improbable and was not convincingly offered.

I find, based on a composite of the more credibly offered and probable testimony, that Martinez observed Romero and Gonzales engaging in an extended conversation at a time when their job assignment was to case mail. Martinez approached the employees and asked what they were talking about. Romero said that they were talking about overtime stops and Martinez told Romero that they were expected to be working at casing mail during the first hour. Gonzales left and returned to her case, which was in a different area. Romero stated that the Golden Hour Rule did not apply. Martinez asked Romero what he was talking about and Romero left to file a grievance. I infer that Martinez was, in fact, familiar with the Golden Hour Rule issue that was the subject of the January 2003 grievance settlement. A Golden Hour Rule had the subject of Board litigation in 2002, in Houston, Texas. *Postal Service*, Cases 16-CA-21199(P), etc., JD(ATL)-39-02 (August 2, 2002), cited by the General Counsel.

The other incident relied on to prove the violation alleged in complaint paragraph 5(z) was a standup meeting of letter carriers at Highland Station conducted by Mishall on December 12.

On December 11, Station Manager Tom Jack had written a letter to the supervisors at Highland Station. Enclosed with his letter was a copy of a warning letter that had been issued to Jack. Jack's letter to the supervisors stated, in relevant part:

I have been given my ultimatum. I either fix the office over run or look for other employment. This being said it is your responsibility to manage the floor to match work hours to workload. This can only be done if carriers work with a sense of urgency and stay in their cases. Loud talking, leaving their work areas without authorization and all time wasting practices must stop. The first hour of work should be nothing but casing mail. Starting 12/12/2003 you will be held accountable for the carriers performance and for the 1700 window. You will get a leaving time and return time during negotiations, write it on the placard and hold carriers accountable. The carriers should know at this point how long it will take to case and carry these new routes. Carriers also have 3 things to do with mail deliver it, return it or forward it. I am still watching carriers looking up forwards and wasting time. We will not work employees over 12 in a day and/or 60 hours in a week.

We need to document down time because of waiting for mail. You will instruct carriers to swipe to stand by time when they run out of mail, this is operation 354. I can not even come close to justifying our problems with the mail flow if we are not documenting our down time caused by the plant.

You will have a stand up with all carriers 12/12/2003 concerning all of the items addressed above. You will in-

struct all of them on the issues covered above and hold the line.

Jack spoke with Mishall by telephone the morning of December 12. Mishall confirmed that he had received Jack's letter and Jack gave him specific instructions regarding what the carriers were to be told. Mishall made notes while he was being instructed by Jack and confirmed his understanding of what he was to do by reading the notes back to Jack. Mishall testified that he followed the notes when he spoke to the employees. Mishall also prepared a memorandum dated December 15, describing what was said at the standup meeting. Jack testified regarding his instructions to Mishall. Evidence of what was said at the meeting included testimony by Mishall, Woodley, letter carrier Terrence Griffin, Metz, and Pratt. The testimony by the employees was largely conclusory in nature and included opinions that Mishall's remarks amounted to a reimplementation of the Golden Hour Rule. The following is a composite of the more credibly offered and probable evidence:

Mishall told the employees that time wasting practices had to stop and that they were to only case mail during the first hour of the day and to not leave their work areas or make phone calls. He said that they must work diligently and quietly and with a sense of urgency. He told them that they must give their supervisor their leave time and return time. He stated that there were three things to do with their mail—deliver it, return it or forward it. He instructed them to swipe over to 354 time if they ran out of mail, even for 5 minutes. Carriers on 354 time are expected to standby in their cases in pay status until additional mail is available. Mishall told the carriers that they should expect discipline if they did not follow his instructions. There was no mention of a "golden hour."

At the time of this standup meeting there was a flow chart in effect that specified the duties of the Highland Station letter carriers. The first four steps in the flow chart are as follows:

#### AM DUTIES

1. CLOCK IN—Carriers must arrive early enough to clock in on time. Personal effects must be stored and obtained prior to clocking in. Clocking in early must be approved with form 3189.

*M-41, 112.26 Do not report at cases or racks before tour of duty is scheduled to begin or linger about cases or racks after tour has ended*

2. GET VEHICLE KEYS

3. DO YOUR VEHICLE CHECK—Perform full-expanded vehicle check including shift and emergency brake hold check. Not to exceed 3 minutes Report any vehicle repairs needed on PS Form 4565.

4. PICK UP MAIL AT HOTCASE

5. GO DIRECTLY TO CASE

*M-41, 112.24 Display a willing attitude and put forth a conscientious effort in developing skill to perform duties assigned*

*M-41, 112.25 Be prompt, courteous, and obliging in the performance of duties. Attend quietly and diligently to work and refrain from loud talking and the use of profane language.*

The M-41 is Handbook M-41, "City delivery Carriers Duties and Responsibilities." The references to the M-41 in the flow chart, as well as the references to the M-41 in Hardin's January 10, 2003 memorandum set forth supra, accurately reflect M-41 requirements. The M-41 was in effect at all times material and the Union was aware of the M-41 requirements. The M-41 is not alleged to be unlawful.

There was some question and answer discussion after Mishall made his remarks. One carrier asked if they should check their vehicles first and Mishall said that they should come in and check your vehicles and then go to the hot case to pick up their mail and go to their cases and case mail. There was a question about going to the restroom or getting a drink of water and Mishall said that they could. In answer to another question, Mishall said they could take an emergency phone call. The meeting began to get unruly and Mishall concluded the meeting by telling the carriers that they should just follow the flowchart and abide by the M-41.

The General Counsel contends that the Golden Hour Rule that was the subject of the 2002 charge and grievance was re-implemented. I cannot determine from the complaint or the stated positions of the General Counsel which of the asserted restrictions mentioned in the prior charge and grievance are claimed to be restrictions that were reimplemented in December 2003. Moreover, I cannot determine which of the asserted reimplemented restrictions the General Counsel claims that the Employer would be obligated to bargain about. I find it unnecessary to individually discuss each of the asserted 2002 unilateral changes.

There is an absence of substantial and probative evidence that on December 5 or on December 12, the Employer unilaterally changed any term or condition of employment of letter carriers at Highland Station that the Employer had a duty to first bargain about. Rather, the evidence shows that the Employer exercised its right to require employees to comply with established job requirements. Accordingly, I conclude that the violation alleged in paragraph 5(z) of the complaint has not been proven and I recommend that it be dismissed.

#### 34. Threat to fire steward Metz on December 13

The complaint alleges in paragraph 5(aa) that on December 13, Jack threatened to fire employees at Highland Station in retaliation for their union activities, in violation of Section 8(a)(1). The evidence offered is that there was a conversation between Jack and Metz on December 13, at Highland Station. No one else was present. Each testified about the conversation.

Prior to the conversation the Local had named Metz in three unfair labor practice charges, including the allegation, discussed supra, that Metz had been discriminated against in violation of Section 8(a)(1), (3), and (4) of the Act. Based on the record, Metz can be fairly described as an active and assertive steward.

According to Metz, Jack engaged him in a conversation in which Jack said that he believed that the carriers at Highland Station were slowing down if they thought a truck was going to be late. Metz testified that he expressed his disagreement. Metz testified that Jack then said that he's been told by Hardin that if Jack could not manage Highland Station, Hardin would put

somebody in who could. According to Metz, Jack then said that he had never been unsuccessful and that he would do whatever it took to be successful at Highland Station. The General Counsel contends that Jack then made a statement that was a threat to discharge Metz. Metz testified as follows:

Q. What else, if anything, did Mr. Jack say to you?

A. He said—he said, so if you can't get your carriers to make their office time then—then they would replace me, and then he hesitated for a second, and as it was said to me.

Q. And when he said they would replace me, was he referring to himself?

A. No, he was talking—he said “you.”

Q. Okay. Now, why don't you state again. What was it that Mr. Jack said?

A. He said, if you can't get your carriers to, you know, make or prove their office time that—then they would replace me, and then he stopped for a second and then he said, as it was said to me. Meaning, as it was said to him, you know, likewise it was said to him that if he couldn't run his office to office time then the same thing applies to me. But he would be replaced and that I was going to be replaced.

Q. And what did you take him to mean by that?

A. That he'd fire me.

Thus, Metz twice testified that Jack's words were “they would replace *me*,” i.e., Jack would be replaced. This is consistent with Hardin's letter to Jack. The General Counsel would treat Metz' testimony as if he had testified that Jack said “they would replace *you*,” based upon Metz' conclusory testimony, elicited by a leading question, that when Jack said “me,” he was referring to Metz. This contention might be more persuasive if Metz had used the first person in describing what Jack said immediately before he made the asserted threat. Instead, earlier in the same sentence, Metz used the second person, stating that Jack said “if *you* can't get *your* carriers.” It is more probable than not that he would have related that Jack went on to say “replace *you*,” if that had been what Jack said. Moreover, he repeated the same version twice, the second time after being asked what he meant. I conclude that Metz testimony is insufficient to prove the threat.

Jack testified that he tried to enlist Metz' assistance in encouraging the letter carriers to remain in their cases to avoid Jack disciplining carriers for not following the flow chart. He denied threatening Metz with discipline if he did not comply. Considering the probabilities, and giving weight to the demeanor of witnesses, I credit Jack's denial. Accordingly, I conclude that the violation alleged in paragraph 5(aa) of the complaint has not been proven and I recommend that it be dismissed.

### 35. Alleged refusals to provide requested information<sup>25</sup>

#### a. Background and the legal framework

There is a significant history of the USPS violating the Act by failing and refusing to furnish relevant and necessary information requested by the NALC, as well as not timely furnishing information. See *Postal Service*, 350 NLRB 125 (2007). In that case the Board found that the Employer failed and refused to provide, and failed and refused to timely provide information requested by the NALC local union in Houston, Texas. The Houston postal facilities are in the Employer's southwest administrative area, as is Albuquerque. In decision the Board noted that the Respondent has a history of violating section 8(a)(5) and (1) by failing to provide requested information at many of its locations over a 20 year period. *Id.*, footnote 1. Because of the Respondent's recalcitrance on that issue, the Board issued a broad order. The Fifth Circuit enforced the Board's order in *NLRB v. Postal Service*, Case No. 03-61059 (2004) (unpublished).

On January 8, 2003, the United States Court of Appeals for the Tenth Circuit entered an unpublished judgment enforcing the Board's Order in Cases 28-CA-17383(P) and 28-CA-17405(P). The Board's order was based on a formal settlement agreement of charges alleging violations of Section 8(a)(5) and (1) of the Act. The agreement provides for the Respondent's answer to the complaint and does not contain a nonadmission provision. The enforced Board order directs the Respondent to cease and desist from refusing to bargain with NALC or its designated local union as collective-bargaining representative of the nationwide unit of letter carriers. The Respondent was specifically ordered to cease and desist from refusing, failing, or delaying to provide and furnish information to the Union that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit.

There is no reported case in which the Board has sought contempt sanctions for the Respondent having disregarded the court orders.

The complaint alleges multiple instances when the Respondent refused, failed or delayed furnishing information to the Union that was necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the unit.

As restated by the administrative law judge in *Contract Carriers Corp.*, 339 NLRB 851 (2003), the following principles set forth in *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), apply in circumstances like those of the present case:

An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the Respondent's duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). The employer's obligation includes the duty to supply information necessary to administer and po-

<sup>25</sup> The unlawful refusal of the Employer to provide copies of the notes made by Supervisor Curtis McCann at a fact finding meeting on September 18, the subject of complaint paragraph 7(p), was addressed supra, with the consideration of other alleged violations.

lice an existing collective-bargaining agreement (Id. at 435–438), and, if the requested information relates to an existing contract provision it thus is “information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement. . . .” *A.S. Abell Co.*, 230 NLRB 1112, 1113 (1977). Where the requested information concerns employees . . . within the bargaining unit covered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance. With respect to such information, “the union is not required to show the precise relevance of the requested information to particular bargaining unit issues.” *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310 (8th Cir. 1979) at 1315. Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F.2d 61, 69 (3d Cir. 1965). In either situation, however, the standard for discovery is the same: “a liberal discovery-type standard.” *Loral Electronic Systems*, 253 NLRB 851, 853 (1980); *Acme Industrial*, *supra* at 432, 437. This information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it. . . . [Footnote omitted.]

....

Once the initial showing of relevance has been made, “the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information.” *San Diego Newspaper Guild [Local 95 v. NLRB]*, 548 F.2d 863 (9th Cir. 1977)] at 863, 867.

Finally, in *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), the Board stated that in assessing the relevance of the information, it will not pass on the merits of the union’s claim that the employer breached the collective-bargaining contract or committed an unfair labor practice; thus, the union need not demonstrate that the contract has been violated in order to obtain the desired information.

The evidence, discussed below, shows that the Respondent delayed furnishing some information for long periods of time. Much of the information was not provided until March 9, 2004, the day the unfair labor practice hearing opened. The duty to bargain is not satisfied if information is not furnished in a timely manner. Where an employer has furnished information, but has unduly delayed furnishing the information, a finding of a violation and a cease and desist order may be justified to deter such conduct in the future. See *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990); *Postal Service*, 332 NLRB 635 (2000).

#### *b. The alleged violations*

##### (1) Information requested by Segarra on February 14

Complaint paragraphs 7(g) and (h) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying, failing, and refusing to furnish requested information to the Union.

Segarra gave three written information requests to Manager Marjorie Woodall on Friday February 14. Each request stated that the request was to investigate a possible grievance and asked that the information be provided at a meeting with Woodall at 12 noon on Wednesday, February 20. Monday, February 17, was a holiday. Woodall’s testimony and her March 26 memorandum to Hardin shows that Woodall and Segarra were going to discuss four unspecified grievances at Formal Step A.

The three information requests asked for the following:

1. USPS transportation performance record, for mail; Station 1st arrival time and last departure time in p.m. on 12/27/02 thru 1/4/03
2. List of all open routes to be pivoted (including auxiliary routes), on 12/27/02, 12/28/02, 1/3/03, and 1/4/03
3. Any documentation policies, operating instructions, directives, etc. indicating the 5:00 p.m. operational window in the ALB MSC

The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

The meeting was held on February 20, but no information was provided at that time. Also present at the meeting was the steward and the supervisor who had handled the grievances at informal step A. The testimony, Woodall’s March 26 memorandum to Hardin and a letter Woodall sent to a paralegal on June 2, show that the transportation performance record described in the first request was available. According to Woodall, she forgot to bring the information. She did provide that information to Pratt on March 14, in response to a different information request, but did not tell Pratt that Segarra had also requested the same information, nor did she tell Segarra that the information had been given to Pratt. It was not until March 9, 2004, that the Respondent provided all the available information. On these facts, I conclude that Woodall did not sufficiently respond to the information requests at any relevant time and the requested information was clearly relevant. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

##### (2) Information relating to a grievance of a June 18 letter of warning

Complaint paragraphs 7(i) and (j) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying, failing and refusing to furnish to the Union requested on August 14.

On June 18, a letter of warning had been issued to letter carrier and alternate Steward Jack Stelling. The letter of warning was grieved. The grievance was denied at Informal Step A and was set for consideration at Formal Step A on September 18. On August 14, Pratt submitted a request for information. The letter asked for all materials management relied upon to support the decision to issue grievant Jack Stelling; a disciplinary letter of warning on June 18; copies of all PS Form 3996’s for Stelling for the dates cited in the letter of warning; a copy of the supervisor’s handwritten notes from a fact finding interview conducted on June 16; and a copy of all materials related to the last route adjustment to Stelling’s route assignment in 2002.

The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

Pratt filed the charge in Case 28-CA-19002(P) on September 17, with a copy of the August 14, information request attached. The charge alleged that the requested information had not been provided. On September 18, the Formal Step A meeting regarding the letter of warning was conducted. The information requested on August 14, had not been provided. Pratt pointed this out to Wadsworth, the management representative. The grievance was then settled in favor of Stelling and the letter of warning was withdrawn.

The complaint alleges, and Pratt's credible testimony shows that in addition to the failure to provide the requested information prior to the meeting on September 18, the Employer did not furnish the requested supervisor's notes until February 27, 2004; that the Employer did not furnish a portion of the requested PS Forms 3996 until March 9, 2004, and that some of the PS Forms 3996 have never been furnished. PS Forms 3996, titled "Carrier Auxiliary Control" is a form the carrier fills out estimating how much time is needed to perform duties beyond the carrier's assigned 8-hour shift. Pratt testified that the Union wanted the materials because there was a question whether Stelling's route had been properly adjusted in 2002. Inferentially, if the Union concluded that the route had not been properly adjusted, a request for readjustment could be requested. The request for information was not withdrawn and the requested information was clearly relevant. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

(3) Information requested in August regarding an employee transfer

Complaint paragraphs 7(k) and (l) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying, failing and refusing to furnish requested information to the Union.

Letter carrier Kyong San Nicolas wished to transfer to Florida and had located a letter carrier in Florida who had agreed to a "mutual trade/transfer," a procedure that is available to employees who wish to swap work locations, subject to management approval at each employee's work location. The trade was submitted for approval and was denied. The denial was grieved. Steward Karl Pecora handled the grievance for the Union. On August 20, Pecora submitted to Supervisor Troy Montoya an information request that asked for a copy of all materials relied on by the Employer in denying the request.

The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

The manager in Albuquerque who was responsible for handling the grievance was Tim Hennig. Hennig supported the proposed transfer, but the transfer was denied in Florida. Hennig spoke with a manager in Florida, but did not receive an explanation for the disapproval. The Union did not receive the requested information. There is no evidence and no contention that the requested information did not exist at the postal facility in Florida. Information was not furnished until March 9, 2004. The requested information was clearly relevant. I conclude that

the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

(4) Information requested in September regarding employee accident reports

Complaint paragraphs 7(m) and (n) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying the furnishing of requested copies of 1769 Accident reports from recent vehicle accidents involving employees I. Hicks, Harry Tipton, and John Metz.

The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

Steward Gill handled a grievance for letter carrier Jennifer Martinez relating to a vehicle accident involving the employee. On September 10, Gill requested copies of accident reports relating to recent vehicle accidents involving three named letter carriers. The accident reports were not provided until March 9, 2004. The requested information was clearly relevant. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

(5) Delay in providing Employee Everything Reports and refusing to meet on grievances

Complaint paragraphs 7(q) and (r) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying until March 9, 2004, the furnishing of Employee Everything Reports for Jim Copeland and Priscilla Padilla that were requested for the Informal Step A meeting that was requested.

The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

The credibly offered testimony of steward Robert Woodley was that he requested in writing the Employee Everything Reports for unit employees Jim Copeland and Priscilla Padilla on September 17 and 19, respectively. The requests were in writing and delivered in person to Sanchez. The requests stated that the information was for the purpose of investigating possible grievances. Woodley testified that the information requested related to his investigation of whether Copeland and Padilla had been improperly mandated to work on their scheduled day off. Sanchez did not provide the information or otherwise respond to the requests. The information was readily available on management's computer and is clearly relevant. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

Complaint paragraph 5(t) alleges that Sanchez also refused to meet for an Informal Step A meeting on about September 24. On brief the General Counsel states that Sanchez refused to meet regarding the Copeland and Padilla issues that were the subject of the September 17 and 19 information requests. The Employer contends that there is no charge to support complaint paragraph 5(t). The criteria of *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), discussed supra, are satisfied and complaint paragraph 5(t) will be considered on the merits. I have not identified any supporting evidence for the alleged refusal to meet. I conclude that the violation has not been proven and I therefore recommend dismissal of complaint paragraph 5(t).

## (6) Delay in providing rural carrier trip reports

Complaint paragraphs 7(s) and (u)(1) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying until March 9, 2004, the furnishing of rural carrier trip reports for September 19, for Five Points, Pino, Rio Rancho stations that were requested in writing by steward Gill on September 22, 23, and October 2.

The rural carriers are represented by National Rural Letter Carriers Association (NRLCA). Because the request is for information concerning employees outside the bargaining unit, the relevance must be demonstrated. *Brooklyn Union Gas Co.*, supra. The relevance of the requested information is obvious. Gill's grievance investigation was whether rural carriers based at Five Points, Pino, Rio Rancho stations were delivering mail that letter carriers at AMF Station represented by the Union should have been allowed to carry. The Respondent has not carried its burden to prove a lack of relevance.

Gill's request was made to Supervisor Perez at AMF station. The information was not provided until March 9, 2004. Perez's response to Gill when he requested the information was that the information was not available at AMF station and that the Union should request the information from Five Points, Pino, and Rio Rancho stations. The relevance of the information regarding the nonunit employees is clear. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

## (7) Failure to provide Carl Montano's work restrictions

Complaint paragraphs 7(t) and (u)(2) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing requested work restrictions for letter carrier Carl (Carlo) Montano. Gill gave Supervisor Perez a written request for the work restrictions on September 22 and a written request to Supervisor Curtis McCann on October 4. The second request stated that it related to a work restrictions grievance. The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

McCann wrote on the request that the information would be provided by October 10. About a week later Perez told Gill that the information would not be provided, citing medical confidentiality. Montano's work restrictions were not furnished to the Union. The record does not show that if the Union was given Montano's work restriction the confidentiality of the employee's medical records would be compromised. The Union did not ask for medical or personal information that was the basis for the restrictions.

When, on March 9, 2004, the Respondent untimely provided other information, the only additional response regarding this request was that the information would be provided only upon a medical release from Montano. The Employer has not proposed any accommodation that would address confidentiality issues nor has the Employer demonstrated that disclosure of the work restrictions would impinge on a legitimate and substantial claim of confidentiality. Thus, there is insufficient information to balance the competing interests. See *Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *Exxon Co. USA*, 321 NLRB 896 (1996).

I conclude that the Respondent violated Section 8(a)(5) and

(1) of the Act by its response to the information request. Because Montano I recommend that the Respondent be ordered, on request, to bargain with the Union in good faith for a mutually satisfactory confidentiality agreement, protective order, or other procedure that will accommodate the Union's need for the requested information while safeguarding it from unnecessary disclosure, and if such good-faith bargaining efforts are successful, disclose the requested information to the Union subject to the provisions of the parties' agreement. See *Exxon*, supra.

## (8) Failure to provide Highland Station information for requested on October 20 and 27

Over the objection of the Respondent, the General Counsel was permitted to amend the complaint to add paragraphs 7(v), (w), (x), and (y) at the hearing. The allegations involve the same legal theory as the allegations in timely charges regarding similar conduct by the Respondent; the allegations arise from the same factual situation or sequence of events; and similar defenses to would be raised. See *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

Complaint paragraphs 7(v) and (w) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing the hours analysis report and the employee moves reports for Highland Station for the week of October 11. The evidence shows that Steward Metz gave such a request to Supervisor Mishall in writing on October 20. Metz credibly testified that the information related to unit employees and was not provided. The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

Complaint paragraphs 7(x) and (y) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing the ETC everything report, 3996's, route assistance worksheet, list of P.M. assistance used and list of employees used from outside of Highland Station on October 16. The evidence shows that steward Metz gave such a request to Supervisor Sanchez in writing on October 27. Metz credibly testified that the information related to unit employees and was not provided. The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

## (9) Failure to provide Highland Station route inspection information

Complaint paragraph 7(z), (aa), and (bb) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing or delaying the furnishing of Forms 1838, 1838c, 3996, 1840B and all things related to the route inspection conducted for specified routes at Highland Station October 4-10. The evidence shows that on October 20, Steward Metz gave 36 grievances to Supervisor Mishall. Each request was identical, except for the letter carrier route number for which information was sought and the grievance number. In the part of the griev-

ance form for the grievant's name was the statement "class action." Accompanying each grievance was an information request. The requests stated that the information was for the purpose of investigating a possible grievance. The requests were for "Forms 1838, 1838c, 3936, 3999, 1840B and all thing related to the Route Inspection conducted on the week 10-4-03 through 10-10-03 at Highland station for Route [number of a route]." After some delay, the Respondent provided only a portion of the requested information. The remaining information was not provided until March 9, 2004. The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance.

I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

(10) Failure to provide AMF route inspection information

Complaint paragraph 7(cc), (dd), and (ee) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by not furnishing or delaying the furnishing of Forms 1838, 1838c, 3996, 1840B and all things related to the route inspection conducted for specified routes at AMF October 18-24.<sup>26</sup> The evidence shows that on October 27, Steward Gill gave 23 information requests to Supervisor Perez. Each request was identical, except for the route number for which information was sought. The requests stated that the information was for the purpose of investigating a possible grievance. The requests were for "Forms 1838, 1838c, 3936, 3999, 1840B and all related information to the route Inspection of 10-18-03 through 10-24-03 including personal notes at Airmail Station for Route [number of a route] and employee mores report." The route numbers specified were letter carrier routes.

Manager Tim Hennig told Gill on October 28, that the information would be furnished. Gill testified that about a month later Pratt told him that then Local vice president Richard "Smiley" Martinez had told Pratt "that Smiley had gotten our route count information" Gill testified that when he later reviewed the information provided, some documents were missing. The remaining information was eventually provided, but some was delayed until March 9, 2004. The information requested concerned unit employees and was presumptively relevant. The Respondent has not carried its burden to prove a lack of relevance. I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by these acts.

36. Charges for copying documents

Complaint paragraph 5(w), (x), and (y) allege that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing new methods for calculating the amounts charged for copying documents in response to information requests on November 7 and 12, and refused to bargain collectively about the issue.

On November 7, Manager Andy Letterhos, Hennig's supervisor, sent a memo to Metz regarding the October 27, information request. The memo stated:

<sup>26</sup> There appears to be errors in some of the paragraph references in the amended complaint that did not prejudice the Respondent.

The copies of the route inspection for Highland Station have been completed for your examination. Upon receipt of the money for the expenses for copying performed, the entire package will be sent to you. The following is a list of the expenses incurred:

Copies made:	1324	
Copies charged @ .15 per copy	1324	\$183.60
Hourly rate for 8.17 hours of copy preparation		\$294.12
Total charged:		\$477.72

If you have any questions, you may call my employee Tim Hennig at 346-8659.

Thank you for your time and concern,

On November 12, Manager Letterhos sent a memo to Gill regarding the October 20 information request. The memo stated:

The copies of the route inspection for Highland Station [sic, AMF] have been completed for your examination. Upon receipt of the money for the expenses for the copying performed, the entire package will be sent to you. The following is a list of the expenses incurred:

Copies made:	960	
Copies charged @ .15 per copy	860	\$129.60
Hourly rate for 4.5 hours of copy preparation		\$162.00
Total charged:		\$291.00

If you have any questions, you may call my employee Tim Hennig at 346-8659.

Thank you for your time and concern,

On November 24, Pratt replied to Letterhos' memos. The text of the letter was as follows:

I am in receipt of your letters to NALC Stewards John Metz [Highland Station] and Mike Gill [AMF], dated November 7 and 12, 2003, respectively (copies attached), in which you state that you are withholding grievance information requested by them until certain "copying" expenses are paid by the Union. Although the Union has paid for copying expenses in the past, the amounts you have charged and the procedure you are utilizing in assessing these figures (as well as withholding the requested information), have not been used in the past or agreed to by the Union. As such, your actions constitute unilateral changes and I am hereby requesting that you rescind these changes and request bargaining on this matter. Absent corrective action on your part, I will file yet additional charges with the NLRB not just for these unilateral changes, but for our [sic] failure to provide the requested information. I look forward to hearing from you soon.

Letterhos replied to Pratt by letter on December 1. Letterhos position was that he had always charged the NALC for information in excess of 100 pages. Letterhos enclosed copies of the relevant provisions from the Employer's Administrative Support Manual (ASM), including the per page copy charge of \$.15, professional charges of \$5.35 per quarter hour and clerical charges of \$4.40 per quarter hour. In his letter, Letterhos as-

serts that under the terms of article 19 of the NALC national agreement, the ASM applied. Letterhos and Pratt both sent a copy of their letters to the Albuquerque district manager in Dallas, Texas. The total hourly charges stated in the letters sent to Gill and Metz are inconsistent with the ASM provisions sent to Pratt, based on the number of hours stated. The implicit hourly rate used in the letters is \$9 per quarter hour. The record does not disclose whether the discrepancy between the ASM hourly rates and the letters was ever explicitly addressed. The Employer's position as reflected in the record has consistently been that it was contractually privileged to assess the charges set forth in the ASM.

The Union did not pay the charges for the information and filed a grievance. The district manager directed Letterhos to turn over the documents, without waiting for payment. The applicability of the charges were pending in the grievance procedures at the time of the hearing. The Employer has continued to maintain that charges were appropriate. Gill testified regarding another information request submitted to McCann, discussed supra, where he acknowledged that he had split an information request into multiple requests to avoid the possibility of the Local being charged.

The evidence does not show that the disagreement regarding the copying charges were more than a contract dispute. The Union contended that it could avoid charges for copying documents relevant to an employer action that affected many employees by casting the dispute as individual grievances. The Employer challenges the correctness of the Union's position. Moreover, the Employer provided the documents after the Union grieved the issue.

The hourly amounts sought by the Employer were the amounts stated in the ASM. The figures in the letter appear to be only arithmetic errors, which the Union chose to not mention to the Employer.

On those facts, I conclude that a violation of Section 8(a)(5) and (1) of the Act has not been proven and I recommend dismissal of complaint paragraph 5(w), (x), and (y).

#### CONCLUSIONS

1. The Respondent Employer, United States Postal Service, is an employer over which the Board has jurisdiction pursuant to Section 1209 of the Postal Reorganization Act.
2. National Association of Letter Carriers, AFL-CIO

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

3. Sunshine Branch 504 is a constituent NALC local and a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent violated Section 8(a)(1), (3), and (5) as found herein.

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

6. The Respondent has not otherwise violated the Act.

#### REMEDY

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

The Respondent having discriminatorily disciplined and Michael Gill and placed him temporarily on off-duty status, Respondent shall be directed to make Gill whole for any and all loss of earnings and other rights, benefits and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent must also be required to expunge any and all references to its unlawful placement of employee Michael Gill on off-duty status from its files and the unlawful warning letters issued to employees Michael Gill and Karl Pecora. Respondent must notify these employees in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future.

The General Counsel has requested special remedies, including a broad posting requirement, noting the Respondent's history of disregarding its duty to provide information and the evidence in the record that managers and supervisors are frequently transferred. I recommend that the Respondent be ordered to post the notice at all Albuquerque District facilities. A convincing case has not been made for other special remedies.

[Recommended Order omitted from publication.]