United States Postal Service *and* Bobby Cline and American Postal Workers Union, Playground Area Local 5643. Cases 15–CA–17767, 15–CA–17818, 15–CA–17819, 15–CA–17884, 15–CA–17917, and 15–CA–17961

July 31, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On May 17, 2007, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt[2] the recommended Order as modified and set forth in full below.[3]

The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act by denying employee Bobby Cline his *Weingarten* right to union representation during an investigative interview. The Respondent excepts, citing due process grounds. We find merit in these exceptions.

On November 8, 2005, Supervisors Joel Ouellette and Lease Ginn met with Cline and Union President Bobby Pruett for an investigative interview. According to Cline, the following exchange took place. As the interview was about to start, Pruett asked the supervisors to explain its purpose. Ouellette told Pruett that although he could be present during the interview, he could not speak. Pruett protested, but Ouellette repeated that he would not allow Pruett to speak. Based on Cline's testimony, the judge found that, through Ouellette, the Respondent violated Section 8(a)(1) by denying Cline his *Weingarten* right to union representation. Excepting, the Respondent argues that the judge erred in so finding, as the General Counsel neither alleged this theory in the complaint nor moved to amend the complaint to reflect such a violation.

Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense. Typically, such notice is furnished by the allegations set forth in the complaint. However, "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The "determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." Id. at 335. Further, "[t]he presentation of evidence associated with an alleged claim . . . is insufficient to put the parties on notice that another, unalleged claim (for which that evidence might also be probative) is being litigated, especially where the two claims rely on different theories of liability." *Dilling Mechanical Contractors*, 348 NLRB 98, 107 (2006).

[1] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1), (3), and (4) of the Act by: (1) issuing employee Marcus Jackson a warning letter; (2) issuing employee Bobby Cline a warning letter; (3) placing Cline on emergency suspension; (4) requiring Cline to undergo a fitness-for-duty examination; (5) placing Cline on administrative leave; (6) unlawfully interrogating Cline on three separate occasions concerning his union and other protected activities; and (7) suspending Cline's pay for 2 weeks. There are also no exceptions to his findings that the Respondent violated Sec. 8(a)(5) by failing and refusing to provide relevant and necessary information to the Union upon its request.

[2] Although not sought by the General Counsel, the judge recommended imposing a broad cease-and-desist order as part of the remedy on the ground that the Respondent had demonstrated a proclivity to violate the Act. See *Hickmott Foods*, 242 NLRB 1357 (1979). In doing so, the judge relied in part on his finding that the Respondent unlawfully denied employee Bobby Cline his right to union representation under *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). As explained below, however, we reverse that finding on due process grounds. We also observe that a narrow order in this case will prohibit any future violations of Sec. 8(a)(1), (3), (4), and (5) that are like or related to those found herein. In these circumstances, we decline to impose a broad order.

The judge also recommended requiring the Respondent's chief executive officer to sign the notice to employees and placing the Respondent on notice that if it commits further *Weingarten* violations, it will be assessed the expenses of the resulting litigation. We do not adopt these recommendations because we are reversing the judge's *Weingarten* finding, and the circumstances of this case do not otherwise warrant these extraordinary remedies.

We shall modify the judge's recommended Order in keeping with the foregoing, to conform to the violations found and to the Board's standard remedial language, and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.,* 335 NLRB 142 (2001). We shall also substitute a new notice to conform with the Order as modified and in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

Here, the unalleged *Weingarten* violation was not fully litigated. What transpired was precisely the scenario the Board found insufficient as a matter of due process in *Dilling Mechanical Contractors*, supra: evidence was introduced in association with an alleged claim based on one theory of liability, which the judge then relied on to find an unalleged claim based on a different theory of liability. When Cline offered the testimony upon which the judge relied to find the *Weingarten* violation, he was testifying in support of a complaint allegation that the Respondent, by Supervisors Ouelette and Ginn, had coercively interrogated Cline. The testimony was not thereafter mentioned or referred to for the duration of the hearing. Significantly, after Cline testified, the General Counsel twice amended the complaint. On neither occasion did he seek to add a *Weingarten* allegation. See *International Baking Co. & Earthgrains*, 348 NLRB 1133, 1134 (2006) (finding it significant, in concluding that an issue had not been fully litigated, that the General Counsel moved to amend the complaint in one respect, but failed to amend the complaint to allege the violation the judge found).

The Respondent also contends that had it been put on notice of a potential *Weingarten* violation, it may well have altered its litigation strategy. Again, Cline was testifying in support of an allegation of coercive interrogation. In defense of that allegation, the Respondent chose to call to the stand the manager who drafted the questions asked of Cline rather than Ouelette and Ginn, who conducted the interview. Had it known that it faced potential *Weingarten* liability, the Respondent might have called Ouellette and Ginn to testify as to their recollections of what was said. The Respondent also may have altered its conduct of the case by cross-examining Cline and Pruett on the *Weingarten* issue. But the Respondent had no reason to believe there was any such issue in the case.[4]

Accordingly, for the foregoing reasons, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by denying Cline his *Weingarten* right to union representation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United States Postal Service, Destin, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union or other protected activities.

(b) Placing an employee on emergency suspension because he engaged in union activities, filed unfair labor practice charges with the Board, testified in Board proceedings, and/or engaged in other protected concerted activities, or to discourage other employees from engaging in such activities.

(c) Requiring an employee to take a fitness-for-duty examination because he engaged in union activities, filed unfair labor practice charges with the Board, testified in Board proceedings, and/or engaged in other protected concerted activities, or to discourage other employees from engaging in such activities.

(d) Placing an employee on administrative leave because he engaged in union activities, filed unfair labor practice charges with the Board, testified in Board proceedings, and/or engaged in other protected concerted activities, or to discourage other employees from engaging in such activities.

(e) Disciplining, suspending, or otherwise discriminating against employees because they engaged in union activities, filed unfair labor practice charges with the Board, testified in Board proceedings, and/or engaged in other protected concerted activities, or to discourage other employees from engaging in such activities.

(f) Failing and refusing to bargain in good faith with the exclusive representative of its employees in a unit appropriate for collective bargaining by failing and refusing to furnish the Union, in a timely manner, information requested by the Union that is relevant to the Union's representative duties and necessary for that purpose.

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

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

(a) Within 14 days from the date of this Order, rescind the disciplinary warnings issued to Marcus Jackson on February 22, 2005, and to Bobby Cline on March 4, 2005, and the 14-day suspension issued to Bobby Cline on about March 13, 2006.

(b) Make Bobby Cline whole, with interest, for all losses he suffered as a result of his unlawful emergency suspension on September 2, 2005, and the Respondent's failure thereafter to recall him, and of his unlawful 14-day suspension beginning April 1, 2006.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Marcus Jackson and Bobby Cline and the unlawful suspensions of Bobby Cline, and within 3 days thereafter

[4] Had the Respondent been given adequate notice of the *Weingarten* issue, Cline's credited testimony would have established a prima facie violation. See *Barnard College*, 340 NLRB 934, 935 (2003) ("The union representative cannot be made to sit silently like a mere observer.").

notify them in writing that this has been done and that the disciplines and suspensions will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Destin, Florida, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in its Destin, Florida facility at any time since February 22, 2005.

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees concerning their union or other protected activities.

WE WILL NOT place any employee on emergency suspension because the employee engaged in activities protected by the Act, or to discourage employees from engaging in such activities.

WE WILL NOT require any employee to undergo a fitness-for-duty examination because the employee engaged in activities protected by the Act, or to discourage employees from engaging in such activities.

WE WILL NOT place any employee on administrative leave because the employee engaged in activities protected by the Act, or to discourage employees from engaging in such activities.

WE WILL NOT discipline, suspend, or otherwise discriminate against any employee because the employee engaged in activities protected by the Act, or to discourage employees from engaging in such activities

WE WILL NOT fail and refuse to bargain in good faith with American Postal Workers Union, Playground Area Local 5643 by failing to provide, in a timely manner, information the Union requested that is relevant to the Union's performance of its representative duties and necessary for that purpose.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the disciplinary warnings issued to Marcus Jackson on February 22, 2005, and to Bobby Cline on March 4, 2005, and the 14-day suspension issued to Bobby Cline on about March 13, 2006.

WE WILL make Bobby Cline whole, with interest, for all losses he suffered as a result of our unlawful emergency suspension of him on September 2, 2005, and our failure thereafter to recall him, and of our unlawful 14-day suspension of him beginning April 1, 2006.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Marcus Jackson and Bobby Cline and the unlawful suspensions of Bobby Cline, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the disciplines and suspensions will not be used against them in any way.

UNITED STATES POSTAL SERVICE

[5] 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."

Kevin McClue, Esq., for the General Counsel.
Sandra Walton Bowens, Esq., of Memphis, Tennessee, for the Respondent.
Mr. Michael A. Hughey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel of the National Labor Relations Board (the Board) alleges that the United States Postal Service (Respondent) violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). With certain exceptions, I conclude that the General Counsel has proven these allegations.

I. PROCEDURAL HISTORY

This case began on July 15, 2005, when the American Postal Workers Union, Local 5643 filed the initial charge against Respondent in Case 15–CA–17767(P). On January 30, 2006, the Union amended this charge.

On September 16, 2005, Bobby Cline filed an unfair labor practice charge against Respondent in Case 15–CA–17818. Cline amended this charge on October 25, November 30, and December 12, 2005, and January 27, 2006.

On September 19, 2005, the Union filed an unfair labor practice charge against Respondent in Case 15–CA–17819. The Union amended this charge on January 30, 2006.

On December 1, 2005, Cline filed a charge against Respondent in Case 15–CA–17884(P). Cline amended this charge on January 26, 2006.

On January 27, 2006, Cline filed a charge against Respondent in Case 15–CA–17917(P). Cline amended this charge on March 2, 2006. On March 14, 2006, Cline filed a charge against Respondent in Case 15–CA–17961(P).

On February 17, 2006, the Regional Director for Region 15 issued an order consolidating cases, consolidated complaint, and notice of hearing in Cases 15–CA–17818(P), 15–CA–17819(P), and 15–CA–17884(P). In doing so, the Regional Director acted for and on behalf of the General Counsel of the Board, referred to below as the "General Counsel" or the "Government." Respondent filed a timely answer.

On March 29, 2006, the Regional Director issued a second order consolidating cases, second consolidated complaint, and notice of hearing, which consolidated Case 15–CA–17767(P) with Cases 15–CA–17818(P), 15–CA–17819(P), and 15–CA–17884(P). Respondent filed a timely answer.

On April 11, 2006, the Regional Director issued a third order consolidating cases, third consolidated complaint, and notice of hearing, which consolidated Case 17–CA–17917 with the other four. Respondent filed a timely answer.

On May 15, 2006, the Regional Director issued a fourth order consolidating cases, fourth consolidated complaint, and notice of hearing. Respondent filed a timely answer.

A hearing opened before me on June 26, 2006, in Destin, Florida. The parties presented evidence on June 26 through 29, and on July 19, 2006. Counsel presented oral argument on August 11, 2006.

At the beginning of the hearing, I granted the General Counsel's motion to amend the complaint to add the allegations that Postmaster Paul McGinnis and Supervisor John Culgar were supervisors within the meaning of Section 2(11) of the Act. Respondent admitted these allegations.

The General Counsel further amended the complaint on June 29, 2006, by introduction of General Counsel's Exhibit 54, "Amended Fourth Order Consolidating Cases, Amended Fourth Consolidated Complaint and Notice of Hearing." (For brevity, I will refer to this document simply as the "complaint" or, where clarity requires, the "fourth amended complaint.") This document memorialized the changes made by the oral amendment described in the last paragraph. It also added the allegation that Manager Marty Halverson was Respondent's supervisor within the meaning of Section 2(11) of the Act.

General Counsel's Exhibit 54 also amended complaint paragraph 20 by changing "a copy of the postal inspector's notes regarding the investigation of an alleged threat" to "a copy of the postal inspector's notes regarding the alleged threat made by Cline on September 2, 2005." I conclude that the amendment did not change the meaning of complaint paragraph 20.

Respondent's answer to the fourth amended complaint is in evidence as General Counsel's Exhibit 55.

II. DEFERRAL AND COLLATERAL ESTOPPEL ISSUES

A major issue in this case concerns Respondent's suspending Cline indefinitely, without pay, by putting him on "emergency placement leave" on September 2, 2005. Respondent developed the "emergency placement" procedure to keep potentially violent employees away from postal facilities. The General Counsel contends that Respondent abused this procedure to retaliate against Cline for his union and protected activities, for filing charges, and for giving testimony in Board proceedings.

Cline filed a grievance concerning the emergency suspension and Arbitrator Charlotte Gold conducted a hearing on January 31, 2006. On February 10, 2006, she issued an award denying Cline's grievance. The arbitrator found that Cline "made a statement that could be construed as threatening and clearly it was taken as such." She wrote that, in the final analysis, "I cannot find that the Postal Service violated the National Agreement by taking the action it did."

Respondent's answer asserts that the Board should give "collateral estoppel effect to the fact finding in the prior arbitral decision upholding the emergency suspension." Respondent, thus, requests something slightly different from the outright deferral contemplated by the Board in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

The *Spielberg* doctrine concerns when the Board should be bound by the *outcome* of an arbitration, that is, by the arbitrator's decision for or against the grievant. Here, however, Respondent only is urging that the Board adopt the arbitrator's factual findings.

Well-established Board policies would preclude *Spielberg* deferral here. The present case includes an allegation that Respondent violated Section 8(a)(5) by failing and refusing to provide, in a timely manner, information requested by the Union which was relevant and necessary to its functions. The Board does not defer such cases to arbitration. *New Island Hospital*, 344 NLRB 198 (2005).

Additionally, the complaint alleges that Respondent violated Section 8(a)(4) by discriminating against an employee because he had filed charges or given testimony under the Act. To protect the integrity of employees' statutory rights, the Board does not defer 8(a)(4) allegations to arbitration. *Food & Commercial Workers Local 1776,* 325 NLRB 908 (1998), citing *Wabeek Country Club*, 301 NLRB 694 fn. 1, 699 (1991).

Although the Respondent only urges that the Board adopt the factual findings of the arbitrator, the same policy reasons which preclude total deferral to the arbitral award also weigh against the application of collateral estoppel. Additionally, traditional estoppel principles also do not favor its application here.

Certainly, the parties here are not the same as in the arbitration, in which the General Counsel took no part. The issues also differ. The arbitral award mentions, in passing, that Cline filed eight "labor charges," but the award says nothing to suggest that the arbitrator examined whether hostility to Cline's protected activities motivated the decision to place him on emergency leave. Indeed, the award states that

> The Union believes this to be a just cause issue. It argues, among other things, that Mr. Cline's due process rights were violated because he was not given a predisciplinary interview prior to the Emergency Placement.

Thus, there is no indication that the parties litigated, or that the arbitrator considered, the statutory issues. From the arbitral award, it also appears unlikely that the Union advanced, or the arbitrator considered, the General Counsel's theory of the case.

Respondent may argue that it does not matter whether the issues were the same or different because it is only asking the Board to adopt the arbitrator's credibility findings. However, determining the credibility of a witness's testimony entails, among other things, comparing that testimony to testimony of other witnesses.

Obviously, during the 1-day arbitration, the arbitrator did not have the opportunity to hear all the witnesses who testified in the 5-day unfair labor practice hearing. It does not impugn an arbitrator's ability to note that, in general, a more complete record will result in more accurate findings of fact.

For all these reasons, the doctrine of collateral estoppel should not be applied here. Similarly, even limited deferral provides insufficient protection to important statutory rights. Therefore, Respondent's argument must be rejected.

III. ADMITTED ALLEGATIONS

Based on the admissions in Respondent's answer and at hearing, I find that the Government has proven the allegations discussed in this section of the decision. More specifically, I find that the various charges in this proceeding were filed and served as alleged in complaint paragraphs 1(a) through (n). Respondent has admitted all of these allegations with the exception of those raised in complaint paragraph 1(e).

In its answer, Respondent stated that the "allegations of paragraph 1(e) are admitted, except that Respondent can not admit or deny that the fourth amended charge was served by regular mail on Respondent on January 30, 2006, as the cover letter is dated December 12, 2005."

The fourth amended charge itself is dated January 27, 2006, but the cover letter enclosed with the charge bears the date December 12, 2005. In General Counsel's Exhibit 1(eee), the Government concedes that this letter should have been dated January 30, 2006, rather than December 12, 2005. Noting that Respondent does not deny receipt of the charge, I conclude that the Government has proven the allegations in complaint paragraph 1(e).

Additionally, based on Respondent's admissions, I find that the Government has proven that Respondent provides postal services for the United States and operates various facilities throughout the United States, including a facility in Destin, Florida, as alleged in complaint paragraph 2. Further, I find that the Board has jurisdiction over Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act, as alleged in complaint paragraph 3.

Further, I find that at all material times, Local 5643 of the American Postal Workers Union, AFL–CIO (the Local Union or simply the Union) has been a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 4(a) and that the American Postal Workers Union, AFL–CIO (the National Union) also has been a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 4(b).

Additionally, I find that the collective-bargaining unit described in complaint paragraph 17 (the unit) is an appropriate one for collective-bargaining within the meaning of Section 9(b) of the Act, and that at all material times since about 1971 the National Union has been the exclusive representative, within the meaning of Section 9(a) of the Act, of this unit, and has been recognized as such by Respondent, as alleged in complaint paragraphs 18(a) and 19(a).

Further, I find that at all material times, Respondent and the National Union have maintained and enforced a collective-bargaining agreement covering employees in the unit, as alleged in complaint paragraph 18. This agreement embodies Respondent's recognition of the National Union, as alleged in complaint paragraph 18(a). Also, I find that at all material times since about 1971, Local 5643 has been the National Union's agent for administering the collective-bargaining agreement at Respondent's Destin, Florida facility, as alleged in complaint paragraph 19(b), and that Respondent has recognized Local 5643 as such, as alleged in complaint paragraph 18(b).

Based on Respondent's admissions, I find that the following individuals are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act, as alleged in complaint paragraph 5: Postmasters Leon Malishan, Avis M. Davis, and Paul McGinnis; Officer-In-Charge Billy Dossantos; Manager Marty Halverson; Supervisors Pete Torres, Cynthia W. Grossi, Gary Mills, Bobby Powers, Yolondra Austin, Jerry Maynard, Joel M. Ouellette, Lease M. Ginn, and John Culgar.

Respondent has denied that Postal Inspectors Jennifer McDaniel and Gary C. Nelson are supervisors. Respondent's answer to the fourth amended complaint further states that McDaniel and Nelson "are agents only to the extent that each acted within the performance of the duties of his/her position." However, Respondent has not asserted that either McDaniel or Nelson took any specific action, mentioned in the record, which

falls outside their official duties. I find that at all material times McDaniel and Nelson were agents of Respondent within the meaning of Section 2(13) of the Act.

Complaint paragraph 8 alleges that on or about March 5, 2005, Respondent issued a letter of warning to its employee Marcus Jackson. Respondent's answer admits this allegation, except that it avers the letter was dated March 4, 2005. I so find.

Further, based on Respondent's admissions, I find that on or about March 7, 2005, Respondent issued a letter of warning to its employee Bobby Cline, that on or about September 2, 2005, Respondent placed Cline on nonpay and nonduty status, that on or about October 1, 2005, Respondent required Cline to undergo a fitness for duty examination, and that on or about October 26, 2005, Respondent placed Cline on administrative leave, as alleged in complaint paragraphs 9, 10, 11, and 12, respectively.

Also based on Respondent's admissions, I find that on or about March 13, 2006, Respondent issued employee Cline a written notice of disciplinary action involving a proposed April 1 through 14, 2006 suspension, as alleged in complaint paragraph 13(a). Additionally, Respondent has admitted the allegations in complaint paragraph 13(b), which states: "On dates to be named in the future, the exact date being unknown to the General Counsel but particularly within the knowledge of the Respondent, Respondent intends to suspend Cline for fourteen (14) days pursuant to the disciplined [sic] mentioned above in paragraph 13(a)." I find that the Government has proven this allegation.

Respondent has admitted, as alleged in complaint paragraph 20, that since on or about September 15, 2005, the Local Union, by hand delivered letter, has requested that Respondent furnish it with a copy of the postal inspector's notes regarding the alleged threat made by Cline on September 2, 2005. I so find. Further, relying on Respondent's admission, I conclude that this requested information is necessary for, and relevant to, the Local Union's performance of its duties as the National Union's agent for administering the collective-bargaining agreement at Respondent's facility, as alleged in complaint paragraph 21.

IV. CONTESTED ALLEGATIONS

For clarity, this decision generally will address the contested allegations in chronological order rather than the order in which the allegations appear in the complaint.

V. COMPLAINT PARAGRAPH 8

Alleged Discrimination Against Marcus Jackson

1. Facts

Paragraph 8 of the complaint alleges that on about March 5, 2005, Respondent issued a letter of warning to employee Marvin Jackson. Although denying this allegation, Respondent's answer states that "a letter of warning dated February 22, 2005, was presented to Marcus Jackson on February 24, 2005." I so find.

The warning letter concerned Jackson's questioning of a postal employee who normally worked elsewhere but who appeared at the Destin facility on January 31, 2005, and began doing bargaining unit work. Jackson, who was then the union steward, asked the employee questions about her job status to determine whether she was in the bargaining unit.

The employee, Stacie Loucks, usually worked at the Chipley, Florida post office, but Respondent had assigned her to the Destin facility for 1 to 2 weeks to help reduce the backlog there. Loucks did not testify at the hearing, but Respondent offered a February 7, 2005 statement bearing her signature. The General Counsel raised a hearsay objection. Over this objection, I received the document into evidence but not for the truth of the matters it asserted.

When an out-of-court statement has been received *without* objection, Board precedent does allow it to be used as proof of matters asserted in it, and gives the evidence such weight as its inherent quality justifies. *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), quoted in *Grace Fashions*, 283 NLRB 842, 845 (1987); see also *P*I*E Nationwide*, 297 NLRB 454 (1989). However, as noted, the General Counsel did object.

Even though the hearsay rule does not allow the use of Loucks' statement to prove matters asserted in it, the statement has probative value for other purposes. Management had relied upon this statement in deciding to discipline Jackson. The hearsay rule does not preclude considering the contents of Loucks' statement to ascertain what management *believed* had taken place.

According to Loucks' statement, when Jackson asked about her job classification, she answered that she was a "PTF" (part-time flexible). However, she sensed that Jackson didn't believe her. Loucks' statement characterized Jackson as "asking me so many questions so quick that I was getting nervous." Her statement also suggests a reason for this nervousness: Although Loucks had told Jackson she was a "PTF" her identification badge indicated she was a "TRC" (temporary rural carrier): "I got the mail and left. I was afraid that he knew that I was a TRC."

Loucks' statement does not explain why she did not want Jackson to know that she was a rural carrier rather than a "part-time flexible." The collective-bargaining agreement makes that distinction important. Article 7, section 1A of that contract defines the regular workforce to be comprised of fulltime employees, who work 40-hour weeks, and part-time employees scheduled to work regular shifts less than 40 hours per week *or* who "shall be available to work flexible hours. . . ."

The bargaining unit includes both these fulltime and part-time employees. However, article 1, section 2 of the agreement excludes rural letter carriers. In that light, Loucks' statement clearly described the following sequence of events: (1) Union Steward Jackson observed an unknown person doing bargaining unit work and tried to find out about her job classification; (2) she tried to hide her job classification, which placed her outside the bargaining unit; and (3) the steward, becoming suspicious, asked more questions.

In addition to describing Jackson's questions about her work and job classification, discussed above, Loucks' statement also attributed to Jackson a comment about the postmaster of the Bonifay, Florida post office, Roger Brooks:

> [Jackson] asked me where I was from. I told him that I worked in Chipley, but lived in Bonifay. He asked me why I didn't work in Bonifay with Roger Brooks. I told him that Chipley had an opening. Mr. Jackson continued to say that the union was going after Mr. Brooks and once they are done with him he will no longer be there.

Other than quoting Jackson as saying that "the union was going after Mr. Brooks," Loucks' statement does not impute to Jackson any other comment about Brooks.

On February 15, 2005, two supervisors conducted an investigatory interview with Jackson. One of them, Gary Mills, had worked at the Destin facility from October 2004 to January 2005 before being transferred to the Miramar Beach, Florida post office. The record suggests that Mills asked most of the questions and that the other supervisor, Bobby Powers, took notes.

Powers did not testify, but his notes record at least some of the questions the supervisors asked. These questions do not ask for Jackson's version of the facts or otherwise seek information about what happened. In the following excerpt from Powers' notes, "Pruett" refers to Local Union President Bobby Pruett, who also attended the meeting:

> Are you aware of our service standards? Yes.
>
> . . . .
>
> Do you care about these service standards? Very much so.
>
> A) If so, when we bring someone to help eliminate the problem why would you harass that employee? I don't define it as harassment and cannot recall the incident.
>
> Marcus [Jackson]—Specify the statement. Bobby Pruett—Do not answer this question. Mills—Are you refusing to answer this question? Pruett responded do not answer this question.
>
> Are you aware that this conduct is unacceptable? Refused to answer.
>
> Why would you make a threatening statement to a visiting employee about a Postmaster of another office? Pruett interrupted Mr. Mills and asked Marcus "Did you make any threatening remarks about a Postmaster Roger Brooks?" Marcus—I made no threats.
>
> Mills—Did you make the statement Mr. Pruett referenced concerning Roger Brooks?
>
> Marcus—"Made no threats."
>
> What did you mean by the statement about Mr. Brooks? Marcus—I made no threatening statement about Mr. Brooks. I have only met him 1 time which was at an EEO hearing. A) Where did you get your info?
>
> Are you aware of the consequences of your statement? [Paragraph numbers omitted.]

The record does not establish that Mills conducted any further investigation after this February 15, 2005 interview before preparing the February 22, 2005 warning letter. Likewise, no evidence indicates that either Mills or any other agent of Respondent made any inquiry to determine whether Jackson had been telling the truth when he denied harassing Loucks and when he denied making any threat.

Mills prepared a warning letter dated February 22, 2005. He testified that he tried to give Jackson a copy on February 24, 2005. According to Mills, Jackson refused to accept the letter, but I do not credit this testimony. Rather, I credit Jackson's testimony that Mills only discussed the letter but would not give him a copy.

This credibility determination rests not only upon Jackson's impressive demeanor as a witness, but also on differences between assertions in the warning letter which Mills drafted and other evidence. The letter, which cited Jackson for "improper conduct," stated, in part, as follows:

> Specifically, on January 31, 2005, management received complaints about you from an employee, Stacie Loucks, who had been temporary [sic] assigned to the Destin Post Office to assist with the backlog of heavy mail volume at our facility. Ms. Loucks complained to management that on her first day at the facility, you began barraging her with a set of questions concerning her duty status and her postal position. You specifically wanted to know what office she worked at. When Ms. Loucks advised that she worked in Chipley, but lived in Bonifay, you asked why she didn't work at Bonifay under Postmaster Roger Brooks. Once Ms. Loucks advised that the Chipley Post Office had an opening, you made a remark that the Union was going after Postmaster Brooks and once they were done with him he would no longer be there. Ms. Loucks then advised you that her husband worked for Postmaster Brooks.
>
> . . . .
>
> During a fact-finding interview with you, on February 18, 205, in the presence of Bobby Pruett, you were questioned concerning your conduct and your comments about the Postmaster of Chipley. Management wanted to know why you would harass an employee who was assigned to help. You stated you did not define it as harassment and that you could not recall the incident. During the interview, you refused to answer specific questions at times, and stated you could not recall certain issues. In response to your comment about the Postmaster, you denied making any threatening remarks towards Postmaster Brooks, and commented that you had only met him one time during an EEO hearing. Your responses during the interview have been viewed as administratively unacceptable. Your intimidating conduct towards Ms. Loucks and your statement made toward Postmaster Brooks has [sic] also been deemed unacceptable.
>
> Your actions constitute a violation of the USPS Standards of Conduct as expressed in the Employee and Labor Relations Manual, Part 666.3; *Behavior and Personal Habits*
>
> Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

The letter also warned Jackson that "future deficiencies will result in more severe disciplinary action being taken against you. Such action may include suspension, reduction in grade or pay, or removal from the Postal Service."

The record discloses some inconsistencies about the dates of various events. The warning letter, quoted above, refers to a "fact-

finding interview" on February 18, 2005. However, Powers' notes of that interview indicate it took place on February 15, 2005. Additionally, although the warning letter states that Loucks complained to management on January 31, 2005, her statement indicates that she telephoned the Chipley postmaster on February 2, 2005.

Although the warning letter states that Jackson's "actions constitute a violation of the USPS Standards of Conduct," it does not enumerate the precise infractions attributed to Jackson. However, I find that an employee who received this letter reasonably would conclude that he was being disciplined for the following: (1) Asking another employee "questions concerning her duty status and her postal position." (2) Making "a remark that the Union was going after Postmaster Brooks and once they were done with him, he would no longer be there." (3) Making "unacceptable" responses during a "fact-finding" interview. Similarly, I find that an employee who received this letter reasonably would believe that he would be disciplined again, and possibly discharged, if he engaged in any of these actions in the future.

With respect to the first asserted infraction, it may be noted that Respondent does not contend that Jackson violated any rule prohibiting employees from talking with each other while on duty, and the record suggests that no such rule exists. Accordingly, I find that Jackson was not disciplined for the act of speaking to Loucks but rather for what management believed Jackson said to Loucks.

With respect to the second asserted infraction, neither Loucks' written statement nor the warning letter itself claims that Jackson made any other comment about Brooks except the one quoted above. Moreover, the record does not establish that, in deciding to discipline Jackson, management relied upon any other information except that in Loucks' written statement. Therefore, I find that when the warning letter claims that Jackson made "threatening remarks" about Brooks, it referred solely to the "remark that the Union was going after Postmaster Brooks and once they were done with him he would no longer be there."

The third ground for disciplining Jackson concerns his responses to questions during a "fact-finding" interview. The warning letter stated:

> During the interview, you refused to answer specific questions at times, and stated you could not recall certain issues. In response to your comment about the Postmaster, you denied making any threatening remarks toward Postmaster Brooks, and commented that you had only met him one time during an EEO hearing. Your responses during the interview have been viewed as administratively unacceptable.

From this passage, it appears that management claimed it was disciplining Jackson for refusing to answer certain questions, for stating that he could not recall certain "issues," and for denying that he made any threatening remarks about Brooks.

2. Legal framework

Before determining whether the warning letter violated the Act, I must first decide which legal framework should be used to analyze the facts. Many allegations of discrimination in violation of Section 8(a)(3) or (4) should be examined using the procedure established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, in some cases arising under these sections of the Act, a *Wright Line* analysis is not appropriate.

The *Wright Line* framework provides a means to determine whether unlawful motivation affected a management decision to take an adverse action against an employee and, if so, whether management would have made the same decision had the unlawful motivation not been present. In some cases, however, the evidence may indicate that an employer disciplined a worker solely because of conduct which the Act usually protects. In such instances, the issue does not concern whether the employer would have imposed the discipline in the absence of the protected activity because the discipline was *for* protected activity. Instead, the issue involves whether the employee engaged in any conduct which would take away the Act's protection. The Board does not favor use of the *Wright Line* framework in such cases. *Phoenix Transit System*, 337 NLRB 510 (2002).

Instead, the Board has held that where "an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Ogihara America Corp.*, 347 NLRB 110 (2006), citing *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995), and *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

The warning letter describes the conduct for which Jackson received discipline. This conduct pertained to Stacie Loucks who, as discussed above, was working temporarily at Respondent's Destin facility: "Ms. Loucks complained to management that on her first day at the facility, you began barraging her with a set of questions concerning her duty status and her postal position."

Jackson, as discussed above, was the Union's shop steward. In questioning S. Loucks about her duty status, Jackson was trying to determine whether her performance of bargaining unit work violated the collective-bargaining agreement. He was (to use a phrase familiar in labor law) trying to "police the contract." I conclude that when Jackson questioned Loucks about her duty status, he was engaged in union activity protected by the Act. *White Electrical Construction Co.*, 345 NLRB 1095 (2005), citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Accordingly, Respondent's decision to discipline Jackson for this conduct should not be analyzed under the *Wright Line* framework.

The warning letter also disciplined Jackson for making a comment about Postmaster Roger Brooks. Specifically, it attributed to Jackson "a remark that the Union was going after Postmaster Brooks and once they were done with him he would no longer be there." I must determine whether such a statement would constitute protected activity.

As already noted, Loucks did not testify. Moreover, Jackson's testimony does not disclose what, if anything, he said to Loucks about Postmaster Brooks.

However, the record does include a written statement which employee Bobby Cline prepared after learning that Jackson might receive discipline. Cline gave this statement to the manager then

in charge of the Destin facility, Leon Malishan, but the record does not establish that Mills read it before deciding to issue the warning letter to Jackson. Respondent did not object to the admission of Cline's statement into evidence. The document came into evidence without restrictions and may be used as proof of matters it asserts. *Alvin J. Bart*, supra.

Moreover, Respondent had ample opportunity to challenge the accuracy of the statement. Cline was on the witness stand when the General Counsel offered the statement into evidence. Thus, Respondent had the opportunity to examine the statement's author both through voir dire and on cross-examination.

The statement came into evidence on June 28, 2006. The hearing continued on June 29, 2006, then adjourned until July 19, 2006, when it resumed for further testimony. Thus, Respondent had a 3-week period in which to investigate the statement and, if warranted, to locate witnesses or documents which might refute it. Respondent's failure to produce evidence contradicting the statement leads me to give it considerable weight.

In particular, Respondent has not represented that it no longer employs Loucks and also has not asserted that she was unavailable to testify. Presumably, the 3-week adjournment provided Respondent more than enough time to arrange for this employee to take the witness stand. Moreover, Respondent did not request any additional recess.

For several reasons, I credit Cline's statement. As discussed above, Respondent clearly had the opportunity to investigate the representations in this statement and to present any evidence resulting from that investigation. In particular, it could well have called Loucks to testify if the statements which Cline attributed to her were incorrect. Because Respondent did not call Loucks, I conclude that had she testified, her testimony would have supported Cline's statement.

Additionally, my observations of the witnesses lead me to conclude that Cline's testimony is reliable. There is no reason to assume that his prior statement is any less reliable.

Cline stated that on the day in question, he had been talking with Jackson about Brooks. Loucks also was present. During this conversation, Cline said that he had turned down an opportunity to transfer to the Bonifay facility after an employee there told him "how bad Mr. Brooks was to work for." According to Cline's statement, Jackson then said that Brooks had been accused of sexually harassing a female employee. At this point, Loucks interjected that "Mr. Brooks came in every morning to the Post Office and yelled at the employees and kicked trays of mail in anger." Loucks then imputed to Brooks an instance of favoritism for his personal benefit.

For reasons discussed below, I conclude that Jackson did not say that the Union was "going after" Brooks or that when the Union was through, Brooks would no longer "be there." However, Jackson did discuss with two other employees how Postmaster Brook treated the workers under his supervision. More specifically, Loucks, Cline and Jackson discussed reports that Brooks had sexually harassed an employee, yelled at employees, and played favorites. Such a discussion by employees about working conditions constitutes protected activity. See, e.g., *Ellison Media Co.*, 344 NLRB 1112 (2005) (employees' discussion of a supervisor's purported sexual harassment constitutes protected activity).

Even if Jackson had made the comment which Loucks attributed to him, that comment would itself have constituted protected activity. Thus, Jackson would have made the comment in response to other employees' criticisms of how a supervisor treated employees. Any explanation he gave concerning the Union's intended actions would fall within his duties as union steward and clearly would enjoy the Act's protection.

As the Board observed in *Yesterday's Children, Inc.*, 321 NLRB 766 (1996), employees who are engaged in Section 7 activity in protest of actions by their employer do not lose the protection of the Act simply because they mention that they dislike a manager and would like to see the manager discharged. The statement incorrectly attributed to Jackson, even if it he had made it, would not have deprived him of the protection of the Act.

Because Respondent disciplined Jackson for putative conduct which would have been protected activity, had it occurred, analysis using the *Wright Line* framework would not be appropriate. Rather, the relevant question is "whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Ogihara America Corp.*, supra.

The warning letter given to Jackson also stated: "During the interview, you refused to answer specific questions at times, and stated you could not recall certain issues. . . . Your responses during the interview have been viewed as administratively unacceptable." Although the letter's use of the word "issues" instead of "facts" or "events" makes the exact meaning unclear, it appears that Respondent is disciplining Jackson both for refusing to answer questions and for saying that he did not remember certain things.

Based on notes taken by a supervisor during this meeting, and introduced into evidence by Respondent, I find that Union President Pruett, who represented Jackson at that meeting, instructed him not to answer certain questions and that Jackson did not answer the questions. At this point in the analysis, I am not considering whether management lawfully could discipline Jackson for refusing to answer questions, but rather am concerned with a preliminary, procedural issue: Should I weigh the facts using the *Wright Line* framework or should I apply some other criteria?

Although the Board does not engage in a *Wright Line* analysis when an employer states that it has disciplined an employee specifically for conduct which enjoys the Act's protection, the *Wright Line* framework proves invaluable when an employer claims that it imposed discipline for some other reason but the General Counsel alleges that antiunion animus constituted part of the motivation. In other words. where more than one motive affects a decision to discipline an employee, *Wright Line* provides an effective way to determine whether an unlawful reason resulted in discipline which would not occur otherwise.

Typically, in the absence of unusual circumstances, an employee's refusal to answer his supervisor's questions does not constitute protected activity. However, very unusual circumstances are present here. For reasons discussed below, I conclude that the interview in question was not a bona fide predisciplinary interview but was instead an unlawful attempt to coerce an employee into ceasing his protected activities as union steward. In these circumstances, when the union president—also an

employee—advised the union steward not to answer the question, and the steward complied with this instruction, these two employees were engaged in protected concerted activities.

In sum, the third reason for disciplining Jackson also falls in the category of disciplining an employee for engaging in protected activity. Accordingly, *Wright Line* is not appropriate.

3. Analysis

As discussed above, in essence, the warning letter informed Jackson that he had engaged in three types of misconduct, and cautioned him that similar actions in the future could result in further discipline, up to and including discharge. First, it faulted Jackson for "barraging" another employee with "questions concerning her duty status and her postal position."

Clearly, Jackson was engaging in protected activity when, as union steward, he sought to ascertain Loucks' duty status. He needed that information to determine whether Loucks' work at the Destin facility violated the collective-bargaining agreement. As the Board stated in *Tillford Contractors*, 317 NLRB 68 (1995), "When an employee makes an attempt to enforce a collective-bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966)."

The Board also noted in *Tillford Contractors,* supra, that an employee does not have to refer specifically to the collective-bargaining agreement so long as "the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement. . . ." 317 NLRB at 69. In the present instance, Loucks' own statement indicates she understood the reason for the steward's question; she had given Jackson incorrect information about her job status and confided that she was afraid Jackson would discover her true status as a rural letter carrier.

Additionally, Loucks' statement relates that at one point—apparently after Loucks had been working at the Destin facility for a week—a "Mrs. C." told Loucks that "I [Loucks] had every right to be there that my paperwork for dual something was completed." Based on that portion of the statement, I infer that Loucks did not believe she had "every right" to be performing the bargaining unit work when she began at the Destin facility a week earlier, and for that reason concealed from the steward her true job status. There can be little doubt that Jackson's inquiry pertained to "a reasonably perceived violation of the collective-bargaining agreement" because Loucks herself was concerned about being caught in a violation of that agreement.

In sum, I conclude that Respondent's discipline focused on Jackson's protected activity. Since Respondent disciplined Jackson for protected activity, the appropriate inquiry concerns whether Jackson engaged in any conduct which removed him from the protection of the Act. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006).

Because the General Counsel has proven that Respondent disciplined an employee for conduct the Act protects, the Respondent bears the burden of proving that it had an *honest belief* that the disciplined employee had engaged in misconduct during the protected activity. If the Respondent fails to carry this burden, then the Government has proven the violation. However, if Respondent carries this burden, no violation will be found unless the General Counsel further proves that (notwithstanding the Respondent's honest belief) the asserted misconduct actually did not occur. See *Pepsi-Cola Co.*, 330 NLRB 474 (2000).

To carry its burden, Respondent first must identify the asserted misconduct. It does not suffice for a respondent simply to say "we honestly believed the employee had engaged in some kind of misconduct" without a more specific description of the claimed wrongdoing. Moreover, the "misconduct must be so 'flagrant, violent, or extreme' as to render him unfit for further service." *Tillford Contractors*, above, citing *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg. Inc.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976).

The warning letter informed Jackson that "[y]our intimidating conduct towards Ms. Loucks and your statement made toward Postmaster Brooks has [sic] also been deemed unacceptable." The warning letter does not further identify the putative misconduct except to state: "Ms. Loucks complained to management that on her first day at the facility, you began barraging her with a set of questions concerning her duty status and her postal position. You specifically wanted to know what office she worked at."

However, Respondent has not claimed that Jackson spoke in a loud tone of voice, came unacceptably close, displayed menacing gestures or body language, or otherwise communicated hostility. Moreover, Respondent could not have made such an assertion because it based the discipline exclusively on Loucks' written statement, which did not indicate that Jackson menaced her, swore at her, or otherwise manifested a belligerent posture or tone.

Loucks' written statement did note that Jackson asked her questions on more than one occasion and indicated that she didn't like it. Her statement reported that she told a "Mrs. C" (otherwise unidentified) "that Mr. Jackson was being an asswhole [sic] and he was drilling me with all kinds of questions about my position with the post office and that I didn't want to go back."

According to her statement, when Loucks first arrived at the Destin facility, Jackson asked her about her status and she told him that she was a "PTF," which would signify that she was a bargaining unit employee, rather than a temporary rural letter carrier. Loucks' statement indicates that a week later, Jackson told Loucks that she was not a PTF and began asking her questions about her job duties. "He asked me so many questions so quick," Loucks' statement reported, "that I was getting nervous. I got the mail and left. I was afraid that he knew that I was a TRC."

Thus, her statement suggests that Loucks' discomfort did not result from any ungentlemanly behavior on the part of the steward but rather from the fact that she had provided him incorrect information and feared that her true status would be discovered. Moreover, and quite significantly, Loucks' statement does not indicate that she ever asked Jackson to stop asking her questions. Someone reading Loucks' statement would have no reason to believe that Loucks said anything to Jackson to signify that his questions made her uncomfortable or that he should stop asking them.

The conclusion of Loucks' statement makes evident that when someone else told Jackson that his questions weren't welcome, he

stopped asking them. More specifically, Loucks' statement reports that someone named "Lonnie," otherwise unidentified, told Loucks that she was going to speak to Jackson. The statement continues:

> From that time I did not have anymore [sic] questions asked. Later that evening I was doing paper dolls near the break room and Mr. Jackson was walking and talking on his cell phone saying that someone has complained about him harassing them and that wasn't that some mess. I got up and went to the supervisors desk and worked on my etravel. Mr. Jackson did not say anything else to me.

A supervisor reading Loucks' statement reasonably would understand that Loucks sought to conceal her true job status from the union steward and that the steward continued to ask questions to ascertain that status. Thus, the statement reasonably would place a supervisor on notice that Jackson was engaged in protected activity.

However, the statement does not provide a basis for an honest belief that Jackson engaged in any intimidating conduct. For one thing, the statement covers a period of at least a week, and does not indicate how many times during that period Jackson asked Loucks about her job status. As already noted, it said nothing to indicate that Jackson had an unfriendly demeanor or tone of voice, and it did not indicate that Loucks asked Jackson to quit asking questions.

Another factor weighs against a finding that Respondent honestly believed that Jackson had engaged in some kind of wrongdoing during his protected activity. As will be discussed further below, Respondent had established a standard practice of conducting a thorough, objective investigation before imposing discipline. In this instance, however, Supervisor Mills did not meet with Loucks at any time, even after Jackson had denied the accusations. Indeed, the record does not establish that Mills took any other steps to ascertain the facts.

Respondent's failure to follow its own established standards undercuts any claim that it honestly believed that Jackson had engaged in misconduct. Accordingly, I conclude that Respondent has not carried its burden of proving that it had such an honest belief.

Moreover, even assuming for the sake of analysis that Respondent had demonstrated that it held an honest belief that Jackson had engaged in misconduct, the General Counsel has proven that such claimed misconduct did not, in fact, occur.

Because Loucks' written statement constitutes hearsay, it may not be used to prove the truth of the matters it asserts. No other evidence supports a claim that Jackson engaged in misconduct or made a threatening remark.

Even were I to consider Loucks' affidavit for the truth of the assertions in it, I would resolve any credibility issue in favor of Jackson, whose demeanor I observed while he testified. Jackson clearly and emphatically denied harassing Loucks. He testified that Loucks never asked him to stop talking with her or asking her questions. Based on Jackson's testimony, which I credit, I find that Jackson did not harass Loucks and that she did not ask him to stop speaking with her.

Because Jackson did not engage in any misconduct, it is not necessary to weigh the factors discussed in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Those factors define when an employee's misconduct becomes so egregious that the employee loses the protection of the Act. In the absence of misconduct, such factors are not relevant.

In sum, I conclude that Respondent's disciplining of Jackson because he asked Loucks questions relating to her position violated Section 8(a)(1) of the Act. It also constituted unlawful discrimination against him in violation of Section 8(a)(3) of the Act.

The February 22, 2005 warning letter also disciplined Jackson for making "a remark that the Union was going after Postmaster Brooks and once they were done with him, he would no longer be there." For reasons discussed above, I conclude that the evidence falls short of establishing that Jackson actually made such a comment. However, I further conclude that the manager who decided to discipline Jackson believed that Jackson had said the words attributed to him.

If Jackson had made the remark, it would have been during a conversation with other employees about reports that a supervisor had sexually harassed employees. In this context, the shop steward's assurance that the Union would take action against the supervisor clearly enjoys the Act's protection. *Ellison Media Co.*, supra.

Respondent's warning letter makes clear that if Jackson engaged in similar conduct in the future, he would be subject to discipline. Thus, it palpably interferes with, restrains and coerces the employee in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act. Indeed, the warning focuses on a union steward's communication with employees concerning terms and conditions of employment, which goes to the essence of union representation.

Moreover, the written warning constitutes discrimination in violation of Section 8(a)(3), unless Jackson engaged in some kind of misconduct which removed him from the Act's protection. However, the record establishes no such misconduct. Therefore, I conclude that Respondent also violated Section 8(a)(3).

The warning letter also disciplined Jackson for failure to answer questions during the investigative interview. As noted above, an employee ordinarily has a duty to answer questions during an interview which management conducts to determine whether to impose discipline. However, for the following reasons, I conclude that Respondent was not conducting a bona fide disciplinary interview but instead was using that process as a pretext to conceal unlawful activity: Interrogating the union steward about his protected activities and warning him that harsher discipline would follow if he engaged in similar activities in the future.

First, it should be noted Respondent required Jackson to attend this meeting because of Jackson's protected activities as union steward, investigating an apparent violation of the collective-bargaining agreement. Moreover, the evidence suggests that management was aware that it had violated its contract with the Union. Thus, Loucks, who did not testify, indicated in her written statement to management that she had been afraid that Jackson, the union steward, would find out her true classification. She would not have been likely to make this revelation if both she and management had been unaware of the possible contract violation.

Second, the "predisciplinary interview" focused solely on Jackson's union activity, namely, his questioning Loucks about her job status and the comment attributed to him by Loucks, that "the union was going after Mr. Brooks and once they are done with him he will no longer be there." (As noted above, although Jackson credibly testified that he did not make this statement, Respondent believed that he had.)

Although an employee has a duty to answer his supervisor's legitimate questions about his work, that duty does not extend to unlawful interrogations about employees' union activities. For example, if a supervisor asked an employee for the names of workers who had signed union authorization cards, or who had attended a union meeting, the Act protects the employee's refusal to answer. The interrogation itself is unlawful. Similarly, an employee has no duty to agree that engaging in legally protected activity is improver, and no duty to promise not to do so in the future.

As discussed below, Mills' questioning of Jackson not only focused on the union steward's protected activities but also assumed that such activity was unacceptable. In concluding that it constituted unlawful interrogation rather a bona fide predisciplinary interview, I will not apply an abstract or subjective standard concerning how a disciplinary interview should be conducted, but rather will look to Respondent's *own* established standards. The fact that the interview departed from Respondent's own customary practice, as well as the interview's exclusive focus on protected union activities, leads me to conclude that Respondent used the interview as a sham to disguise an unlawful purpose.

The Respondent and the National Union have agreed upon a "Joint Contract Interpretation Manual," dated June 10, 2004, which provides a "mutually agreed to explanation of how to apply the contract to the issues addressed." This labor-management agreement sets the standards which Respondent follows in dealing with bargaining unit employees. With respect to discipline, it states, in part, as follows:

> Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.
>
> The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

It may be presumed that Respondent follows the procedures to which it agreed. Indeed, it would hardly be fair to assume that Respondent agreed to certain standards and then customarily ignored them, and Respondent has not made such a claim. Accordingly, and in the absence of evidence indicating that Respondent usually did not follow its own procedures, I will assume that it typically does.

Therefore, I conclude that before deciding to discipline an employee, Respondent customarily *does* inform the employee in "reasonable detail what the charges are" and that Respondent does so at or before the predisciplinary interview, which gives the employee the "day in court privilege." The notes of the February 15, 2005 predisciplinary interview, which Respondent introduced into evidence, indicate a significant departure from the "day in court" standard.

The General Counsel had objected to the introduction of these notes, and I received them for a limited purpose. However, one of Respondent's supervisors took these notes and, to the extent they document what questions Respondent's supervisors asked, the notes constitute admissions which are not hearsay under Rule 801(d)(2) of the Federal Rules of Evidence. Accordingly, I will rely on them in determining what the supervisors asked Jackson.

Supervisor Mills asked Jackson why he would "harass" an employee brought in to "help eliminate the problem." The question assumes that Jackson's protected activity—finding out if the contract were being violated—constitutes improper "harassment." Jackson denied that he had harassed an employee but also asked Mills to "specify the statement."

Supervisor Powers' notes do not establish that Mills clarified what he meant by harassment. Instead, they indicate that Union President Pruett instructed Jackson not to answer the question and that Mills then asked Jackson if he were refusing to answer.

The supervisor's notes show that Jackson already *had* answered the question by denying that he had harassed an employee. Insisting upon some other answer demanded that Jackson acquiesce in Mills' premise, namely, that Jackson's protected activity constituted "harassment." By disciplining Jackson for not answering this loaded question, Respondent was in effect imposing discipline for refusing to agree that protected activity was improper. Such conduct departs markedly from Respondent's usual practice of giving employees "a reasonable opportunity to defend themselves."

Supervisor Powers' notes do not indicate that Mills explained what he meant by "harass" even after Jackson asked him to explain. Instead, Mills asked "Are you aware that this conduct is unacceptable?" Absent some clarification, this question communicated that Respondent viewed the union's steward's protected activity as "unacceptable" and asked Jackson to agree with that viewpoint. Needless to say, Respondent cannot require an employee to agree that protected activity is unacceptable. Disciplining Jackson for refusing to acquiesce in this assumption unlawfully interferes with the exercise of Section 7 rights.

The disciplinary letter which Respondent issued to Jackson bolsters the conclusion that, during the predisciplinary interview, Respondent was insisting that Jackson agree with the premise that his protected activities were unacceptable. Thus, the warning letter informed Jackson that

> you denied making any threatening remarks towards Postmaster Brooks, and commented that you had only met him one time during an EEO hearing. Your responses during the interview have been viewed as administratively unacceptable.

Exactly what was "administratively unacceptable"? Could it have been Jackson's denial that he had only met Brooks one time? During the present case, Respondent has not claimed that this statement was untrue. Moreover, how many times Jackson may have met Brooks appears irrelevant.

Rather, I conclude that Respondent deemed "administratively unacceptable" the specific statement the warning letter had

attributed to Jackson, "a remark that the Union was going after Postmaster Brooks and once they were done with him he would no longer be there." Moreover, I conclude that Respondent considered Jackson's denial "administratively unacceptable." In other words, the warning letter was punishing Jackson, in part, for denying that what he had said was a "threatening remark."

Respondent has not, at any time, claimed that Jackson said anything about Brooks apart from the warning letter's accusation that "you made a remark that the Union was going after Postmaster Brooks and once they were done with him he would no longer be there." Applying an objective standard, I conclude that an employee reasonably would understand this letter to communicate that Respondent was disciplining Jackson in part because he made the "unacceptable" statement that the Union was "going after" a particular supervisor.

As discussed above, I have found that Respondent customarily conducts a "thorough and objective" investigation which affords an accused employee with his "day in court privilege." These principles of fairness create the expectation that, when Jackson denied making any threat, the supervisor at least would *consider* what Jackson had to say. It isn't necessary here to state exactly what Mills should have done to satisfy Respondent's own standards—that would improperly substitute my own judgment for Respondent's concerning the way a disciplinary investigation should be conducted—but clearly, if Mills had tried to conduct the usual "thorough and objective" investigation referred to in its June 10, 2004 agreement, Mills would have done *something*.

For example, Mills could have arranged to meet with Loucks, whom he had not interviewed. Or, he could have asked Loucks questions by telephone. Or, he could have tried to find out if any other employee had witnessed the conversation in question. Or he could have taken some other step in a search for an objective reason to believe or disbelieve Jackson's denials.

Mills did none of these things. Indeed, he admitted that he had never spoken to Loucks personally and had not asked questions to find out if other clerks had heard the conversation.

Respondent's failure to conduct any investigation—even after Jackson specifically denied harassing an employee or making a threat—departs dramatically from its usual practice of conducting a "thorough and objective" investigation before imposing discipline. Respondent, of course, would have no reason to follow its usual procedure if the true purpose of the interview was not to gather information needed for a disciplinary decision, but rather to discourage the union steward from engaging in further union activities.

The fact that Respondent did not investigate even after hearing Jackson's denial makes no sense if Respondent intended to use the "predisciplinary" interview for its contemplated and customary purpose—ascertaining the facts—but this behavior is consistent with the ulterior motive of punishing a union steward for exercising his Section 7 rights and coercing the steward into foreswearing future union activity. Jackson had no duty to agree that his union activities were "unacceptable," and disciplining him for failing to agree is unlawful.

Considering that the disciplinary interview concerned *only* the union steward's protected activities, and further considering that Respondent had no reason to believe that Jackson had engaged in misconduct which would forfeit the protection of the Act, I conclude that antiunion animus motivated Respondent's actions. For all the reasons stated above, I conclude that the warning letter dated February 22, 2005, violated Section 8(a)(1) and (3) of the Act.

VI. COMPLAINT PARAGRAPH 9

March 7, 2005 Warning Letter to Cline

Paragraph 9 of the complaint alleges that on about March 7, 2005, Respondent issued a warning letter to employee Bobby Cline. Respondent admits that it issued Cline such a letter. (The record establishes that the letter itself bears the date March 4, 2005, a Friday, but that Cline did not receive the letter until the following Monday.)

Complaint paragraphs 14 and 15 allege that Respondent issued the warning letter for unlawful reasons and complaint paragraphs 24 and 25 allege that Respondent thereby violated Section 8(a)(1), (3), and (4) of the Act. Respondent denies these allegations. Accordingly, the issue to be decided concerns Respondent's motivation for the decision to discipline Cline.

1. The facts

Bobby Cline, one of the charging parties in the present proceeding, began working for Respondent in about 1974. Since about 2000, Cline has been assigned to the Destin, Florida facility, where he works as a window/distribution clerk, a position within the bargaining unit. In September 2004, he filed an unfair labor practice charge against Respondent, which the Board docketed as Case 15–CA–17506(P).

Based on this charge, the Regional Director for the Board's New Orleans office issued a complaint and notice of hearing on January 26, 2005. Cline posted the notice of hearing on the employees' bulletin board.

On January 19, 2005, Cline sent a letter to the office of his representative in Congress. The letter, addressed to a member of the Congressman's staff, reported that postal customers in the Destin area were not receiving good service. It also stated, in part, as follows:

> The employees of the Destin Post Office are working under very difficult conditions to try and provide service to our customers. As an employee myself I can state that we are working in a very hostile work environment.
>
> . . . .
>
> The contract is violated everyday [sic] and our union officials are abused and harassed because they speak out about the problems.

On February 3, 2005, Cline sent another letter to the same representative on the Congressman's staff. This letter, asserting that Respondent's management was harassing a union steward, alluded to management's treatment of Union Steward Marcus Jackson. The letter continued as follows:

> I feel strongly that this is an attempt to not only intimidate but ultimately find grounds to remove this valued employee from being able to perform his duties as union steward which violates Federal Law. I have always felt that if they would do this to our union steward, they would not hesitate to do it to me.
>
> I will also forward this to the Labor Board.

Cline also circulated a petition, which 17 employees signed. On February 8, 2005, Cline presented it to Postmaster Leon Malishan. The petition requested that a "formal investigation be launched into the operations/management" of the Destin facility. It further stated that

> The employees are subjected to poor labor relations, a hostile work environment, an autocratic and oppressive management style resulting in attempts to intimidate, harass, and overall threatening behaviors.
>
> . . . .
>
> Due to the pressure to do more with less, we are severely understaffed and required to perform our duties in unsafe working conditions. . . .

Cline credibly testified that on Friday, March 4, 2005, union officials picketed the Destin post office. During his lunchbreak, Cline joined them, carrying a sign asking, "Tired of Long Lines?" A sign carried by another picket stated "Long Lines Are Not OUR Fault!"

On Monday, March 7, 2005, two supervisors called Cline into an office and gave him the warning letter which is the subject of complaint paragraph 9. This letter states, in pertinent part, as follows:

> Charge 1. Leaving Work Area Without Permission
>
> On 02/08/2005 from 3:35 p.m.—4:05 p.m. you were observed by postal management talking with another employee in the break room. During this time period you were on the clock and should have been performing the duties of your position.
>
> Your actions are contrary to your duties as a postal employee, a violation of section 661.21 of the Employee & Labor Relations Manual and are a serious breach of your employment responsibilities.
>
> This official letter of warning should serve to impress upon you the seriousness of your actions. It is hoped that future disciplinary action will not be necessary. If it is necessary to request assistance for improving your performance, you may consult with me and I will assist you where possible. However, I must warn you that future deficiencies such as outlined above will resulting [sic] more severe disciplinary action being taken against you, including suspension and/or removal from the Postal Service.

Although this letter states that Cline "was observed" talking with another employee in the breakroom, it does not identify the observer. Other evidence establishes that the observer was Avis Davis, a postmaster at another Florida facility.

On February 8, 2005, Davis and another management official had visited the Destin facility. According to Davis, they came to look at "the flow of the mail and basic concept of the Post Office, as far as the way the floor plans are set up, the mail flow, the staffing." (The other visiting official, Dwight Wells, did not testify.)

Davis stated that she observed Cline and another employee talking in the breakroom from 3:35 to 4:05 p.m., and reported it that day during a meeting with local managers. About a week later, Davis wrote a note, "To whom it may concern," stating, in part:

> 03:35—04:05 I observed Mr. Cline in the break room with Mr. Bill Wade

However, Cline testified that he was not in the breakroom during this entire period. According to Cline, he went on break at 3:55 p.m. and entered the breakroom at that time. He did speak with Wade in the breakroom but, Cline testified, at 4:05 p.m. he went off break. For the following reasons, I credit Cline's testimony.

Bargaining unit employees record their activities by "swiping" a card across a card reader when they begin or change tasks. A computer saves this information in a log of "clock rings."

The clock ring log contradicts part of Davis' "to whom it may concern" note. Although this note indicates that Davis had a conversation with Cline during an earlier portion of that same afternoon, the clock ring printout shows that Cline wasn't at the facility when this conversation supposedly had taken place. Instead, the clock ring log supports Cline's testimony that he was out delivering Express Mail. Thus, the log, considered with Cline's testimony, casts some doubt on the accuracy of Davis' note.

Moreover, Davis did not write the "to whom it may concern" note until about a week after her February 8, 2005 visit to the Destin facility. She did so at the request of the "station manager" at the facility, but she could not recall that person's name. Considering that the "to whom it may concern" note was not contemporaneous with her observations, and also considering Davis' inability to name the person who asked her to draft it, I have concerns about its reliability.

Davis had made some other notes during her February 8, 2005 visit to the facility. She testified that these notes had been destroyed, but she did not explain why they had been destroyed. Presumably, the notes Davis took at the time she visited would be more accurate than a note she prepared a week later. The unexplained destruction of the contemporaneous notes prevents a comparison to determine the accuracy of the later note.

Additionally, the note which remained in existence had a different raison d'etre from that of the notes which were destroyed. After observing the work at the Destin facility on February 8, Davis and the other visiting manager conducted a meeting with local management on February 9. Davis presumably took the contemporaneous notes to assist her memory when she explained her observations to the managers at this meeting. Thus, the function of these notes might be described as reportorial.

A week later, a different purpose caused Davis to write the "to whom it may concern" note. A manager she cannot name had requested her to write such a memo for some use her testimony did not disclose. There is less reason to trust the candor of this after-the-fact document than the accuracy of the spontaneous notes which had been destroyed.

For all of these reasons, I resolve any conflicts in the evidence by crediting Cline rather than Davis. Accordingly, I find that Cline was not in the break room from 3:35 to 4:05 p.m. on February 8, 2005.

2. Legal framework

The issues to be resolved concern Respondent's motivation: Did Respondent discipline Cline solely because management

believed he was talking in the breakroom during working time, or did unlawful animus taint this decision? If such animus did enter into the decisionmaking process, would Respondent have disciplined Cline anyway even if he had not engaged in protected activities? The Board's *Wright Line* decision provides the appropriate framework for deciding these questions.

3. Analysis

The General Counsel first must prove that Cline engaged in protected activity. Cline's filing an unfair labor practice charge against Respondent in September 2004 clearly enjoys the Act's protection. Indeed, Section 8(a)(4) specifically makes it unlawful to discharge or discriminate against an employee because he filed charges with the Board.

Cline's posting of the notice of hearing on the employees' bulletin board also constituted protected activity. Such a communication about a work-related matter—the alleged unfair labor practices—implicitly sought to enlist the support of other employees for their mutual aid and protection.

Cline's correspondence with his representative in Congress also concerned work-related matters. Specifically, Cline complained that employees at the Destin Post Office were "working in a very hostile work environment." In the same letter, Cline stated that the union contract was being violated and that union officials were being harassed. These words clearly demonstrate that Cline was writing on behalf of other employees as well as himself.

Similarly, on February 8, 2005, when Cline presented to management a petition signed by 17 employees, he and the other signers were engaged in concerted activity for their mutual aid and protection. The complaint focused on matters relating to working conditions. Clearly, Cline was engaged in protected activity when he circulated this petition and presented it to management.

On March 4, 2005, during off-duty time, Cline and some union officials picketed the Destin Post Office. This picketing clearly constituted *concerted* activity.

A more difficult question concerns whether the Act *protected* the picketing. Cline testified that the picket signs bore legends such as the following: "You deserve better than this." "Are you tired of long lines?" "Are you tired of delayed mail?" "Long lines are not our fault." Cline carried a sign asking, "Are you tired of waiting in long lines?"

From these legends on the signs, it appears that the picket signs mainly communicated to the public a message concerning the quality of the product—postal service to customers—rather than about wages, hours and working conditions. On the other hand, the Union's motive obviously did relate to a working condition, the number of employees assigned to the Destin facility. Cline and, presumably, some other employees believed that under-staffing had resulted in employees being pressed to do more work than possible in a given amount of time.

The perceived understaffing not only would make working conditions less pleasant but also would lessen the quality of customer service by causing delays. It would be quite reasonable for union officials to believe that members of the public would be more interested in fast mail service than in employees' working conditions. Such a belief would lead to the conclusion that the best way to garner public support for more staffing would be to appeal to the customers' interest in faster mail service. The solution to the slow service problem—assigning more clerks to the Destin facility—would also address the employees' complaints about being overworked and understaffed.

Therefore, were I to focus on the *intent* of the picketing, I would conclude that it constituted protected activity. However, the Board has stated that "we determine whether certain communications are protected by examining the communications themselves." *Five Star Transportation, Inc.*, 349 NLRB 42 (2007). Following this principle, I will look to the messages on the picket signs rather than the motivation for the picketing.

In *Waters of Orchard Park*, 341 NLRB 642 (2004), the Board held that merely raising safety or quality-of-care concerns on behalf of nonemployee third parties is not protected conduct under the Act. With one possible exception, the legends on the picket signs concerned the quality of service to the customer, rather than the working conditions of employees. The exception, a sign telling the public "don't blame us" for slow service, arguably might say something, or at least imply something, about working conditions. However, even this sign does not explicitly present a complaint that certain working conditions should be changed.

In *Five Star Transportation, Inc.*, supra, the Board did caution that a written communication must be considered "in its entirety and in context" when determining whether there is a nexus to terms and conditions of employment. See also *Endicott Interconnect*, 345 NLRB 448 (2005), enfd. denied 453 F.3d 532 (D.C. Cir. 2006). The context—picketing by a union which represents employees of the picketed employer—certainly weighs in favor of finding the picketing protected.

Unions ordinarily use picketing to call public attention to wages, hours, and working conditions, so onlookers might reasonably begin by assuming that this union-related picketing had something to do with those matters. However, if the message on the picket signs proved to have little connection with such issues, onlookers would abandon this initial assumption after reading the signs. Applying an objective standard, I cannot conclude that the signs conveyed any substantial message about employees' working conditions. Guided by the Board's recent decision in *Five Star Transportation, Inc.*, I conclude that the Act did not protect the picketing on March 5, 2005.

It should be noted that I am *not* reasoning that the picketing initially enjoyed the Act's protection and then lost that protection because the signs disparaged Respondent. Although a reference to long lines is critical of Respondent, it does not constitute the sort of disparagement contemplated by *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Unlike the disparagement in that case and in *Five Star Transportation* (the latter concerning, among other things, a claim that the employer had hired a sex offender to drive a schoolbus), a statement about long waiting times at the post office isn't inherently inflammatory.

Moreover, comments about long customer lines do not pack the wallop of purported revelations, by insiders, of hidden product defects unknown to customers. Anyone who has been to a particular post office will have some knowledge about the length of the line and the duration of the wait. In other words, the picket signs reasonably would have little impact on a customer's decision to use Respondent rather than some other carrier. In sum, I conclude that this picketing was unprotected not because of any

disparagement but because the picket signs did not communicate a message about working conditions.

Although I conclude that the Act did not protect the March 4, 2005 picketing, because the picket language did not pertain to working conditions, Cline's other activities described above do fall within the Act's protection. Accordingly, I conclude that the General Counsel has established the first *Wright Line* element.

Next, the government must prove that Respondent knew about the protected activities. There can be no doubt that Respondent knew about the charge Cline had filed in September 2004, because a complaint had issued. Respondent doesn't claim it had not been served with the January 26, 2005 complaint or otherwise was unaware of it during the relevant time period. I conclude that it had knowledge of both the charge and the resulting complaint.

The record does not establish that, as of March 7, 2005, Respondent already knew about Cline's letters to his Congressman. However, there can be no doubt that Respondent was aware Cline had circulated a petition concerning working conditions. Cline presented the petition to Postmaster Malishan on February 8.

In case the Board should disagree with my conclusion, above, that Cline's March 4, 2005 picketing was not protected activity, I will address Respondent's knowledge of that activity. I find that Respondent knew that Cline participated. Cline credibly testified that he saw Postmaster Malishan watching.

In sum, I conclude that the General Counsel has proven the second *Wright Line* element.

Next, the government must establish that an employee suffered an adverse employment action. The warning letter could be cited as a predicate for more severe discipline in the future. Respondent did exactly that. In March 2006, Respondent issued a disciplinary notice informing Cline that he was being suspended for 14 days. As discussed more fully below, this notice gave three reasons for the suspension. One of those reasons was the earlier warning letter. Because the March 7, 2005 warning served as a justification for the later, harsher discipline, it certainly affected Cline's employment status adversely. I conclude that the government has proven that the warning letter constituted an adverse employment action.

Finally, the General Counsel must prove a link or nexus between the protected activity and the adverse employment action. For the following reasons, I conclude that the record establishes such a link.

Initially, I note that Cline did not engage in the conduct for which he was disciplined. Crediting Cline rather than Davis, I have found that, on February 8, 2005, he did not talk to another employee in the breakroom from 3:35 to 4:05 p.m. However, the mere fact that Cline did not engage in the misconduct attributed to him does not establish a connection between his protected activities and the discipline.

It is true, of course, that a respondent's assertion of a pretextual reason for disciplining an employee may warrant an inference of unlawful motivation. However, evidence that an employee did not commit the infraction for which he received discipline does not, by itself, establish the existence of a pretext. An employer might, for example, simply be mistaken.

Could Davis' report that she saw Cline in the breakroom during this time period be an innocent mistake? Although Davis was simply visiting the Destin facility, and did not work there, it is somewhat difficult to believe this was a case of mistaken identification. Earlier in the afternoon, Cline initiated a conversation with Davis which may have annoyed her. At least, her testimony suggests she considered it inappropriate for Cline to raise some matters with her rather than with his regular supervisor.

Whether or not Davis became annoyed, she certainly recalled having the conversation with Cline, and reported in her note (albeit incorrectly) that it took place between 2:49 and 3 p.m. It is difficult to believe that not long thereafter, she had forgotten who Cline was and mistook another worker for him. Therefore, I must reject the possibility that Cline received the warning because of a problem with mistaken identity.

According to Davis, she told local management on February 9 that she had seen Cline spend 30 minutes in the breakroom when he should have been working. The record does not explain why management waited almost a month before issuing the warning letter.

In some instances, the seriousness of an alleged infraction will cause management to conduct an investigation, which will delay the imposition of discipline. However, the record does not indicate that management conducted any investigation.

Moreover, the asserted misconduct—taking a break during worktime—is not the sort of infraction which would require a lengthy investigation. Management could ascertain very quickly whether it did or did not occur.

Instead, management took no action until March 4, 2005, when Postmaster Malashin saw Cline, and some union officials, picketing the facility. Although Cline did not receive the warning letter until March 7, it bears a March 4 date. Because of this date, it appears very likely that management drafted it on the same day Cline picketed.

The picketing itself is significant even though I have concluded it did not enjoy the Act's protection. The picketing provided a vivid reminder that Cline had engaged in numerous protected activities in the past.

If, for some reason, the postmaster had forgotten that Cline had filed an unfair labor practice charge which resulted in a complaint against Respondent, and also had forgotten that less than a month earlier, Cline had circulated and submitted a petition protesting working conditions, the sight of Cline on the picket line definitely would refresh his recollection. Moreover, it linked Cline with the Union, for which Respondent already had demonstrated animus.

Cline's filing of the unfair labor practice charge and circulation of the petition, although protected, were not union activities as such. However, Cline's presence on the picket line clearly associated him with the Union. It would appear that Cline was missing no opportunity to challenge management's treatment of the employees.

Respondent's earlier treatment of Union Steward Jackson, discussed above, revealed that Respondent harbored animus against the Union. Indeed, the February 22, 2005 warning letter which Respondent issued to Jackson directly concerned Jackson's efforts as union steward. Respondent issued this warning to the union steward less than 2 weeks before it issued the warning letter to Cline. It is difficult to believe that Respondent's antiunion animus dissipated during this short period. To the contrary, Respondent's later actions, such as silencing the union president

during a November 8, 2005 predisciplinary interview, discussed below, refute any argument that Respondent's animus was on the wane.

I conclude that this antiunion animus entered into Respondent's decision to discipline Cline. Additionally, I conclude that the General Counsel has established the fourth *Wright Line* element, shifting the burden to Respondent to prove that it would have issued the warning letter in any event, even if Cline had not engaged in protected activities.

To determine whether an employer would have imposed similar discipline even in the absence of protected activity, the Board examines the record for documentation of how the employer treated other employees in similar circumstances. In the present case, a preponderance of the evidence does not establish that Respondent would have issued the warning letter to Cline if he had not engaged in protected activities. Moreover, Cline did not commit the infraction attributed to him. I conclude that Respondent has not carried its rebuttal burden.

In sum, I conclude that by issuing Cline the letter dated March 4, 2005, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

VII. COMPLAINT PARAGRAPH 10

September 2, 2005 Suspension

Complaint paragraph 10 alleges that on about September 2, 2005, Respondent placed employee Bobby Cline "on nonpay and nonduty status." Complaint paragraph 24 alleges that this suspension violated Section 8(a)(1) and (3) of the Act. Complaint paragraph 25 alleges that the suspension violated Section 8(a)(1) and (4) of the Act.

Respondent admits that it placed Cline on nonpay and nonduty status on September 2, 2005. However, it denies any unlawful motivation and also denies that this action violated the Act.

1. Facts

a. Cline's additional protected activities

Some of Cline's protected and concerted activities—those on or before March 4, 2005—already have been described above in connection with complaint paragraph 9. Here, I begin with Cline's activities after that date.

On April 6, 2005, Cline sent a letter to Respondent's chief executive officer, the postmaster general, complaining about "the hostile work environment I and my coworkers are subjected to over the past two years. It has gotten worse over the past eight months." The record doesn't establish to what extent other employees knew about Cline's letter before he sent it. However, considering the letter's reference to coworkers being subjected to a hostile work environment, I conclude that Cline intended to speak not only for himself but also for his fellow employees.

Moreover, management would have reason to believe that Cline was articulating the concerns of other employees because previously, on February 8, 2005, he submitted a petition signed by about 17 other workers. This petition, like Cline's April 6, 2005 letter to the postmaster general, complained of a "hostile work environment." Management reasonably would view the April 6, 2005 letter as a followup to the petition. Accordingly, I conclude that the letter to the postmaster general constituted protected activity.

In April 2005, Cline filed a charge against Respondent. Cline's signature on this charge bears the date "4/7/5" but the Board docketed the charge, as Case 15–CA–17687(P), on April 18, 2005. The Regional Director for Region 15 deferred this charge to arbitration, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), by letter dated June 27, 2005. Clearly, filing an unfair labor practice charge constitutes protected activity.

On April 24, 2005, Cline sent a letter to District Manager Harold Swinton, a Postal Service official in Jacksonville, Florida. The letter complained that local management in Destin was discriminating in the assignment of overtime against union members. Specifically, Cline named three employees on the "overtime desired list," one of the three being a union steward. Another, Cline himself, belonged to the Union but the third did not. Cline asserted that local management granted more overtime to the employee who was not a union member.

The letter asked: "Is this behavior in accordance '*with the guidelines of our contracts*'?" (Italics in original.) The letter does not identify the specific "guidelines" and, arguably, the quoted question might not be strictly rhetorical. In other words, it might signify actual uncertainty on Cline's part as to whether the collective-bargaining agreement covered the situation. Considering the question in context, however, I conclude that Cline intended to invoke rights arising under the agreement. There can be no doubt that assertion of a right under the collective-bargaining agreement constitutes protected activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

Moreover, when Cline complained about discrimination based on union membership, he was doing more than asserting a contract right. He was protesting a perceived violation of the Act, one which affected another employee as well as himself. Certainly, this portion of the letter constituted protected activity. (Cline later filed an unfair labor practice charge against Respondent raising this same allegation. That charge will be discussed below.)

The letter went on to protest that local management was failing to comply with the collective-bargaining agreement's requirement that weekly schedules be posted. Under the *Interboro* principle, this assertion of a right afforded by the collective-bargaining agreement constitutes protected activity.

The April 24 letter further stated that "Carrier Stewards" had been given "official discussions by the Postmaster," apparently for being 6 and 9 minutes late, respectively, in returning to the facility. "If you will check with the local Chamber of Commerce, City Hall, and/or Department of Transportation," Cline wrote, "you will find traffic to be a huge problem in this city. . . ."

Presumably, "Carrier Stewards" referred to shop stewards in the letter carriers' bargaining unit. Although Cline is a member of a different bargaining unit, that fact does not remove Cline's letter from the Act's protection. To the contrary, it supports a conclusion that Cline was not writing simply on his own behalf but instead was expressing the concerns of other employees, even those represented by a different union.

The protected nature of the April 24 letter becomes even more apparent at its conclusion:

> With all due respect, I find these flagrant violations of the contract both to be hostile actions and also an attempt at Union busting. Mr. Swinton per your last correspondence you state "we may never agree on every issue. . . ." I am inclined to agree that this is true, however, I too am "counting on your cooperation" in resolving the many problems in the Destin Post Office.
>
> I welcome you to contact me at your earliest convenience.

Thus, the letter in its entirely referred to claimed violations of the collective-bargaining agreement and asserted discrimination because of union membership or participation. Respondent has not contended that any part of this letter constituted misconduct which would deprive it of the Act's protection. I conclude that writing and sending it constituted protected activity.

On May 11, 2005, Cline filed an unfair labor practice charge against Respondent in Case 15–CA–17711(P). This charge alleged that since on or about April 1, 2005, and continuing thereafter, Respondent had failed to grant Bobby Cline and Marcus Jackson overtime work in retaliation for their activities on behalf of the American Postal Workers Union. (Cline had raised this same allegation in his April 24 letter to District Manager Swinton.)

Later, the Board's General Counsel transferred this case from the New Orleans Regional Office to the Hartford, Connecticut Regional Office, where it received a new docket number: Case 34–CA–11178(P). On August 12, 2005, the Regional Director for Hartford deferred the case to the arbitral process in accordance with *Collyer Insulated Wire*, above.

On May 19, 2005, Cline sent another letter to District Manager Swinton. The first paragraph states:

> Per our conversation May 12, 2005, I am sending you the specific problems in the Destin office that you requested and assured me you would take into consideration. I feel it necessary to speak up about *wrong done to my coworkers* also. I believe that an injustice done to one of us is an injustice done to all of us. [Italics added.]

This letter describes instances in which, Cline asserted, local management treated other workers unfairly. It complained, for example, that one supervisor discriminated in the assignment of work on the basis of race and sex. Cline further stated that after one employee said she was going to talk to the supervisor "about the disparity of work hours," the supervisor fired that employee.

The May 19 letter also contended that the local postmaster assigned work in a manner that violated both the collective-bargaining agreement and a 2001 arbitral award. Additionally, Cline stated that on a daily basis, three supervisors delivered express mail, in violation of the collective-bargaining agreement and another arbitral award.

Further, Cline stated that the "Postmaster and supervisors in the Destin office constantly violate the contract by denying the Union Steward[']s request for records and documents. This is an on going [sic] problem and is a thinly veiled attempt to delay [Steward] Marcus Jackson from processing grievances in a timely manner."

In the May 19 letter, Cline both asserts rights arising out of the collective-bargaining agreement and protests what he perceives to be an antiunion bias by management. Respondent has not contended that anything in this letter removes it from the protection of the Act, and I conclude that it does constitute protected activity.

On June 20, 2005, Cline testified before the Hon. Michael A. Marcionese, administrative law judge, in Case 15–CA–17506(P), which Cline had filed against Respondent the previous September. Judge Marcionese issued a bench decision finding that Respondent had violated Section 8(a)(1) of the Act. Cline's testimony in a Board proceeding, as well as his filing the charge which led to that proceeding, constituted protected activity.

In accordance with the Board's Rules, Judge Marcionese certified his bench decision, which the Board published on July 13, 2005. This decision included a recommended order requiring Respondent to cease and desist from threatening employees with a lawsuit or other reprisals for filing an unfair labor practice charge and to post a notice to employees at its Destin facility and at the Miramar Beach station. The notice informed employees that Respondent would not threaten them with a lawsuit or other reprisals for filing unfair labor practice charges with the Board.

On August 18, 2005, Cline sent an e-mail to District Manager Swinton, asking him "to check the delayed mail report from Destin for today. As of 1300 cst the box mail had one clerk working it with 12 feet of letters and 10 feet of flats left to be boxed. This is all first class mail. The third class mail is over a week old. The box parcels (priority and pp) have not been touched. . . ."

Here, I need not decide whether this email, if considered by itself, would constitute concerted activity. The Board has held that a communication must be considered "in its entirety and in context" to determine whether there is a sufficient nexus to terms and conditions of employment. *Five Star Transportation, Inc.*, above.

Other protected activities by Cline, before August 18, also communicated that Cline viewed the mail handling delays, the asserted understaffing, and the contractual provisions concerning assignment of work as linked. Thus, even if Cline's August 18 e-mail to District Manager Swinton only referred to the mail backlog, rather than to the collective-bargaining agreement's requirements, the context made clear that Cline sought for management to follow the contract.

Also on August 18, 2005, when Cline saw Supervisor Peter Torres boxing mail, he asked Torres, "How come you all are boxing mail, you know it's against the contract." As already noted, the invocation of a provision of the collective-bargaining agreement constitutes protected activity. *NLRB v. City Disposal Systems*, above; *Interboro Contractors, Inc.*, above; *White Electrical Construction Co.*, 345 NLRB 1095 (2005).

This particular protected activity hit a particularly sensitive nerve. On the one hand, Cline had asserted, many times and to many people, that the Destin facility was understaffed. These complaints certainly focused attention on the management of that facility. On the other hand, when management sought to eliminate the backlog problem, Cline protested that bargaining unit employees had to do the work.

Local supervisors could view Cline as putting them on the spot by pressing higher management to do something about the mail problem, and then keeping them on the spot by preventing them from taking the action they considered expedient. The February 2005 discipline of employee and Shop Steward Marcus Jackson suggests that management did have this attitude.

The facts discussed above in connection with complaint paragraph 8 provide another example of local management's reaction to a demand that the collective-bargaining agreement be followed. When a new person, Loucks, showed up one day and began doing bargaining unit work, Union Steward Jackson started asking her questions about her job status, questions necessary to determine whether the collective-bargaining agreement permitted Loucks to do the work. Later, when a supervisor questioned Jackson, the supervisor first asked if Jackson was aware of and cared about Respondent's service standards. Jackson answered that he cared very much. The supervisor then asked, "If so, when we bring someone to help eliminate the problem why would you harass that employee?"

The warning letter which Respondent issued to Jackson demonstrated management's displeasure with an employee's insistence that the collective-bargaining agreement be followed. Cline's protected activities had gone further than Jackson's. First, he had attracted the attention of higher management to the mail-handling problem, and then, like Jackson, he had tried to enforce the collective-bargaining agreement.

In this context, Cline's complaints about mail-handling delays clearly become associated with his insistence—and the Union's insistence—that management solve the problem by assigning bargaining unit employees to do the work. Accordingly, I conclude that Cline's August 18, 2005 e-mail constitutes protected activity.

The discussion above has provided an overview of what happened at the Destin facility on August 18, 2005. Because these events reveal something of the dynamics of the interactions between Cline and his supervisors, and because they offer some insight into the nature of Respondent's animus and what triggered it, they have considerable relevance to subsequent actions which the complaint alleges as unfair labor practices. Therefore, these actions merit further examination.

Cline sent the email to higher management during his lunchbreak on August 18. Cline's testimony, which I credit, establishes that some time after the lunchbreak, a customer provided him with a mail delivery confirmation number and that, to check on the status of the package, he used one of Respondent's computers to access a postal service website. Even though Respondent had provided employees with access codes and allowed them to use the computer for this work-related purpose, Supervisor Torres yelled at him and accused him of surfing the web.

Cline testified that Torres said that he had just gotten off the telephone, that he had gotten his "ass chewed out" and was "pissed." Torres confirmed telling Cline that he had just gotten his "ass chewed." In his testimony, Torres explained that he had received a call from Linda Copeland, a higher-level manager, who had asked what was going on in the office. Responding to Copeland's inquiry, Torres "surveyed the situation." He discovered understaffing which apparently had occurred because no supervisor had asked a particular clerk to work overtime at the end of his shift. Torres reported the problem to Copeland, who instructed that he should get a supervisor from a branch facility to come in and help. Following those instructions, Torres called in Supervisor Jerry Maynard.

Cline then saw Torres and Maynard boxing mail, which Cline described as a "flagrant violation of the contract. Managers can't do clerk work." Cline testified that he

> asked Mr. Torres about it. I said, you know, How come you all are boxing mail, you know; it's against the contract. And he tells me in an angry voice, Do what I say; mind your own business, or you're going to get in more trouble.

Neither Torres nor Maynard described this incident during their testimony. I credit Cline's uncontradicted testimony that Torres told him to "mind your own business or you're going to get in more trouble."

Torres' angry threat takes on additional significance in light of the unlawful warning letter which Respondent had issued to Union Steward Jackson after Jackson attempted to enforce the collective-bargaining agreement. Although the complaint does not allege that Torres' statement violated Section 8(a)(1), it provides additional evidence of animus.

Union Steward Jackson drafted an unfair labor practice charge on behalf of the local union. It alleged that on about August 18, 2005, Respondent "harassed employee Bobby Cline by threatening to issue discipline to him for using the computer because of his membership and activities in behalf of the American Postal Workers Union, Playground Local No. 5643."

On August 26, 2005, Cline accompanied Union Steward Jackson, who gave Supervisor Torres a copy of this charge as well as a grievance. Cline stood nearby as Torres read the charge. According to Cline:

> Mr. Torres looked at it, and he said, This didn't happen. And he looked at me and said, You're a liar. And I said, No. I said, I keep notes about these things so that I will be completely accurate. And Mr. Torres . . . said, kind of sarcastically, Well, you better go check your notes again, because this is a lie.

Torres' version generally agrees with Cline's, except that Torres recalled being handed a number of unfair labor practice charges rather than just one. (Possibly, Torres had in mind the grievance which Jackson had handed him along with the charge.)

Torres testified that "there was one that accused me of threatening Bobby [Cline], and I told him he needed to rethink this one." Torres admitted telling Cline that he, Cline, was lying.

The charge alleged that Respondent had "harassed employee Bobby Cline by threatening to issue discipline." Torres' testimony leaves little doubt that the word "threatening" prompted him to call Cline a liar: "[A]ll I did was give the man a simple instruction, job instruction. He calls that a threat because it's something he doesn't want to do[.]"

Although the Union filed the unfair labor practice charge, it named Cline as the subject of harassment, and Cline was present as a witness when management received it. Cline's participation in the filing and service of the charge unquestionably constitutes protected activity. Moreover, Respondent reasonably would view

Cline as the source of this charge. Indeed, Torres' words—"He calls that a threat . . ." —impute the charge language to Cline.

b. Other events before the September 2, 2005 suspension

After Torres read the unfair labor practice charge and called Cline a liar, Cline replied that he kept notes. Cline quoted Torres as responding, "[Y]ou better go check your notes again, because this is a lie."

Cline made these notes in a book which he kept in his locker at work. As Hurricane Katrina neared, it appeared that the post office would be closed. On Sunday, August 28, Cline went to the facility, intending, among other things, to retrieve the notebook from his locker. He discovered that the notebook wasn't in his locker.

Cline contacted the Postal Inspection Service to report the notebook missing. During the investigation, he told the postal inspectors that he suspected that Supervisor Torres had taken the notebook, which included "notes about the upcoming labor case." Cline described to the inspectors the exchange he had had with Torres the preceding Friday. Notwithstanding Cline's suspicion, the investigation did not indicate that Torres had taken Cline's notebook.

The Act does not protect Cline's reporting the notebook missing and telling the inspectors that he suspected Torres had taken it. Although Respondent does not claim that it suspended Cline on September 2, 2005, because Cline had accused Torres of theft, Respondent did cite Cline's accusation as one of the reasons for a 14-day suspension it imposed on Cline in March 2006. That matter will be discussed later in this decision.

On September 2, 2005, three statutory supervisors were having a conversation with an employee. The supervisors were the Destin facility's postmaster, Leon Malishan, Supervisor Peter Torres, and Acting Supervisor Cynthia Grossi. According to Cline, he approached the four as the discussion was becoming heated.

Cline testified that Grossi was telling the employee, Marcus Jackson, that he should be at the window (for transactions with customers) at 8:30 a.m., but Torres told the employee to check with him, Torres, before going to the window. Cline performed the same job duties as Jackson, and wanted a clarification concerning whether he should go to the window at the beginning of his shift or check with Torres first.

After Jackson left, Cline told the three supervisors he had a question. "We're getting two different messages. Mr. Torres is telling us one thing and Ms. Grossi's telling us something else. . . ." Cline testified that he further told the supervisors that "[w]e're just trying to do the right thing We just want to know exactly what it is."

According to Cline, Postmaster Malishan came to within 8 inches of his face and shouted, "[Y]ou're just a troublemaker here. You don't want to do what you're told. You just don't want to listen to anybody."

During his testimony, Postmaster Malishan denied coming to within 8 inches of Cline's face. However, he did not deny shouting at Cline and did not deny calling Cline a "troublemaker." During Supervisor Grossi's testimony, counsel did not ask her about Malishan's tone of voice. She neither stated nor denied that Malishan shouted at Cline and called him a troublemaker. Likewise, she did not corroborate or contradict Cline's testimony that Malishan called Cline a troublemaker.

Torres' testimony also does not address whether or not Malishan shouted at Cline and called him a troublemaker. Torres, however, was not present during the entire conversation. Instead, he returned to his office for a telephone call.

Malishan, Grossi and Torres all took the witness stand after Cline testified that Malishan shouted at him and called him a troublemaker. Thus, they had the opportunity to contradict Cline about these matters, but they did not.

Some other testimony indirectly sheds light on whether Malishan became loud with Cline. This testimony, by Billy Dossantos, does not pertain to the September 2, 2005 discussion but does suggest that Malishan could become uncomfortable in Cline's presence.

Dossantos took over management of the Destin post office after Malishan received another assignment. He described a labor-management meeting which took place in mid-October 2005, a day after Dossantos became officer-in-charge of the Destin facility. This meeting took place during the transition period when both Dossantos and Malishan had some connection with the Destin facility, and both of them attended the meeting. Dossantos testified as follows:

> Q. Okay. What do you recall?
>
> A. I mean, there was—it was heated. I mean, I was just sitting there, you know, watching. Leon got up and left and said, You know what; I'm done. You know, I can't help anymore. This is his office, and I'm leaving.
>
> Q. Okay. And at that point—
>
> A. And we all said, Good, whatever. He left.

Considering that no witness to the September 2, 2005 discussion denied that Malishan loudly called Cline a troublemaker, and also considering that Malishan did not enjoy the presence of Cline's company, I find that Malishan did shout at Cline, and did call him a troublemaker during the September 2, 2005 discussion.

More generally, for the following reasons, I conclude that Cline's testimony provides the most reliable account of this conversation, and I credit it. By comparison, Grossi's testimony does not offer as complete and coherent a picture.

Credible evidence establishes, and I find, that Cline did not participate in the conversation which the supervisors had with Marcus Jackson. He witnessed that conversation and, at some point, raised his hand, but no one recognized this nonverbal request to speak.

Logically, after Jackson left and Cline finally did get to say something, the three supervisors would want to know what Cline wanted and therefore would pay attention. The supervisors would be likely to note and remember Cline's initial words, because they would explain the purpose of the meeting and provide them a reason why Cline was imposing on their time.

Beyond curiosity as to why Cline was bothering them, the supervisors reasonably would be interested in clearing up any confusion or misunderstanding concerning their instructions. Indeed, Grossi testified that she said, "Yes, we do need to talk about it, because Pete and I are both new here, and we're trying to

get this done. *I thought it needed to be talked about*." (Emphasis added.)

However, in their testimony, none of the three supervisors recounted what Cline had said to begin the discussion. Torres already had left to answer his telephone, so the absence of this information from his testimony does not affect his credibility. On the other hand, both Malishan and Grossi did hear what Cline said, yet neither of them quoted him during their testimony.

Malishan testified that "once he had said what he wanted to say concerning what he felt that we should do and that the instructions was [sic] misleading or whatever, then I began to talk. . . ." This testimony does not suggest that Malishan had a very clear recollection of what Cline said. Malishan's use of the qualifier "or whatever" raises some doubt about how much he really remembered.

Moreover, Malishan's inability to be more specific is consistent with Cline's testimony that Malishan interrupted and cut Cline off before he had completed his question. Indeed, if Cline did not have the opportunity to finish speaking, Malishan's difficulty recalling the gist of what Cline said isn't surprising.

Grossi testified that Cline "made a statement" but did not describe it. Thus, she conveyed even less information than Malishan concerning what Cline said. That, too, would be consistent with the conclusion that Malishan interrupted Cline before he could complete his thought. Grossi and Malishan obviously would be at a loss describing what Cline had said if Malishan prevented him from saying it.

Both Grossi and Malishan testified that after Cline spoke, Malishan began to respond but that Cline interrupted, insisting that he, Cline, had not finished. At this point, the discussion took a rather curious turn. Instead of focusing on the question Cline was trying to ask, the participants began arguing about whether Cline had, or had not, finished speaking and about what constituted a "conversation."

The record suggests that Grossi considered the key issue to be whether Cline had finished a sentence. Apparently, she reasoned that if Cline had finished a sentence, then it was Malishan's turn to respond and that exchange would constitute a "conversation."

Thus, according to Grossi, when Cline interjected that he hadn't finished asking his question, Grossi replied that, in fact, Cline had "finished his sentence." Grossi's testimony continued:

> Q. Do you remember what he said?
>
> A. I do not remember the exact sentence. No, I do not. But I do have a degree from Florida State in English, and I knew it was a sentence, so he said the sentence. . . .

Even though Grossi may have a degree in English, her testimony that Grossi had "said the sentence" doesn't sound very convincing in light of her inability to remember the sentence. Moreover, her focus on whether Cline had spoken "a sentence," rather than on whether Cline had finished expressing a thought, seems to miss the point. Additionally, whether or not Grossi is correct in defining a "conversation" to be one person completing a sentence and then another person responding, her concern about this procedural matter appears to have exceeded her interest in the substance of Cline's question.

Indeed, the testimony of Grossi and Malishan leaves the definite impression that on this occasion, they didn't really care what Cline was trying to ask. If they had cared, they would have afforded Cline an opportunity to complete or clarify his question rather than arguing with him about whether he had finished asking it. This manifest lack of interest in what Cline was trying to say also makes it more likely that Malishan interrupted Cline, as Cline testified.

Accordingly, and because Cline's recollection of the conversation was more complete than either Grossi's or Malishan's, I credit Cline's testimony. To the extent Cline's testimony conflicts with that of the other witnesses, I credit Cline.

Specifically, I credit Cline's testimony that when he insisted that he hadn't gotten to ask his question, "Mr. Malishan started in again about, you know, You're just a troublemaker; just do what you're told; don't be asking any questions, you know, this kind of stuff."

Although Cline's testimony, quoted above, depicts Malishan as getting loud, Malishan testified that it was *Cline* who "got upset." Malishan's testimony continued:

> Q. When you say he got upset, physically looking at him, is there anything that you can remark on as to him being upset?
>
> A. Well, once he said that, of course, I didn't say anything else. I left to go back to the window. He followed me back to the office—

Thus, Malishan did not answer the question, and did not offer any reason for his conclusion that Cline had become upset. Malishan's failure to give any reason for believing that Cline was upset affects the weight to be given that testimony.

Moreover, Malishan's further testimony, that he left and Cline followed him, does not agree with Grossi's, which indicates that Cline left *before* Malishan, rather than the opposite. In considering how much to believe Malishan's assertion that he left before Cline, it is helpful to revisit Grossi's testimony and examine it in greater detail.

Grossi testified that after Cline spoke, Malishan started to reply but Cline interrupted, saying, "That's not how you have a conversation. You let somebody make a statement. Then you respond." Grossi then interjected, "Excuse me, but that's what just happened. You made a statement, and Leon [Malishan] was responding. That's a conversation." When asked how Cline reacted, Grossi testified:

> Well, it was at that point, I believe, that he said, Well, you know, I can't work with you all; you all are crowding me, or something to the effect. I honestly can't remember the exact words, but he left.

Although Grossi's testimony differs from Cline's in some other details, both she and Cline indicate that Cline left the meeting first. Thus, Malishan's claim to the contrary lacks corroboration.

Moreover, Grossi's testimony on this point is highly plausible. Cline had approached the supervisors with a very simple question: Should he and the other clerks be at the window at 8:30 a.m., as Grossi had instructed, or should they see Torres first, as Torres had instructed? That question needed only a very short answer, but it was not forthcoming.

The words which Grossi attributed to Cline—"I can't work with you all . . ."—indeed sound like something Cline would say in frustration, and the record shows why Cline might be frustrated. When Cline tried to ask the simple question, Malishan interrupted and called him a "troublemaker." No evidence suggests that Grossi also yelled, but there also is no evidence that Grossi ever addressed the substance of Cline's question.

Grossi's testimony does not suggest any discussion about whether employees should follow her instruction or Torres' when they reported for work. Instead, she described how she took issue with Cline's protest that Malishan had cut him off before he had finished speaking. Grossi's testimony includes one remark which is both puzzling and revealing at the same time. To place this comment in context requires a brief repetition of facts already discussed above.

During the September 2, 2005 discussion, when Cline complained that this wasn't the way to have a conversation, Grossi focused on that word, insisting that Cline and Malishan indeed were having a conversation. On the witness stand, Grossi observed that "It was pretty cut and dried grammatically."

Grossi volunteered that comment. Neither attorney had solicited her opinion on this subject. It is rather puzzling why Grossi would focus on a point of grammar either during her testimony or during the September 2, 2005 conversation itself.

At the same time, Grossi's comment reveals why Cline had found this encounter frustrating. To Grossi, who testified she had a degree in English, an exegesis on the meaning of "conversation" might have been important, but it didn't tell Cline what he sought to find out, namely, which supervisor's instruction the clerks should follow.

In sum, both Cline and Grossi indicate that Cline, rather than Malishan, left first. Moreover, the record suggests at least two reasons why Cline would leave. When he asked the question, Malishan called him a "troublemaker" and Grossi changed the subject. Neither of these responses answered Cline's question.

Because the testimony of both Cline and Grossi contradict Malishan on the issue of who left the discussion first, I do not credit Malishan. Instead, I find that Cline left first, with Malishan following. Moreover, for reasons discussed above, I conclude that Cline's testimony is more reliable than that of either Grossi or Malishan. Accordingly, crediting Cline, I further find that during the discussion, Malishan did get close to Cline and called him a "troublemaker" in a loud voice.

As Cline walked back to his work area, with Malishan following, Cline said out loud, "I bet the OIG will let me ask a question." ("OIG" refers to the Postal Service's Office of Inspector General.) Crediting Cline, I find that Malishan stopped Cline and told him to go ahead and call the inspector general, adding that he, Malishan, was not afraid. Malishan then walked off.

Cline decided to take leave to visit his EAP ("employee assistance program") counselor. He obtained and completed a leave request form, writing in the "remarks" section "Threatened by PM." ("PM" stands for "postmaster.") On the back of the leave request form, Cline checked the box marked "job-related." (Although Cline's notation on the leave slip did not elaborate, I infer that Cline wrote "threatened" because Malishan shouted at him and called him a "troublemaker.")

Cline located Grossi and gave her the leave request form. He told her "All this has upset me, and I'm going to my doctor, and I'm going to go see my EAP counselor." Grossi took the leave slip without saying anything.

Cline testified that he was walking towards the timeclock when he heard Supervisor Torres yelling at him, "You better bring documentation back." Torres' testimony essentially corroborates Cline's on what he said and did, but the tone differs markedly. Cline's testimony portrays Torres as being angry and yelling. The impression created by Torres' testimony is that he raised his voice somewhat to get Cline's attention, because Cline was some distance away.

Cline said, "okay" but it does not appear that Torres heard that response. As Cline continued to walk to the timeclock, Torres got up, walked to Cline, and told him to bring back documentation. Cline clocked out but then remembered he had not put away his cash drawer, so he returned to his work station, put away the drawer, and then left the building.

According to Grossi, before Cline left the building he came by her office and told her, "I'll be back but it won't be pretty." Grossi did not testify that Cline's voice sounded menacing or that he otherwise displayed any signs of agitation. Instead, Grossi testified that Cline told her "he was going to his 'EAP counselor, you know, which means he probably was upset.'" Thus, the only reason Grossi offered for inferring that Cline "probably was upset" was his destination, not his appearance.

No other witness heard Cline make the "won't be pretty" statement attributed to him by Grossi, and Cline denied making it. Thus, determining whether Cline made the "won't be pretty" statement requires a choice between the testimony of Cline and Grossi, based on an assessment of the witnesses' credibility.

Before examining the credibility of Grossi and Cline, one other piece of evidence may warrant mention, even though this document raises rather than answers questions. Although Grossi's testimony attributes to Cline the words "it won't be pretty," a log kept by the Okaloosa County Sheriff's Department casts some doubt on that quotation. This "Call History Record" indicates that someone telephoned on September 2, 2005, and reported that an employee had threatened Grossi. According to this log, the threatening words were "when I return, it will be *nothing nice*" (italics added) rather than "won't be pretty."

The sheriff's log does not identify who made the telephone calls and also does not include the caller's telephone number. According to Union President Pruett, Postmaster Malishan had mentioned that he had contacted the sheriff's department, but Malishan's testimony itself says nothing about such a call. Neither does the testimony of Torres or Grossi, and no representative of the sheriff's department testified.

Therefore, the present record does not reveal whether the difference between the words "won't be pretty" and "nothing nice" might be a useful clue in determining credibility. Later in this decision, this possible clue will receive some more attention in connection with the 8(a)(5) allegations, but it does not figure in the credibility analysis immediately below.

Much turns on whether Cline did or did not make the "it won't be pretty" statement to Grossi, as she testified. For reasons discussed above, I did not find Grossi's testimony about Cline's attempt to ask a question as reliable as Cline's. However, the

importance of determining whether Cline did or did not make the "won't be pretty" comment makes it advisable to consider the credibility issues further and in greater depth.

Some factors militate in favor of crediting Grossi. She was new to the Destin facility and presumably did not have the same history of conflict with Cline as did Malishan and Torres. Because prior conflicts could leave hard feelings affecting a witness's perception and recollection, the absence of such conflicts might make Grossi a more objective witness.

It is true that Grossi had known Cline before she came to the Destin facility and, in fact, Grossi had attended Cline's wedding. However, the record does not establish that Grossi's prior acquaintance with Cline biased her either way.

Moreover, the words Grossi attributed to Cline—that "it won't be pretty"—can be interpreted in different ways. Logically, if Grossi had wanted to "frame" Cline by making up something, she would have come up with a quotation which was less ambiguous and more overtly threatening.

Further, uncontradicted testimony suggests that Grossi was upset when she reported the quotation to Torres and Malishan. That state, if genuine, would seem unlikely had Grossi simply made up the "won't be pretty" remark.

All of these reasons militate in favor of crediting Grossi's testimony concerning the "won't be pretty" remark. However, other factors raise some concern about the reliability of Grossi's testimony.

During oral argument, the General Counsel noted that Grossi did not know how much she was earning in her current job as a postmaster. The General Counsel argued that Grossi is "the only government employee in these United States who does not know how much she earns."

Contrary to the General Counsel, I would not simply assume that government employees always know their wage rates. Indeed, it would neither surprise me nor affect my assessment of credibility if, for example, a brilliant NASA rocket scientist, capable of calculating a trajectory to Pluto, failed to notice her wage rate. She would be interested in, and focused upon, numbers dealing with kilometers per second rather than dollars and cents.

However, Grossi has a background in finance, and, in fact, both designed and taught finance courses in a program for associate postmasters. She testified that when she worked at the Fort Walton Beach post office as a clerk, she did the bookkeeping and kept a double-entry cash book. Grossi further testified that higher management had assigned her to work at the Destin facility "because they needed somebody to take care of the financial operations." It does seem unusual that a person with this kind of aptitude for financial numbers would be unaware of her own wage rate.

Additionally, when asked whether retirement benefits for a postmaster were different from those of a "regular clerk," Grossi testified that she did not know. That also is surprising for someone whose specialty concerns finance.

Grossi's testimony about her September 2, 2005 discussion with Cline and Malishan also raises some questions about credibility. As described above, the supervisors' inability to recall what Cline had said to begin the discussion reflects on the reliability of their testimony. More than that, there seems to be some difference between Grossi's assertion that she wanted to have a discussion ("I thought it needed to be talked about") and her actions during the discussion, when she supported Malishan's interrupting of Cline before he had finished asking his question.

Some other matters also cast doubt on Grossi's testimony. When asked on cross-examination if she had ever stated "kiss my ass" to one of the employees at work, Grossi denied it. However, another witness credibly testified that on one occasion, Grossi did say, "[Y]ou can kiss my ass."

Moreover, Grossi testified that on September 2, 2005, when she, Torres and Malishan were in the postmaster's office, she filled out the threat assessment form which is in evidence as Respondent's Exhibit 14. Specifically, Grossi testified:

> Q. Your handwriting is on this form?
> A. Yes ma'am.
> Q. Okay. And what part of the form is your handwriting on?
> A. All of it.

However, Torres testified that *he* filled out this form. Specifically, he testified

> Q. BY MS. BOWENS: And you're the one who completed the form. Is that correct?
> A. I did, with Mr. Malishan.

Additionally, an e-mail which Grossi sent to higher management on September 2, 2005, also causes concern about her credibility. That e-mail will be discussed further below.

The factors militating in favor of Grossi's testimony mainly proceed from assumptions that may be open to question. For example, the reasoning that Grossi was less likely to be biased against Cline because she did not have a long history of conflict with him assumes that antipathy to Cline would be the only reason why Grossi might give unreliable testimony. That assumption might be incorrect. Similarly, the reasoning that if Grossi had wanted to "frame" Cline she would have imputed to him a less ambiguous "threat" rests on an assumption about Grossi's thinking.

On the other hand, factors militating against Grossi's testimony include instances in which she could not recall certain facts (such as what Cline said at the September 2 meeting with supervisors) as well as instances where her testimony conflicted with that of other witnesses. These factors are grounded in the record itself rather than on assumptions which may be questionable. Accordingly, I conclude that Grossi's testimony is not as reliable as Cline's, and resolve conflicts by crediting Cline's.

Therefore, crediting Cline's denial, I find that he did not say that he would be back but that "it won't be pretty."

Grossi's testimony depicts her initial reaction as incredulity. However, Grossi said that as she continued to think about it, she became worried and decided to tell Torres. He and Grossi then went to the office of Postmaster Malishan, who called the Postal Inspection Service.

Respondent has established a procedure for dealing with perceived threats which could result in violence at a postal facility. The procedure ostensibly works as follows: Upon report of a possible threat, a "threat assessment team" evaluates it to determine what action, if any, should be taken to protect the employees, customers and property at a postal facility. After Postmaster Malishan called the Postal Inspection Service, he

contacted Respondent's higher management in Jacksonville, Florida. At some point, Malishan spoke with a labor relations manager and this contact resulted in the involvement of the threat assessment team.

On this same date, Grossi sent two e-mails to the manager of post office operations, Linda Copeland. The body of Grossi's first email states, in its entirety, as follows:

> As Mr. Cline left needing to see his EAP counselor, he told me, "I'll be back and it won't be pretty." I fear for myself and the other employees in this building.

Grossi testified that she received an instruction to send a second email. The text of that email reads, in its entirety, as follows:

> On the morning of Sept. 2, 2005, I was threatened by Bobby Cline. After instructing Marcus Jackson to be on the window in uniform, Mr. Cline said he wanted to see the 3 supervisors (Malishan, Torres, and me) at one time. As we gathered, Pete Torres went to answer the phone. Mr. Cline said that he would wait for Pete but began anyway. He made one statement and as Leon tried to respond, Mr. Cline said, ["]No, let me finish my sentence. That's a conversation." I said, "Actually, Bobby, you did finish a sentence and Leon was responding to it." Mr. Cline stated he couldn't work here with three of us jumping on him. A few minutes later he handed me a leave slip and said he was going to his EAP counselor. I passed the 3971 on to Pete to handle. As Mr. Cline passed my office going out the door he said, "I'll be back, but it won't be pretty." This made me fearful for myself and the other employees.

Although both e-mails assert that Grossi feared "for myself and the other employees," neither one states that Cline made any menacing gesture, got uncomfortably close to Grossi, or spoke in a loud tone of voice. Similarly, neither of these e-mails indicates that at any time in the past, Cline engaged in any behavior which made Grossi fearful or uncomfortable.

Neither of Grossi's emails mentions the reason why Cline wrote on the leave request that he had been threatened by the postmaster, namely, that Malishan had gotten close to him and loudly called him a troublemaker. That omission, particularly from Grossi's second email, is difficult to understand, considering the amount of other detail it included.

Grossi's selection of details to include and omit introduces a significant distortion. Her email describes Cline protesting that he had been interrupted and asking to be allowed to finish his sentence. The email also describes Grossi's response, asserting in fact that Cline had not been interrupted. However, the information which Grossi omitted changed the context considerably.

Specifically, Grossi's email reported to higher management that "Mr. Cline stated he couldn't work here with three of us jumping on him." If the email had described Malishan' shouting in Cline's face that he was a troublemaker, Cline's comment would have appeared quite appropriate. The e-mail also failed to describe Cline's reaction to Malishan's outburst. He simply walked away.

Presumably Grossi, having a degree in English, would appreciate that neglecting to include key facts would change the message communicated. In particular, Grossi reasonably would understand the relevance of Malishan's outburst to the words Cline wrote on the leave slip, "threatened by PM." Therefore, it is appropriate to take her email into account as one of the factors affecting her credibility.

Even in her e-mails, Grossi does not indicate that Cline raised his voice, either during the discussion with Malishan or later when he handed her the leave slip. Grossi's testimony also does not suggest that Cline spoke loudly, approached too closely, or otherwise acted in a manner which would cause concern either for her well-being or the safety of others. I find that he did not.

Moreover, Grossi's testimony does not describe any previous instance in which Cline did anything that would make her uneasy or afraid. I find that he did not.

Considering the action taken by Respondent, described below, it is also quite relevant to determine whether Cline had ever, before September 2, 2005, said or done anything which could be considered violent, threatening or intimidating. The record discloses no such instance and I find that he did not engage in any such behavior.

In addition to Grossi's September 2, 2005 e-mails to higher management, Postmaster Malishan sent an e-mail recounting the events of that morning. That e-mail states, in pertinent part, as follows:

> I was sitting in the office interviewing an applicant for Casual Carrier position . . . when I heard the loud voice of Marcus Jackson at the Retail Window. At this time I walked to the window to listen to what was transpiring between Marcus Jackson, Cindy Grossi, Peter Torres, and Bobby Cline was listening. The conversation was concerning Marcus Jackson being dressed and ready for the Window Service. Cindy Grossi has instructed Marcus Jackson to wear his uniform to work and use his apron when he has to throw parcels or other duties that is dirty work. The final decision was that Marcus would follow instructions. Marcus left to get dressed.
>
> Bobby Cline insisted that he wanted to talk to Cindy Grossi, Peter Torres and Leon Malishan. He began to talk about the situation of Marcus Jackson being ready for the window. I tried to talk and Bobby Cline said that I was not listening to him. I said ok Bobby tell us what you want to. At this moment he got angry and told me the OIG was at the office yesterday and that He was going to call him. At this time I walk[ed] backed [sic] to the office where Mr. Bobby Cline followed me. He came to the door where [applicant] Karen S. Moran was waiting on me to return. I told Bobby that he could call who he wanted to and that I had an individual that I was attended [sic] to. He left the office and return[ed] to the window.
>
> Maybe two minutes later Peter Torres gave me a PS 3871 sick [leave] slip that Bobby Cline have [sic] filled out requesting sick leave of 7 hours for the remaining of the day. In the remarks section he has "THREATENED by PM."
>
> Five minutes later Cindy Grossi came into the office and informed me as Bobby Cline left the office He informed here "I'LL BE BACK, BUT IT WON'T BE PRETTY." She was visibly upset.

> I call[ed] Inspector Guy C. Nelson, MPOO Linda Copeland.

(Capitalization in original.) For the reasons discussed above, I have not credited Malishan's testimony that he walked back to his office with Cline following. Therefore, I conclude that Malishan's representation to this effect in the e-mail is incorrect.

As noted above, Postmaster Malishan's testimony includes no denial that he shouted at Cline and called him a troublemaker. However, Malishan's September 2, 2005 e-mail fails to include this information.

The email raises other questions. It quotes Cline as saying, during the discussion with Grossi and Malishan, that the "OIG" (meaning a representative of the Office of Inspector General) had been at the facility the previous day, and that Cline was going to call him. This statement finds no support in the testimony. No witness testified that, during this discussion with the supervisors, Cline spoke of the inspector general. Moreover, when Malishan testified, he didn't once mention the office of inspector general.

Cline did testify that he said something about calling the inspector general on his way back to his workstation, after the discussion. Crediting Cline, I find this to be the case. Additionally, crediting Cline, I find that in response to this comment, Malishan stopped Cline and told him to go ahead and call the inspector general.

It is significant that in his email, Malishan placed in all capital letters the words Grossi attributed to Cline: "I'LL BE BACK, BUT IT WON'T BE PRETTY." (By comparison, Grossi's two e-mails had only capitalized the first letter of the sentence.) Although the text of Malishan's e-mail exceeds four paragraphs, he does not write any other sentence in all capitals.

Malishan's testimony does not explain his capitalization of the quotation attributed to Cline. Possibly, Malishan did so to suggest that Cline spoke the words in a loud or menacing way. However, Malishan himself was not present when, according to Grossi, Cline made the quoted statement.

Moreover, the record does not establish that Grossi told Malishan that Cline had spoken in a loud, harsh or threatening tone and Grossi's own testimony did not indicate such a tone. Grossi gave only one reason for her conclusion that Cline was "probably upset," and that reason had nothing to do with his tone of voice or demeanor. Instead, Grossi inferred that Cline was "probably upset" because he had mentioned he was going to go to his EAP counselor.

Malishan might also have capitalized the quotation to call attention to its seriousness, rather than to suggest Cline's tone of voice. If so, Malishan wasn't merely reporting information to higher management but instead was commenting on it. Although the words attributed to Cline—"it won't be pretty"—might be interpreted in more than one way, total capitalization urges that the words are important rather than incidental, and threatening rather than benign.

For reasons discussed above, I have found that Cline did not say the words—"It won't be pretty"—which Grossi attributed to him. Therefore, it is clear both that Grossi's report to Malishan was not correct, and that the emails Grossi and Malishan sent to higher management likewise were inaccurate.

As noted above, Respondent has established "threat assessment teams" at various places throughout its operations, including a team at Jacksonville, Florida. This team convenes when a threat has been reported for the ostensible purpose of evaluating the threat and deciding upon the response.

When asked whether he had any contact with Respondent's threat assessment team on September 2, 2005, Malishan replied that he wasn't sure. He spoke only with Respondent's labor relations representative in Jacksonville, and Malishan did not know whether this person was a member of the threat assessment team.

Malishan's testimony at one point suggests that he may have called Respondent's labor relations representative only to get approval for an action he already intended, using the emergency suspension procedure to place Cline on leave without pay. Thus, Malishan testified that he called the labor relations representative "to find out exactly if I were in—if I was not in error if I were to place Mr. Cline on emergency placement leave, and I wanted to get input from labor."

In any event, the Jacksonville threat assessment team (TAT) did become involved. It met at about 1:25 p.m. on September 2, 2005. The record leaves some uncertainty as to what information the team considered but it appears to have been limited to the e-mails submitted by Malishan and Grossi and a form completed by either Grossi or Torres (depending on whose testimony is credited) when they met with Malishan that morning.

Although the minutes of the TAT's September 2, 2005 meeting are in evidence, they do not reflect that the team had any discussion about whether or not to put Cline on emergency leave. Rather, Respondent's manager of labor relations, Thomas Hopper, already had taken that action.

The threat assessment team's minutes indicate that the meeting lasted only 7 minutes. The minutes read, in their entirety, as follows:

TAT Meeting

Minutes

9/2/05

> A meeting was convened at 1325 PM in the Manager, Human Resources' office in response to a Priority 2 threat received from the Destin Post Office regarding Bobby Cline/Cynthia Grossi. Present were: Carolyn Ballou, Robert Mahar (through teleconferencing), Tom Hopper, Dr. Dobbins and Sydney Dobrow.
>
> In response to the Priority 2 threat, Mr. Hopper advised the Committee that he had contacted Linda Copeland, the MPOO, about the situation. He stated that he advised her to call the Inspectors and the local police and to place Mr. Cline on emergency suspension.
>
> The Committee discussed that for the safety of all employees involved, it will be necessary to retrieve Mr. Cline's set of building keys, registry room keys, as well as his identification badge. In order to determine how entry is made to the facility, whether through a keypad or badge swipe, Ms. Copeland was added to the teleconferencing. She advised that the facility is accessed through a keypad and agreed to have the building code changed. Ms. Ballou reiterated the Committee's recommendations concerning

> retrieving Mr. Cline's keys and badge and Ms. Copeland stated that she has requested the Inspectors to go to Mr. Cline's home and pick up his keys and badge.
>
> Ms. Copeland was further advised that if Mr. Cline's keys cannot be retrieved today, that a locksmith should be brought in and that the building/registry room locks should be changed before the end of the day. Ms. Copeland agreed.

Following the teleconference, the meeting was adjourned at 1332 p.m.

The testimony of Labor Relations Manager Hopper supports the conclusion that the threat assessment team did not make the decision to put Cline on emergency leave. When asked what was the main discussion during the team's meeting, Hopper answered, "What we were going to do to protect the employees."

Additionally, Hopper testified that before the threat assessment team's meeting, either he or one of his staff members had advised the Destin management to take Cline "off the clock." It was, he said, "just normal protocol." However, he was not sure who gave that instruction regarding Cline on September 2, 2005.

Because Hopper could not recall who actually gave the instruction to suspend Cline, because Hopper described this instruction as "just normal protocol," and because the threat assessment team itself did not determine whether or not Cline should be suspended, I conclude that Postmaster Malishan actually made the decision, which the labor relations office then "rubber stamped."

The conclusion that Malishan made the actual decision to suspend Cline draws support from Malishan's testimony, quoted above, that he called labor relations to find out "if I was not in error if I were to place Mr. Cline on emergency placement leave, and I *wanted to get input* from labor." (Emphasis added.) Malishan's testimony thus suggests that although he sought advice, he bore responsibility for the decision.

Therefore, I find that Postmaster Malishan made the decision to suspend Cline. Further, I conclude Malishan did not write the email to provide information to some other decisionmaker but rather to document his own decision in a favorable light.

A supervisor who reported to Malishan signed the certified letter notifying Cline of this action. That letter, dated September 6, 2005, stated as follows:

> You are hereby notified that you were placed in an off duty (without pay) status effective approximately 0882 on September 2, 2005, and continue in this status until you are advised otherwise.
>
> This action is based on the following reason:
>
> You made threatening remarks to 205B Supervisor Cynthia Grossi. On the morning of September 2, 2005, Ms. Grossi instructed Marcus Jackson to be dressed in his uniform and ready for the window when he reports to work. She said he could wear an apron over his uniform when he is doing dirty work. You interjected that you wanted to see the Postmaster, Ms. Grossi and me at the same time about that issue. You began the conversation while I was away answering the telephone. You made a statement and Mr. Malishan attempted to respond to your statement. You told Mr. Malishan to let you finish your sentence and said, "That's a conversation." Mr. [sic] Grossi responded that you did finish your sentence and that Mr. Malishan was attempting to respond. You said you couldn't work here with three of us jumping on you. You said the OIG was at the office yesterday and you were going to call him. A few minutes later you gave Ms. Grossi a leave slip and said you were going to your EAP counselor. Ms. Grossi passed the leave slip on to me to handle. As you passed Ms. Grossi's office you said, "I'll be back, but it won't be pretty." Ms. Grossi was fearful for herself and the other employees.
>
> You have the right to appeal this action under the grievance-arbitration procedure set forth in Article 15, Section 2, of the National Agreement within fourteen (14) days of your receipt of this notice.
>
> Please turn in all government property issued to you immediately.
>
> A copy of this letter is being sent to your home address by ordinary mail.

Cline surrendered his identification and keys to a postal inspector. Respondent required Cline to take a psychological fitness for duty examination. After Cline passed this examination, Respondent did not reinstate him immediately. Although Respondent appears to have placed Cline on administrative leave shortly after the psychologist's favorable report, it left him in nonpay status for about a month. Cline's administrative leave continued until March 13, 2006, when Cline returned to work.

The complaint alleges that requiring Cline to submit to a fitness-for-duty examination and then placing him on administrative leave rather than reinstating him to duty status discriminated against him because of his protected activities, in violation of Section 8(a)(4), (3), and (1) of the Act. Discussion of these allegations will be deferred until later in this decision.

2. Analysis

At the outset, I must determine whether to analyze the facts using the *Wright Line* framework or to follow the procedures used when an employee is disciplined for conduct which itself is protected. Respondent's stated reasons for suspending Cline arguably include protected activities. On September 2, 2005, when Cline requested to meet with Grossi, Torres, and Malishan, he intended to ask a question of concern to all the window clerks and not merely himself. This question, about the proper reporting procedure the window clerks should follow, arose because Supervisors Grossi and Torres had given another employee, Jackson, conflicting instructions. Cline sought to ask this question after he heard Grossi and clerk Marcus Jackson engage in a loud discussion about where Jackson should report.

Moreover, when Cline began to ask the supervisors his question, he spoke in the plural: "I said, you know, we're getting double messages here, you know. We're just trying to do the right thing. We just want to know exactly what it is." Considering Cline's repeated use of "we," the supervisors reasonably would understand him to be inquiring not only for himself but in the interest of the other window clerks as well.

The September 6, 2005 letter notifying Cline of the "Emergency Placement in Off-Duty Status," quoted above in its entirety, referred to the colloquy between Grossi and Jackson, then

informed Cline that he had "interjected" that he had wanted to see the Postmaster and the two supervisors "at the same time about that issue." In this context, Cline's use of "we" might well be an indication of concerted activity.

Nevertheless, the Board's *Wright Line* framework appears to be much better suited to resolving the issues presented. Although one reason given in the September 6 letter pertains to arguably protected activity, the other reason—Cline's "threat" to Grossi does not. Accordingly, I will follow the *Wright Line* framework.

The General Counsel clearly has established the first *Wright Line* element, protected activity. As described above, Cline engaged in many protected activities, some of which took place not long before his suspension.

The testimony Cline gave before the Board in June 2005 had resulted in a decision, certified by the judge on July 13, 2005, finding that Respondent had committed an unfair labor practice. This decision ordered Respondent to cease and desist and to post a notice. Moreover, on August 26, 2005, just 1 week before the suspension, Cline had acted as a witness while Union Steward Jackson served another unfair labor practice charge on Supervisor Torres.

The General Counsel also has proven the second *Wright Line* element, employer knowledge. Without doubt, Respondent knew that Cline had testified in the June 2005 Board proceeding because it had participated in that proceeding.

Likewise, Respondent knew about Cline's role in serving the unfair labor practice charge on August 26, 2005. The supervisor who received the charge, Torres, not only saw Cline but, after examining the charge, called Cline a liar. This emphatic reaction leaves no doubt that Respondent associated Cline with the unfair labor practice charge.

The third *Wright Line* element requires the General Counsel to prove that Respondent has taken an adverse employment action against an employee. Certainly, a suspension without pay constitutes an adverse employment action. The General Counsel has satisfied this third *Wright Line* criterion.

Finally, under *Wright Line*, the General Counsel must show some link between the protected activity and the adverse employment action. The search for such a link may well begin with Judge Marcionese's findings in the July 13, 2005 decision. That decision concluded that Respondent violated Section 8(a)(1) of the Act by threatening an employee, Cline with a lawsuit and unspecified reprisals because the employee had filed charges with the Board.

Cline had filed the charge against Respondent that began that previous case. That charge, his testimony, and the resulting decision all potentially embarrassed Respondent's local management. Certainly, the judge's finding that Respondent had *threatened* an employee would not make them happy.

Less than 2 months after this decision, the same employee participated in the service of another unfair labor practice charge which raised *another* threat allegation. As Torres put it, "there was one that accused me of threatening Bobby [Cline], and I told him he needed to rethink this one." Torres admitted that after reading this charge, he called Cline a liar.

Thus, twice in the recent past, Cline had gone to the Labor Board with accusations that management had threatened him. Cline's use of the word "threatened" had become associated with filing charges, particularly after Judge Marcionese had indeed found a threat.

Then, on the morning of his suspension, he had written on his leave request "threatened by PM." Standing alone, making this notation on the leave slip would not constitute protected activity. However, the word "threatened" reasonably would bring to mind Cline's previous activities before the Board.

Significantly, immediately before Cline approached Grossi, Malishan and Torres on September 2, 2005, they had been having a loud discussion with Union Steward Jackson concerning the proper reporting procedure, which was also the subject of Cline's question. Although Jackson was no longer present when Cline asked his question, the record establishes that Cline sought the information not only for himself but for other employees. Cline told the supervisors, "[W]e're getting double messages here, you know. We're just trying to do the right thing. We just want to know exactly what it is."

Thus, Cline's question itself constitutes protected, concerted activity. Moreover, it associated Cline once more with the union steward. Earlier in the year, Cline had sent a letter to his Congressman's office protesting "our union officials are abused and harassed because they speak out about the problems," followed by another letter referring to management's treatment of Jackson. Only 2 weeks previously, Cline had accompanied Steward Jackson to serve the unfair labor practice charge on Torres.

Cline's association with the union steward explains why Malishan would react so antagonistically when the soft spoken Cline politely asked a legitimate, work-related question. Malishan had just been discussing the same issue with the union steward, and the conversation had become loud. Cline's continuation of Jackson's inquiry represented still another instance when, apparently, Jackson and Cline had teamed up.

In this context, a threat Supervisor Torres made 2 weeks earlier takes on special significance. On August 18, 2005, Cline had protested that Torres and another supervisor were violating the collective-bargaining agreement. Torres warned Cline to "mind your own business or you're going to get in more trouble."

Clearly, Torres believed that Cline had not "minded his own business" on September 2, 2005. Torres wrote the letter notifying Cline that he had been placed on emergency leave. In this letter, Torres stated:

> On the morning of September 2, 2005, Ms. Grossi instructed Marcus Jackson to be dressed in his uniform and ready for the window when he reports to work. . . . *You interjected* that you wanted to see the Postmaster, Ms. Grossi and me at the same time about that issue. [Emphasis added.]

Not only did Torres write this letter, he also participated in the decision to place Cline on emergency suspension. His perception that Cline had "interjected" himself into the management's discussion with the union steward, coupled with his "mind your own business" warning, provides strong evidence of a link between Cline's protected activities and his placement on emergency suspension.

Torres also had displayed hostility when Cline and Jackson served him with an unfair labor practice charge. He admitted having called Cline a "liar" on that occasion.

However, Torres wasn't the only supervisor to become concerned about Cline and the union steward acting in concert. A higher-ranking official, Postmaster Paul McGinnis wanted to know why it had required two people—Cline and Jackson—to serve the unfair labor practice charge on Torres. Respondent's unlawful interrogations of Cline about this protected activity, using questions drafted by McGinnis, will be discussed below. Both the number of these interrogations and the number of supervisors involved in the effort reflect the extent of management's hostility to employees acting in concert for their mutual aid and protection.

Postmaster Malishan's loudly calling Cline a "troublemaker" provides additional evidence of animus. The Board has held that this epithet itself may constitute evidence of unlawful animus. *United Parcel Service*, 340 NLRB 776, 777 fn. 9 (2003), citing *James Julian, Inc. of Delaware*, 325 NLRB 1109, 1111 (1998), *Knoxville Distribution Co.*, 298 NLRB 688 (1990).

Another matter may be noted, although I do not rely upon it in reaching the conclusion that a connection exists between Cline's protected activity and his September 2, 2005 suspension. As discussed above, the words "threat" and threatened" had taken on special significance because of Cline's previous unfair labor practice charges and Judge Marcionese's decision. Accusing Cline of making a "threat" and suspending him for it could offer the attractive irony of giving Cline, in effect, a "dose of his own medicine." However, I need not, and will not, speculate about whether this irony occurred to Malishan and Torres or appealed to them. The evidence discussed in preceding paragraphs is more than sufficient to establish a nexus between Cline's protected activities and his suspension on September 2, 2005.

Moreover, Respondent's conduct *during* Cline's suspension provides further evidence of unlawful motivation. As mentioned above, while Cline was on emergency suspension, Respondent subjected him to three interrogations, which will be discussed below in connection with complaint subparagraphs 7(b), (c), (d), and (e).

Additionally, Respondent's defense against these allegations reveals evidence of animus. For clarity, I will defer the discussion of this evidence until after the examination of complaint subparagraphs 7(d) and (e), which will provide necessary background. The discussion of this evidence of animus appears below in the section dealing with complaint subparagraphs 7(d) and (e), under the heading "Continuing *Wright Line* Analysis."

Further, some of Respondent's other violations, those alleged in complaint paragraphs 8 and 9, demonstrate a pattern which Respondent appears to repeat here. Specifically, for the reasons discussed above with respect to complaint paragraph 8, I have concluded that Respondent falsely accused Union Steward Jackson of engaging in improper conduct and then disciplined him in retaliation for his union activities. Also, as discussed above with respect to complaint paragraph 9, I have concluded that Respondent falsely accused employee Cline of engaging in improper conduct and then disciplined him to retaliate against him for his protected activities.

These two instances may not establish that Respondent had a modus operandi of retaliating against union adherents by falsely accusing them of misdeeds, but they do demonstrate that local management did not have qualms sufficient to preclude such conduct. Accordingly, Respondent's previous false accusations do have some relevance to the issue of animus.

Another factor also relates to the issue of animus. In approximately 2 dozen prior cases, cited below in the "remedy" section, the Board has found this same Respondent guilty of violating the Act. These repeated violations have taken two forms: (1) Failing and refusing to provide, in a timely manner, relevant information a union needs to perform its duties and (2) denying an employee's request for union representation or restricting the union representative's ability to represent an employee during a predisciplinary interview, contrary to the employee's rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

As discussed below, the present record establishes that Respondent engaged in both types of conduct in the present case. Obviously, Respondent's repetition of unlawful conduct, despite many prior cease-and-desist orders, says something about the likelihood that hostility to protected activities was a substantial or motivating factor in management's decision to take an adverse employment action.

The record establishes that, notwithstanding prior cease-and-desist orders focused on precisely this type of conduct, Respondent denied Cline the right to union representation during a predisciplinary interview on November 8, 2005, by instructing the union representative that he could not speak during this meeting. The supervisor gave this instruction at the *beginning* of the meeting, and not in response to anything the union president had said or done.

This action definitely constitutes evidence of antiunion animus. Moreover, although this conduct occurred after Respondent suspended Cline on September 2, 2005, I conclude that this evidence is relevant to whether unlawful animus tainted that decision. For the following reasons, I give this evidence considerable weight: (1) Respondent ordered the union president not to speak at a predisciplinary interview involving Cline, who was also the subject of the September 2, 2005 suspension; (2) Cline remained on suspension notwithstanding that he had successfully undergone a fitness-for-duty examination, thus, indicating that Respondent continued to have some reason other than his fitness for keeping him away from work; (3) the union representative had done nothing which would interfere with the conduct of the interview; and (4) the instruction focused on, and interfered with, the Union's essential role as exclusive representative of the bargaining unit.

Additionally, I have considered this fifth reason: Respondent previously had been ordered to cease and desist from precisely this conduct. This is not an instance in which compliance with an order imposed any significant burden. Respondent simply had to stop doing something which served no legitimate purpose anyway. It is difficult to understand why a supervisor, instructed to refrain from this conduct, would fail to do so.

Thus, a new instance of this unlawful conduct must signify either that Respondent had created an environment in which further violations would be condoned, or else that Respondent had made clear that it would not condone any more violations, but the level of animus at Destin was so high that the supervisor went ahead and committed the unfair labor practice anyway. In the absence of evidence, I will not assume that Respondent went

through the motions of telling its supervisors to respect employees' *Weingarten* rights but then gave the supervisors a wink and a nod. To the contrary, the record suggests that the level of animus at Destin was exceedingly high, particularly when the union adherent was Cline.

The fact that Respondent resorted to a pretext supports this conclusion. When the asserted reason for an action is false, the Board may infer not only that another reason exists, but also that the concealed motive is an unlawful one. *Tidewater Construction Corp.*, 341 NLRB 456 (2004), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (1966). Additionally, the *type* of pretext present here has significance.

The term "pretext" can refer to two distinct situations. In the first type, an employer falsely claims that it disciplined an employee for doing something that the employee actually did. The falsehood does not concern the employee's actions but rather the employer's reasons for imposing discipline.

The second type of pretext involves an employer *falsely* claiming that an employee engaged in misconduct, and then disciplining the employee for it. Presumably, an employer would be more reluctant to lie about an employee's actual conduct than about its reasons for the disciplinary action. A decision to "frame" an employee by falsely accusing him of misconduct suggests a considerable amount of animus. In the present case, I conclude that Respondent did concoct a reason to suspend Cline.

Events after Cline's suspension further persuade me that Respondent contrived a pretext. One of those events, the denial of Cline's *Weingarten* rights, has been discussed above.

Additionally, as already noted, even after Cline passed the fitness-for-duty examination, Respondent did not recall him to work. Respondent did not explain why, in view of the staffing shortage at the Destin facility, it did not take this typical step.

Respondent customarily restored an employee to work status after the employee passed a fitness-for-duty examination or, if not, according to Postmaster Malishan, at least placed the employee on paid administrative leave. However, Respondent did not even place Cline on paid leave status for 3 more weeks after he was approved to return to duty, and that happened after Postmaster Malishan left the Destin facility and another manager took his place. That failure is consistent with other evidence of Malishan's hostility to Cline, a hostility grounded in Cline's protected activities.

In sum, the record provides ample evidence of animus. The General Counsel has proven the forth *Wright Line* element. Thus, the government has satisfied its initial burden. At this point, under the *Wright Line* framework, Respondent must prove that it would have taken the same action in any event, even if Cline had not engaged in protected activities.

However, as the Board observed in *Rood Trucking Co.*, 342 NLRB 895 (2004), a finding of pretext defeats any attempt by a respondent to show that it would have discharged a discriminatee even absent protected activities. Accordingly, it is not necessary to examine the sufficiency of Respondent's rebuttal evidence. However, in case the Board disagrees with my conclusion regarding the pretextual nature of the suspension, I am including the following analysis.

As discussed above, the record does not support a conclusion that the "threat assessment team" actually assessed the "threat" or made the decision to suspend Cline. To the contrary, I have concluded that Postmaster Malishan made the decision, which the labor relations manager approved pro forma.

Because only Destin management made the decision to suspend Cline, it is appropriate to consider whether this local management would have made the same decision even if Cline had not been involved in protected activities. The record does not reflect a prior instance of an employee at the Destin post office being placed on emergency suspension under similar circumstances.

Respondent presented documents concerning emergency placement suspensions at other post offices in the North Florida District. This evidence also fails to carry Respondent's rebuttal burden because the situations were different.

For example, on January 16, 2001, Respondent suspended two employees who had been involved in a marital dispute. One of those employees had obtained a restraining order against the other from a Florida court. The order ostensibly resulted from episodes of violence. Although both employees worked on the same shift at the same place, the order prohibited one of them being near the other. Moreover, one of the employees alleged that the other possessed handguns.

The circumstances in that instance provided much greater reason to fear violence than the single ambiguous remark attributed to Cline. Therefore, it does not establish what Respondent would have done in Cline's case, in the absence of protected activity.

Other instances of emergency suspensions involved physical contact or "heated verbal threats" in a confrontational situation. Cline was not involved in a confrontation with Grossi and was not "heated." Grossi offered no reason for believing that he was upset except he said he was going to see his EAP counselor. The fact that Respondent has suspended employees who had been yelling at each other does not establish that it would have suspended Cline if he had not engaged in protected activities.

The record does establish that one person had been "heated" that morning at the Destin facility. That person was Postmaster Malishan, who loudly called Cline a troublemaker, then followed Cline as he walked away and confronted him. Malishan's action was more bellicose than anything attributed to Cline, yet the postmaster was not suspended.

Perhaps the mildest situation which resulted in an emergency suspension began when one employee asked another, "What's up, King Jackass?" The other employee put his finger in the questioner's face and told him not to let it happen again. Respondent suspended both of them. However, in this instance, the April 12, 2002 notices of suspension also stated that the two employees were disrupting operations. During the hearing, the General Counsel questioned Labor Relations Manager Hopper about this suspension:

> Q. And does it appear to you that he was placed on emergency placement because of that alleged statement he made?
>
> A. I would say, and further on down, it says, "Additionally, you too were disrupting operations."

Respondent does not claim that Cline was disrupting operations at the time he spoke to Grossi. Accordingly, the April 12, 2002 situation was not similar to the one presented here.

On the morning of September 2, 2005, when Postmaster Malishan came close to Cline and loudly called him a "troublemaker," Cline did not react with anger, hostility, or aggression. Instead, he walked away. Malishan followed him and confronted him, but again, the record does not indicate that Cline even raised his voice in response.

As a witness, Cline spoke softly, and no evidence suggests that he behaved loudly on September 2, 2005. To the contrary, his credited testimony indicates, and I find, that he approached Malishan and the supervisors politely, with a sincere interest in finding out the answer to a work-related question.

Cline's credible testimony also indicates that Torres spoke loudly to him as he was leaving the building. However, the record does not indicate that Cline reacted with raised voice, and I conclude that he did not. In sum, although both Postmaster Malishan and Supervisor Torres yelled at Cline, he did not react in any manner which would make him appear to be a threat.

Moreover, notwithstanding that both Malishan and Torres became loud and confrontational without apparent reason, neither was placed on emergency suspension nor required to take a psychological fitness-for-duty examination. Cline was.

On October 22, 2005, the examining psychologist issued a report favorable to Cline's return to duty. As noted above, the record establishes that after an employee passes a fitness-for-duty examination, Respondent normally or customarily restores the employee to duty or, if not, at least places the employee on administrative leave.

The record suggests that a few days after Cline passed the examination, Respondent changed his status from "emergency placement" to administrative leave. However, although an employee on administrative leave ordinarily receives regular pay, Respondent did not change Cline's pay status for about a month. During this period, therefore, Cline's "administrative leave" status was in name only.

In this case, Respondent's failure to take any of its customary actions constitutes additional evidence that it did not apply its usual procedure in Cline's case. That departure also calls into question any claim that Respondent treated Cline as it would any other employee.

In sum, for all the reasons discussed above, I have concluded that Respondent's asserted reason for suspending Cline was pretextual and, accordingly, it is not necessary to examine Respondent's rebuttal evidence. However, were I to consider this evidence, I would conclude that it was insufficient to carry Respondent's rebuttal burden.

Therefore, I find that Respondent violated Section 8(a)(4), (3), and (1) of the Act by placing Cline on emergency suspension on September 2, 2005.

VIII. CLINE'S LAWSUIT AGAINST RESPONDENT

Before leaving the issues raised by Respondent's suspension of Cline on September 2, 2005, one other matter should be addressed. On June 21, 2006, Charging Party Cline filed a lawsuit against Respondent in the United States District Court for the Northern District of Florida. In this lawsuit, Cline alleged that the Respondent had harassed him and, on about September 2, 2005, placed him on emergency placement leave, a nonpay, nonduty status. The lawsuit further alleged that Respondent thereby had discriminated against Cline because of his age, sex, and race.

Although such alleged discrimination would violate other federal statutes, it would not constitute a violation of the Act, which defines and protects an employee's right to engage in certain concerted activities with other employees, to form, join, or assist a labor organization, and to file charges with and give testimony before the Board.

Thus, it may appear inconsistent for Cline to argue in another forum that Respondent discriminated against him for one set of unlawful reasons while claiming here that Respondent took the same action against him for other reasons. However, I conclude that Cline's filing of the lawsuit against Respondent does not estop him from asserting here that antiunion animus entered into Respondent's decision to take action against him. Similarly, Cline's claim in District Court, that Respondent discriminated against him because of his race, sex, and/or age, does not preclude Cline from also asserting that Respondent sought to retaliate against him for filing unfair labor practice charges and giving testimony before the Board.

The present situation should be distinguished from that in which a plaintiff in District Court alleges unlawful employment discrimination and seeks reinstatement, while at the same time alleging before the Social Security Administration that he is disabled and cannot work. Such a plaintiff presumably would know whether or not his own medical problems prevented him from working. However, an employee does not have such intimate knowledge of the reasons why management might decide to take some employment action. That is particularly true when the employer asserts a pretextual reason and tries to keep the real motivation secret.

Moreover, the employer may well have more than one motivation. Under *Wright Line, above,* the General Counsel need only show that activities protected by the Act were a substantial or motivating factor. Upon such a showing, the burden shifts to the respondent to prove it would have taken the same action even in the absence of such protected activities.

Because more than one motivation can affect an employment decision, the presence of one such motivation does not exclude the existence of another. Accordingly, Cline's filing of the lawsuit does not affect the viability of the unfair labor practice allegations.

IX. COMPLAINT PARAGRAPH 11

Paragraph 11 of the complaint alleges that on or about October 1, 2005, Respondent required Cline to undergo a fitness-for-duty examination. Complaint paragraph 24 alleges that this conduct violated Section 8(a)(3) and (1) of the Act, and complaint paragraph 25 alleges that the conduct violates Section 8(a)(4) and (1) of the Act.

Respondent has admitted that it required Cline to undergo the fitness-for-duty examination, as alleged in complaint paragraph 11. However, Respondent denies that it thereby violated the Act as alleged in complaint paragraphs 24 and 25. Resolution of these issues depends upon Respondent's motivation.

1. Facts

The record establishes that while Cline remained in the nonpaid "emergency placement" leave, Supervisor Torres requested that Cline be required to take a fitness-for-duty examination before

being allowed to return to work. Postmaster Malishan concurred in Torres' recommendation.

Torres' request for this fitness-for-duty examination is in evidence but does not bear a date. On the witness stand, Torres could not recall when he sent it, or even whether he made the request in September or October 2005. Labor Relations Manager Hopper testified that it was submitted probably "sometime by the end of September, I would imagine."

Although local management can request a fitness-for-duty examination, higher management, in the district office, must approve it. Respondent's manager of injury compensation, Carolyn Ballou, who was a member of the threat assessment team which met on September 2, 2005, testified that in deciding to require Cline to take a fitness-for-duty examination, "employee unrest" was taken into account.

During her testimony, it first appeared that Ballou associated the matter of "employee unrest" with the decision to suspend Cline in an emergency nonpay status. However, later in her testimony, Ballou clarified that the matter of "employee unrest" figured in the decision to require a fitness-for-duty examination rather than the decision to suspend Cline. This clarification makes sense because, as noted above, on September 2, 2005, the decision to suspend Cline had been made before the threat assessment team met.

When asked to be more specific about "employee unrest," Ballou testified that the Destin "office had been in the newspaper. There were some issues going on with the postmasters and stuff." She explained that the newspaper article "had to do with mail, delays of mail, the employees not happy with the way, I guess, the postmaster was managing things."

On October 22, 2005, the examining psychologist issued a report favorable to Cline's return to duty. Although Respondent did not reinstate Cline at that point, management ostensibly placed him on "administrative leave," which should have resulted in Cline receiving a paycheck. However, it did not.

On November 16, 2005, Cline learned that he should be receiving a paycheck and contacted the new officer in charge of the Destin post office. That manager arranged for Cline's name to be placed again on the payroll. However, because Cline was not working, he was not eligible for overtime. Respondent finally reinstated Cline on about March 13, 2006.

2. Analysis

Cline's protected activities, and Respondent's knowledge of them, have been discussed above. Requiring Cline to pass a fitness-for-duty examination certainly is a condition of employment because, unless he satisfied it, he could not return to work. Moreover, it was an unusual and potentially stigmatizing condition which, I conclude, constitutes an "adverse employment action." Accordingly, I further conclude that the record establishes the first three *Wright Line* elements.

Credible evidence also proves the fourth element, a connection between Cline's protected activities and the adverse employment action. It may be noted that two of the same supervisors responsible for suspending Cline—Torres and Malishan—signed the request that Cline be required to undergo the fitness-for-duty exam. Thus, the record here does not present an instance of a higher management official, unaware of the trumped up nature of the suspension, deciding on her own initiative to subject Cline to the fitness-for-duty examination.

Rather, the record establishes not only that the same supervisors responsible for the pretextual suspension also initiated the fitness-for-duty examination process, but also that these two supervisors harbored personal hostility to Cline because of his protected activities.

Although the record does not pinpoint the exact date when Torres and Malishan decided to subject Cline to the fitness-for-duty examination, they probably did so during the same month he was placed on emergency suspension. More importantly, the two events were related.

Without repeating the discussion, above, concerning the animus displayed by Torres and Malishan, it may be noted that their hostility took open and unmistakable forms, such as Torres calling Cline a liar after reading the unfair labor practice charge and Malishan loudly calling Cline a troublemaker. In particular, Torres' warning that Cline would get in trouble if he didn't mind his own business—a warning occasioned by Cline's assertion of a right under the collective-bargaining agreement—connects Cline's protected activities and the adverse employment action.

Even if higher management merely had rubber stamped this request, I would still conclude that animus motivated it, both because Malishan and Torres are Respondent's agents and because the asserted reason for the examination—that Cline had made a threat—was a pretext to conceal unlawful discrimination. However, evidence indicates that unlawful considerations also tainted higher management's review.

As described above, Carolyn Ballou, a manager involved in the review process, testified that in deciding to require Cline to undergo a fitness-for-duty examination, the reviewers considered the employees' dissatisfaction with the local management at the Destin post office. She referred to this dissatisfaction as employee "unrest."

Besides participating in this "unrest," for example, by circulating a petition and presenting it to management, Cline had worked energetically to inform both higher management and even Congress that employees were unhappy about the working conditions in the Destin facility. Respondent has not explained how either the employees' dissatisfaction or Cline's expressions of concerns on their behalf could make Cline unfit for duty. Engaging in protected activity is a right, not a disability.

Respondent's failure to reinstate Cline after the favorable fitness-for-duty report on October 22, 2005, also suggests that an ulterior purpose, not concern about Cline's medical condition, motivated management. Respondent's labor relations manager testified that it was customary for an employee to return to work in such circumstances. Likewise, Post Malishan testified that when an employee passes a fitness-for-duty examination "was supposed to either return to work, [or] *remain in a pay status* until it was determined whether or not discipline was going to be taken for the incident." (Italics added.)

However, as discussed above, Respondent neither reinstated Cline nor immediately made the necessary computer entry to return him to pay status. Although it appears that Respondent technically changed Cline's status from "emergency placement" to "administrative leave" a few days after the favorable fitness-for-duty report, this change must be considered essentially illusory

because it did not result in Cline receiving a paycheck. Respondent's treatment of Cline thus departed from its usual practice, as described by Malishan.

In sum, the evidence amply establishes a link between Cline's protected activities and Respondent's requiring him to undergo a fitness-for-duty examination. Accordingly, I conclude that the government has proven the fourth *Wright Line* element.

The burden therefore shifts to the Respondent to rebut the General Counsel's case. However, I conclude that Respondent based its fitness-for-duty examination requirement on the same pretext it had used to place Cline on emergency suspension. This pretext was the false accusation that Cline had made a threat.

Because of this pretext, Respondent's evidence cannot rebut the General Counsel's case. *Rood Trucking Co.*, above. However, even were I to consider this evidence, I would conclude that it was insufficient to establish that Respondent would have taken the same action even if Cline had not engaged in protected activities.

In sum, I conclude that by requiring Cline to undergo a fitness-for-duty examination, Respondent violated Section 8(a)(4), (3), and (1) of the Act, as alleged.

X. COMPLAINT PARAGRAPH 12

Complaint paragraph 12 alleges that on or about October 26, 2005, Respondent placed Cline on administrative leave. Respondent has admitted this allegation.

Complaint paragraphs 24 and 25 allege that the conduct described in complaint paragraph 12 violated Section 8(a)(3), (4), and (1) of the Act. Respondent has denied these allegations.

1. Facts

The discussion above summarizes most of the facts. Additionally, the record establishes the following.

When Cline received the psychologist's October 22, 2005 report, he did not realize that he should have been placed in pay status at that point. Cline credibly testified that he did not learn that his pay status should have changed until November 16, 2005, when he attended a predisciplinary interview conducted by Supervisor Jerry Maynard.

By this time, Malishan had been transferred to another facility and Billy Dossantos had taken charge of the Destin post office. On November 17, 2005, Cline contacted Dossantos, who confirmed that the favorable fitness-for-duty report should have resulted in Cline's being placed in pay status.

Dossantos told Cline that Supervisor Torres should have taken care of this matter but it had not been done. Dossantos then arranged for Cline to receive a regular paycheck.

2. Analysis

For reasons discussed above, I find that the Government has satisfied the first two *Wright Line* requirements by proving that Cline engaged in protected activity and that Respondent knew about such activity.

To meet the third *Wright Line* criterion, the General Counsel must establish that Cline suffered an adverse employment action. Although being on administrative leave, and therefore getting paid, is better than being on nonpay status, it still denied Cline the opportunity to earn overtime, and thereby reduced his income. Cline credibly testified that he had worked overtime in the past. Moreover, Cline remained on administrative leave during the Christmas holiday season, which afforded opportunity to work overtime because of the great increase in mail.

Although determining precisely how much overtime Cline would have worked must be deferred to the compliance stage, I conclude that being on administrative leave, rather than working and therefore being eligible to work overtime, adversely affected Cline. Accordingly, I conclude that the Government has satisfied the third *Wright Line* requirement by proving that Cline suffered an adverse employment action.

Fourth, the Government must show a connection between Cline's protected activities and the adverse employment action. As discussed above, the record provides ample evidence of unlawful animus, which establishes the necessary link.

Malishan's statement that Cline was a "troublemaker" affords particular insight into his motivation for placing Cline on administrative leave rather than recalling him to work. This action kept him away from other employees, thereby reducing his ability to cause "trouble" by engaging in protected concerted activities.

For example, segregating Cline in this way prevented him from observing instances which he might consider violations of the collective-bargaining agreement. Likewise, it precluded Cline from insisting that the collective-bargaining agreement be followed, as he had done in the past.

Moreover, some additional, contemporaneous evidence of animus bolsters the conclusion that Respondent did not recall Cline to work because of management hostility to Cline's protected activities. As discussed below under the heading "Complaint Paragraph 6," on November 8, 2005, during an investigative interview preliminary to imposing discipline, two supervisors referred to Cline's participation in the service of an unfair labor practice charge on Supervisor Torres. They asked Cline why he had given Torres a copy of the unfair labor practice charge, adding "there is no reason to do this." They also asked Cline if he had been "trying to instigate a reaction or intimidate" Torres.

After the words "there is no reason to do this," the supervisors added "The Labor Board notifies management." Respondent's question, and this comment following it, suggest that Respondent did not welcome unfair labor practice charges in the workplace. Respondent's second question reinforces this message. By asking Cline if he was trying to intimidate the supervisor—by giving him an unfair labor practice charge—Respondent conveys the message that Cline did something improper and provocative.

The questions imply that Respondent considered it some kind of breach of protocol or propriety for an employee to deliver a charge to a supervisor rather than relying on the Board to mail a copy to higher management. In other words, allegations of unfair labor practices should be kept in the stratosphere of higher management and not be allowed to disturb the relations of rank-and-file employees and first-line supervisors.

This attitude explains why management would bear the expense of placing Cline on administrative leave rather than recalling him to work. Cline had committed the "offense" of bringing an unfair labor practice charge into the workplace and serving it on a first-line supervisor. To prevent this from happening again, it was better to pay him simply to stay home.

Other evidence supports this conclusion. Respondent directed Cline to report to the Fort Walton Beach, Florida post office for

the investigative interview. One of the two supervisors conducting the interview, Jerry Maynard, was then working at the Destin facility and therefore had to travel to Fort Walton Beach. Respondent has not explained why it scheduled the interview at the Fort Walton Beach facility rather than at Destin, Cline's permanent duty station and the location where Maynard then was working. If there were some reason for doing so, apart from keeping Cline away from the Destin post office, it is not obvious from the record.

Moreover, the record discloses no plausible reason for keeping Cline on administrative leave other than the unlawful one described above. Certainly, any argument that Cline had to be kept on administrative leave while Respondent decided whether to impose discipline must fail. The record does not establish that Respondent had a practice of placing employees on administrative leave while deciding whether to impose discipline.

The General Counsel has proven the fourth *Wright Line* element, shifting the burden of proceeding to the Respondent. For reasons discussed above, I have concluded that Respondent's September 2, 2005 suspension of Cline and its later decision to require a fitness-for-duty examination were pretextual. Placing Cline on administrative leave was a continuation of this same conduct, extending the period during which Cline would be away from the Destin facility. Accordingly, I conclude that Respondent based this action on the same pretext.

In view of this pretext, Respondent cannot rebut the government's case. Moreover, the record fails to reflect any instance in which Respondent treated another similar employee who had not engaged in protected activities the same way it treated Cline. Therefore, I conclude that Respondent violated Section 8(a)(4), (3), and (1) by placing Cline on administrative leave.

XI. COMPLAINT PARAGRAPH 6

Complaint paragraph 6 alleges that on about November 7, 2005, Respondent, by Supervisors Ouellette and Ginn, interrogated Cline about pending unfair labor practice charges. Respondent's answer denies this allegation, further stating "Respondent avers that employees Ouellette and Ginn conducted an investigative interview with Mr. Cline on about November 7, 2005." Respondent also denies that the questions violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 23.

1. Facts

The record establishes that this interview actually took place on November 8, 2005, when Joel Ouellette and Lease Ginn met with Cline in the postmaster's office at the Destin facility. Respondent has admitted that both Ouellette and Ginn are its supervisors within the meaning of Section 2(11) and its agents within the meaning of Section 2(13) of the Act. Although Cline remained on leave status, he had received a letter notifying him of this interview.

Union President Bobby Pruett attended the meeting to represent Cline. According to Cline's uncontradicted testimony, which I credit, Pruett asked Ouellette and Ginn to explain the purpose of the meeting. Supervisor Ouellette told Pruett that although Pruett was allowed to sit and watch, he was not allowed to speak or ask any questions. Cline credibly testified that "we brought up the fact that in an investigation interview, that your representative has the right to participate, not just be present. And Mr. Ouellette said that he wasn't going to allow it, that they were going to ask questions and I was going to answer them, and that's the way it went."

Neither Ouellette nor Ginn testified. Crediting Cline's uncontradicted testimony, I find that Ouellette did tell the Union president he could not speak or ask questions. Further, I find that the supervisors did not explain the purpose of the interview even though Pruett asked them to do so.

The supervisors read from a list of questions, which is in evidence. Two of the questions stated as follows:

> Why did you give Mr. Torres a copy of the labor charges there is no reason to do this? The Labor Board notifies management.
>
> Were you trying to instigate a reaction or intimidate Mr. Torres?

Based on this exhibit and Cline's testimony, which I credit, I find that the supervisors did ask Cline these questions.

2. Analysis

During the hearing, Respondent elicited testimony from Postmaster Paul McGinnis, who drafted the questions, concerning their purpose. From McGinnis' testimony and other evidence, I conclude that Respondent was using the predisciplinary interview not only to gather information relevant to whether discipline should be imposed, but also as a kind of discovery device to obtain information useful in defending against an expected grievance.

At the outset, it may be noted that Respondent has not invoked, and cannot invoke the "safe harbor" afforded to employers under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enfd. denied 344 F.2d 617 (8th Cir. 1965). The record does not establish that the supervisors informed Cline that answering these questions was voluntary and that no reprisals would be taken against him depending on his answers.

Regardless of McGinnis purpose in drafting particular questions, the Government does not have to establish an unlawful intent to prove a violation of Section 8(a)(1). An employer's intent doesn't matter. Whether or not a particular statement violates Section 8(a)(1) turns not on motivation but on the effect the words reasonably would have on the willingness of employees to exercise their Section 7 rights. *Waco, Inc.*, 273 NLRB 746, 748 (1984) ("[T]he illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act.").

In determining whether Respondent's questions reasonably would interfere with an employee's exercise of protected rights, I will consider the factors which the Board applied in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." Citing *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the Board considered the following factors:

1. The background, i.e. is there a history of employer hostility and discrimination?

2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

3. The identity of the questioner, i.e. how high was he in the Company hierarchy?

4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of ``unnatural formality''?

5. Truthfulness of the reply.

With respect to the first factor, the record establishes such a history of hostility and discrimination, both in the present case and in the previous Case 15–CA–17506(P). In particular, Respondent had taken several unlawful actions against Cline in the recent past. It had suspended him, required him to take a fitness-for-duty examination, and placed him on administrative leave rather than restoring him to duty because he had filed unfair labor practice charges, given testimony under the Act, and engaged in other protected activities.

Respondent's history of hostility and discrimination includes two events particularly relevant to the questions which Ouellette and Ginn asked Cline on November 8, 2005. Those questions assumed that Cline had served an unfair labor practice charge on Supervisor Torres when actually, Cline was only present as a witness while Union Steward Jackson served the charge. However, Torres clearly believed Cline responsible for some of the wording of the charge because, when he read it, he called Cline a "liar."

This action, calling Cline a "liar" based on the content of an unfair labor practice charge, not only demonstrates that Respondent had a history of hostility to Cline, but also that this hostility arose because of Cline's protected activities. A week later, Postmaster Malishan loudly called Cline a "troublemaker." That epithet not only manifests hostility towards Cline but also, for the reasons discussed above, associates this hostility with unlawful animus.

With respect to the second factor, the questioning took place during an "investigative interview" of the sort which preceded the imposition of discipline. Moreover, the questions pertained to matters that Respondent later identified as the reason for disciplinary action against Cline.

The third factor concerns the position of the questioners in the management hierarchy. As stated above, Respondent has admitted that both Ouellette and Ginn were its supervisors and agents. However, they appear to have been first-line supervisors rather than higher level managers.

The fourth factor concerns the place and method of interrogation. The interview took place in the postmaster's office, which is a locus of authority. Cline had been notified by letter to attend this interview.

The method of interrogation particularly establishes the coercive nature of the interview. Although Union President Pruett attended to represent Cline, the supervisors did not allow him to speak or ask questions. Even after being informed that the union representative had the right to participate, Respondent still would not allow it.

It should be noted that the complaint does not allege that, on this occasion. Respondent violated Section 8(a)(1) by interfering with Cline's *Weingarten* right to union representation. See *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). Whether or not I may find a separate *Weingarten* violation, not alleged in the complaint, depends on whether the issue has been fully and fairly litigated, a question which will be discussed further later in this decision. At this point, however, it is appropriate to consider the supervisors' conduct in relation to the fourth *Rossmore* factor, the method of interrogation. Obviously, if the method of interrogation itself violates Section 8(a)(1), it affects the coercive impact of the questions asked.

During an interview which reasonably may result in discipline, telling the union representative that he cannot speak or ask questions interferes with, restrains, or coerces employees in the exercise of rights guaranteed in Section 7 of the Act, and therefore violates Section 8(a)(1). See *Barnard College*, 340 NLRB 934 (2003) ("The union representative cannot be made to sit silently like a mere observer"), citing *Talsol Corp.*, 317 NLRB 290, 331–332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998).

In a recent case involving this same Respondent, the Board held that the restrictions which Respondent placed upon the union representative limited the union representative's role to that of an observer, and "[s]uch a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to assist the employee being interviewed." *Postal Service*, 347 NLRB 885 fn. 1 (2006).

The supervisors' conduct interfered with the Union's representation of Pruett in another way. The supervisor's instruction that Union President Pruett could listen but not speak came as a response to Pruett's inquiry about the purpose of the meeting. In view of Pruett's request, Respondent's failure to explain the investigation's purpose denied Cline an important *Weingarten* right.

Respondent should well understand that its supervisors have a duty to inform the employee's union representative and the employee of the charges to be discussed because the Board recently found Respondent guilty of breaching this very duty. *Postal Service*, 345 NLRB 426 fn. 2 (2005). The Board issued its decision in this case less than 3 months before the interrogation at issue here.

Respondent's method of interrogation rendered the interview coercive in two ways: (1) By restricting the union president's role to that of observer, and (2) by failing to inform Cline and his representative of the allegations after they requested such information.

The present record does not establish what Cline said in response to the many questions the supervisors asked him. Therefore, the fifth *Rossmore House* factor, the truthfulness of the employee's replies, cannot readily be assessed. However, the other factors leave little doubt about the coercive nature of this interrogation.

In particular, Respondent's failure to accord Cline his *Weingarten* rights during the interview weighs heavily against a conclusion that the questions had no adverse impact on the exercise of rights guaranteed by the Act. To the contrary, the *Rossmore House* criteria indicate that the questioning was highly

coercive. Accordingly, I conclude that the interview, focused on Cline's protected activity, constituted unlawful interrogation.

The interview interfered with, restrained, and coerced Cline not only because it constituted unlawful interrogation but also because it conveyed a veiled threat. When the interrogators asked Cline whether he was "trying to instigate a reaction or intimidate" Supervisor Torres by serving an unfair labor practice charge on him, the question itself conveyed Respondent's disapproval of this protected activity. The milieu, a predisciplinary interview, made the implied threat even more ominous.

In such a predisciplinary interview, an employee reasonably believes that the employer is considering issuing discipline because of the conduct under discussion. Here, the conduct being scrutinized enjoyed the Act's protection. An employee reasonably would infer that a repetition of such protected activities would result in discipline.

In sum, I find that Respondent engaged in the conduct alleged in complaint paragraph 6, and that the questions quoted above, which Respondent's supervisors asked Cline, interfered with, restrained, and coerced employees in the exercise of protected rights. Accordingly, I conclude that this interrogation violated Section 8(a)(1) of the Act.

As discussed more fully in the "remedy" section below, Respondent has a history of violating employees' *Weingarten* rights and did so again in this instance. However, the complaint does not allege that the supervisors' silencing of the union representative on November 8, 2005, violated the Act.

Because of Respondent's persistence in committing *Weingarten* violations, notwithstanding prior cease-and-desist orders, a specific remedy focused on this conduct would be helpful. However, before finding a violation not alleged in the complaint, two separate issues must be considered.

The first issue arises from a fundamental principle of due process, the requirement that a respondent be placed on notice of the allegation and given a right to be heard. Thus, the Board will find and order remedied an unalleged violation only if the issue is clearly connected to the subject matter of the complaint and has been fully litigated. *Garage Management Corp.*, 334 NLRB 940 (2001); *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 (2001).

In *International Baking Co.*, 348 NLRB 1133 (2006), the Board held that a judge should not have found, sua sponte, a violation not alleged in the complaint, because the respondent had not been placed on notice it needed to present a defense. The judge had found that a particular manager had committed a violation, but the complaint had not alleged that this manager had engaged in any unlawful conduct. Thus, the respondent had insufficient reason to believe that it needed to present a defense to this allegation.

In the present case, the complaint did allege that Respondent violated Section 8(a)(1) of the Act at this particular predisciplinary interview on November 8, 2005. Thus, unlike in *International Baking Co.*, the Respondent here knew that the supervisor's actions during this meeting were at issue.

On the other hand, the complaint alleges that the supervisor unlawfully interrogated an employee about his protected activities, not that the supervisor denied the employee's right to have his union representative participate. As discussed above, the denial of this *Weingarten* right did contribute to the coercive nature of the interrogation. Respondent reasonably would recognize that it had to address the alleged conduct in its defense against the allegation of unlawful interrogation.

In view of recent cease-and-desist orders, Respondent cannot plausibly assert that it was unaware that restricting a union representative's participation in a predisciplinary interview was unlawful. See, e.g., *Postal Service*, supra, and *Postal Service*, JD(ATL)–38–06 (Oct. 20, 2006), the latter referring to a *Weingarten* rights training program which Respondent instituted nationwide pursuant to a settlement agreement approved by the United States Court of Appeals for the District of Columbia Circuit.

Respondent also had adequate opportunity to address this matter. Employee Cline testified concerning the November 8, 2005 disciplinary interview on the first day of the hearing. The parties presented evidence on that day and 3 subsequent days. The hearing then recessed for 20 days. When it resumed, both the Respondent and the General Counsel called witnesses. However, neither of the two supervisors who interviewed Cline on November 8, 2005 took the stand.

In sum, Respondent had ample reason to know that the supervisor acted unlawfully when he prohibited the union representative from speaking. Respondent also had a reason to address this conduct when it defended against the allegation of unlawful interrogation, because the denial of *Weingarten* rights weighed against finding the interrogation harmless under the *Rossmore House* criteria. Moreover, Respondent had adequate time to prepare and present a defense.

These facts distinguish the present case from *International Baking Co*. I conclude that the *Weingarten* issue was fully litigated.

The second issue concerns the 6-month statute of limitations in Section 10(b) of the Act, which states, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ." 29 U.S.C. § 160(b).

The 6-month limitation would preclude finding the unalleged violation unless it is "closely related" to a violation alleged and litigated. In *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), the Board held that the following conditions must be satisfied to establish that an unalleged violation is "closely related" to an alleged violation: (1) the unalleged violation must involve the same legal theory as the allegations in the timely charge; (2) the unalleged violation must arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) the respondent would raise the same or similar defenses to both the unalleged violation and the violation alleged in the timely charge.

In *Trim Corp. of America*, 349 NLRB 608 (2007), the Board found a violation which had not been alleged in the complaint but raised for the first time in the General Counsel's posthearing brief. The complaint had alleged that the respondent had unlawfully withdrawn recognition from a union. The evidence established that the respondent had made a threat which caused employees to renounce their support for the union. The complaint, however, had not separately alleged the threat.

The Board panel majority concluded that the unalleged violation—the threat—involved the same legal theory as the allegations in the timely charge because the threat had resulted in the dissipation of the union's majority. Similar reasoning may be applied here. Although the complaint did not separately allege a *Weingarten* violation, it did allege an unlawful interrogation, and the denial of *Weingarten* rights played a role in making the interrogation unlawful. Accordingly, I conclude that the first *Redd-I* criterion has been satisfied.

Clearly, the facts meet the second *Redd-I* criterion. The unalleged *Weingarten* violation occurred as part of the alleged unlawful interrogation.

The third *Redd-I* criterion concerns whether the Respondent would raise the same defenses to the unalleged violation as to the alleged violation. In this case, both the alleged and unalleged conduct violate Section 8(a)(1) of the Act. Neither requires proof of unlawful intent or bad faith. Had the complaint separately alleged that Respondent committed a *Weingarten* violation during this same interview, Respondent's only defense would have been a factual one, that its supervisor did not engage in the alleged conduct. If Respondent had evidence to contradict the General Counsel's witnesses on this matter, it would have presented such evidence as part of its defense against the alleged unlawful interrogation.

Accordingly, I conclude that all three *Redd-I* criteria have been satisfied. Therefore, I further conclude that the *Weingarten* allegation is closely related to those raised in the charges and alleged in the complaint and that it is appropriate to include a separate remedy for this violation.

In sum, I conclude that on November 8, 2005, Respondent interrogated Cline about his protected activities in violation of Section 8(a)(1) of the Act. Further, I conclude that during this interview, Respondent also violated Section 8(a)(1) of the Act by instructing his union representative that he could not speak or ask questions.

XII. COMPLAINT PARAGRAPH 7(a)

Complaint paragraph 7(a) alleges that on or about November 14, 2005, Respondent harassed employee Cline by attempting to conduct an investigatory interview with Cline. In its answer, Respondent stated that the "allegations of paragraph 7(a) are denied, except that the Agency admits that Supervisors Maynard and Ginn scheduled Mr. Cline for a November 14, 2005, fact-finding interview that was subsequently rescheduled.

Complaint paragraph 14 alleges that Respondent engaged in the conduct described in complaint paragraph 7(a) because Cline assisted the local union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 15 alleges that Respondent engaged in this conduct because Cline gave testimony to the Board at a hearing in Case 15–CA–17506, filed charges with the Board, and notified Respondent that he was filing additional charges against Respondent. In its answer, Respondent denied these allegations. Respondent also denied that this conduct violated Section 8(a)(1), (3), and (4), as alleged in complaint paragraphs 24 and 25.

1. Facts

Cline received an instruction to report to the Fort Walton Beach, Florida post office on November 14, 2005, for another investigative interview, which he did. There, he met with Jerry Maynard and Lease Ginn. Respondent has admitted, and I have found, that Maynard and Ginn are Respondent's supervisors and agents, within the meaning of Section 2(11) and (13) of the Act.

At the time of this interview, Maynard was working as the customer service supervisor at the Destin post office. Thus, he had to make a trip to the Fort Walton Beach post office to conduct the interview. During his testimony, Maynard did not explain why he did not simply interview Cline at the Destin facility.

Local Union President Pruett was not present, so Cline called him. According to Cline, Pruett said that he had not been notified of the meeting and instructed Cline not to answer questions in his absence. Cline further testified:

> And so I hung up the phone, and I told Mr. Maynard that, you know, Bobby Pruett hadn't been notified and that he wasn't going to be able to make it, and that we need to cancel this meeting, because I couldn't answer any questions without him being here. And then Mr. Maynard told me, you know, Well, we're just going to ask the same ones over again; you know, we're just going to go over them, so it will be okay. And I said, No, I'm not going to waive my Weingarten rights. And then he said, Well, we'll—just go ahead and start answering questions, and we'll call around to some of these other offices and see if we can't find somebody. And I said, No, sir; I'm going to have to decline, because, you know, none of these other people know my case. And I said, I'm going to terminate the meeting, which I did and didn't answer questions at that point.

Supervisor Maynard also testified. He said that the manager of post office operations, Linda Copeland, had assigned him to "take over the case," presumably meaning the predisciplinary investigation of Cline, but he did not explain the reason for the reassignment.

However, Maynard did offer an explanation for having Cline come to a second investigative interview. Referring to the notes taken during the earlier interview, Maynard testified, "I don't want to call it chicken scratch, if you will, the notes that were taken on that. I couldn't decipher that well, so I wanted to re-ask all the questions that were asked from the first disciplinary investigation."

Maynard did not describe his conversation with Cline concerning the presence of a union representative. However, Maynard's testimony—that he wanted to "re-ask" the questions posed to Cline at the first disciplinary interview—is consistent with the words Cline attributed to him, that "we're just going to ask the same ones over again. . . ." But Maynard's asserted justification for repeating the interview and the questions previously asked—isn't entirely convincing.

Another supervisor, Lease Ginn (who did not testify), participated in the November 7 interview and took at least some of the notes. She also was present on November 14 when Maynard met with Cline. Maynard does not explain why Ginn could not simply have "deciphered" any parts of her notes which were illegible. On the other hand, the other supervisor who conducted the November 7 interview, Joel Ouellette, was not present on November 14, and it is possible that Ouellette's handwriting also posed legibility problems.

In any event, Maynard and Ginn did not conduct an investigative interview of Cline on November 14, 2005.

2. Analysis

The complaint alleges that, through the conduct of Supervisors Maynard and Ginn on November 14, 2005, Respondent violated Sections 9(a)(1) and 8(a)(3) and (4) of the Act. The complaint, however, does not allege that any particular statement interfered with, restrained or coerced employees. Instead, the complaint alleges that Respondent "harassed its employee Cline by attempting to conduct an investigatory interview with Cline." In other words, the General Counsel considers that the interview *attempt* constituted unlawful harassment.

This allegation should be distinguished from those raised in complaint subparagraphs 7(b) and (d), which allege that the interviews constituted "harassment." Here, the General Counsel alleges that the mere *attempt* to have an interview constituted "harassment."

It is true that Cline received a notice to report for an investigatory interview on November 14, 2005, and that he did so. As discussed above, when Union President Pruett did not appear, Cline contacted Pruett by telephone. According to Cline, Pruett said that he had not been notified of the interview. Cline insisted that he would not proceed without Pruett, and the interview was rescheduled to November 16, 2005.

Although Pruett took the witness stand, he did not testify about any investigatory interview in November 2005. The words Cline attributed to Pruett, that he was not notified, are hearsay and I do not rely upon them for the truth of the matter asserted.

The record does not establish that Respondent acted in any way that would interfere with, restrain, or coerce employees in the exercise of statutory rights. Similarly, the evidence does not show that Respondent had a duty to do something but failed to do it. In the absence of evidence showing some action or culpable inaction, I cannot conclude that Respondent did anything which interfered with, restrained or coerced employees in the exercise of protected rights. Thus, I do not find any violation of Section 8(a)(1) of the Act.

Similarly, if the evidence fails to establish that Respondent acted in any manner—or neglected to fulfill a duty to act—then it is difficult to find the "adverse employment action" required at the third step of the *Wright Line* procedure. Cline did experience some inconvenience, but nothing which affected his employment status. Therefore, I do not find any violation of either Section 8(a)(3) or (4) of the Act.

In sum, I recommend that the Board dismiss the allegations associated with complaint subparagraph 7(a).

XIII. COMPLAINT SUBPARAGRAPHS 7(b) AND (c)

Complaint paragraph 7(b) alleges that on or about November 16, 2005, Respondent, by its Supervisors Maynard and Ginn, harassed employee Cline by conducting an investigative interview with him. Complaint paragraph 14 alleges that Respondent engaged in this conduct because Cline assisted the local union, engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 15 alleges that Respondent engaged in this conduct because Cline gave testimony to the Board at a hearing in Case 15–CA–17506, filed charges with the Board, and notified Respondent that he was filing additional charges against Respondent.

Respondent's answer denied the allegations raised by complaint paragraph 7(b) "except that the Agency admits that it conducted an incomplete investigatory interview with Mr. Cline on November 16, 2005." Respondent denied the motivations alleged in complaint paragraphs 14 and 15 and also denied that the conduct violated the Act, as alleged in complaint paragraphs 24 and 25.

Complaint paragraph 7(c) alleges that on about November 16, 2005, Respondent, by Supervisors Maynard and Ginn, interrogated employee Cline about pending unfair labor practice charges. Respondent's Answer denies this allegation. Respondent also has denied that it engaged in the alleged conduct because Cline assisted the local uinion, engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 14. It further has denied that it engaged in the alleged conduct because Cline gave testimony to the Board at a hearing in Case 15–CA–17506, filed charges with the Board, and notified Respondent that he was filing additional charges against Respondent, as alleged in complaint paragraph 15. Respondent also denies that the alleged conduct violated the Act, as alleged in complaint paragraphs 24 and 25.

1. Facts

On November 16, 2005, Supervisors Maynard and Ginn interviewed Cline. This time, the meeting took place at the Niceville, Florida post office, where Union President Pruett worked. Pruett attended the meeting to provide Cline union representation.

Cline credibly testified that the supervisors asked him the same questions "all over again." These questions included asking Cline why he gave Supervisor Torres a copy of the unfair labor practice charge and whether he was trying to provoke or intimidate Torres. Although Maynard took the witness stand after Cline gave this testimony, he did not contradict it. As mentioned above, Ginn did not testify.

2. Analysis

The allegations raised by complaint paragraph 7(c) will be examined first. The record, including Cline's testimony, which I credit, establishes that on November 16, 2005, Respondent conducted a second investigatory interview, during which Respondent asked Cline the same questions it had asked him during the November 8, 2005 interview. More specifically, I find that Respondent again asked Cline, on this second occasion, why he had given Supervisor Torres a copy of the unfair labor practice charges, and if he did so to "instigate a reaction" or "intimidate" Torres.

For the reasons discussed above under "complaint paragraph 6," I conclude that Respondent violated Section 8(a)(1) of the Act when it asked Cline these questions. Also, for the reasons discussed above, because asking the questions did not result in an "adverse employment action," I further conclude that the conduct did not also violate either Section 8(a)(3) or (4).

Complaint subparagraph 7(b) does not focus on any particular question asked during the November 16, 2005 interview, but rather alleges that Respondent "harassed" Cline by *conducting* the interview. Thus, this subparagraph doesn't allege strictly an

allegation of fact but instead alleges a conclusion, namely, that conducting the interview constituted "harassment."

Rather than focusing on what may or may not constitute "harassment," I will examine here whether Respondent's conduct violated Section 8(a)(1) of the Act by interfering with, restraining, and coercing employees in the exercise of their Section 7 rights, and whether it constituted unlawful discrimination under either Section 8(a)(3) or (4) of the Act. The General Counsel argues that Respondent was trying to intimidate Cline rather than simply obtain information to consider in deciding whether to discipline him.

The General Counsel points to one of the questions, which asked Cline if he knew the definition of slander. The General Counsel argues, in effect, that this question does not seek information relevant to the discipline decision but instead intimidates. Postmaster McGinnis, who drafted the questions, offered this explanation for including the question:

> With that one, basically Mr. Cline had accused Mr. Torres of stealing some notebook, and he had written a lot about it, but there was no fax, nothing to back it up, and basically, in, my opinion, I thought it may be slander, and we wanted to know if he knew what the definition was, because he was uttering these false charges. We thought they were false charges. There was no proof to back it up.

Notwithstanding McGinnis' explanation, it remains unclear exactly how Cline's answer to the question might have affected the decision to discipline him. If Cline answered that he did not know the definition of slander, would that result in greater or lesser discipline than the opposite answer? But although the purpose of the question may be puzzling, the issues I must decide are (1) whether this question, in its entire context, interferes with, restrains, or coerces employees in the exercise of statutory rights, and (2) whether the question, even if not violative in itself, provides evidence of motivation relevant to the 8(a)(3) and (4) allegations.

Applying an objective standard, I cannot conclude that the question, on its face, interfered with, restrained, or coerced employees in the exercise of statutory rights. Therefore, were I to consider this question in isolation, I would conclude that this question did not itself violate Section 8(a)(1). Similarly, the question by itself does not manifest any unlawful motivation.

However, to determine whether the question violates Section 8(a)(1) of the Act, it should be considered in its full context, rather than in isolation. Before Cline's disciplinary interviews, McGinnis prepared the list of questions to be asked. The first two pertained to Cline's accusation, to the postal inspectors, that Torres had stolen Cline's notebook. Specifically, the questions asked Cline why he had accused Torres of stealing his notebook and how he knew Torres had taken it. From these questions, Cline reasonably would understand that Respondent might discipline him for making this accusation.

These first two questions set the stage for the third question, the one under consideration here. As noted above, this question asked if Cline knew "what the definition of slander is? (The utterance of false charges or misrepresentations which defame and damage another's reputation.)"

Also as noted above, this question does not suggest that Respondent is inquiring into an improper subject. Even if considered with the two preceding questions, it does not appear to be coercive. If management contemplated disciplining Cline for falsely accusing Torres of taking his notebook, the "definition of slander" question would appear to have some relevance. Whether or not Cline understood the consequences of his accusation might well affect the severity of the discipline imposed.

However, the two questions which follow the "definition of slander" question subtly change the direction away from Cline's communication with the postal inspectors and towards Cline's unfair labor practice allegations, the ones which prompted Torres to call Cline a "liar."

The question immediately after the "definition of slander" question asked: "Did you write down every incident or conversation you have with Mr. Torres in your notebook?" Respondent next asked Cline, "Did you write down in your notebook that Mr. Torres called you a liar when presented with a copy of labor charges on August 26, 2005?"

The next question concerned, in part, whether Cline considered Torres calling him a liar significant enough to warrant an entry in his notebook. Considered in isolation, this puzzling question does not bear an obvious relationship to Cline's protected activities, but the next one clearly does. It asks: "Why did you give Mr. Torres a copy of the labor charges there is no reason to do this? The Labor Board notifies management." Asking this question during a predisciplinary interview reasonably would convey the message that the employee could be disciplined for serving an unfair labor practice charge on a supervisor. Moreover, the words "there is no reason to do this" strengthen the message that the employee might be disciplined for engaging in protected activity, because they imply management's disapproval.

Respondent next asked the following: "Were you trying to instigate a reaction or intimidate Mr. Torres?" An employee reasonably would understand this question to reflect Respondent's disapproval and the setting, a predisciplinary interview, leads to the reasonable conclusion that the employee's protected activities could lead to disciplinary action.

In the context created by these questions which followed, the earlier question about knowing the definition of slander refers not only to the accusation that Cline made to the postal inspectors but also to the content of the unfair labor practice charge which Cline and Jackson served on Torres. After reading this charge, Torres admittedly called Cline a "liar," signifying in no uncertain terms his belief that the charge was false. Significantly, this question about knowing the definition of slander then continued with Respondent's definition: "The utterance of false charges. . . ."

Thus, the predisciplinary interview questions conveyed that management disapproved of slander, that management defined slander in terms of false charges, that management was concerned about Cline's serving an unfair labor practice charge on a supervisor at work, and that management suspected Cline had done so for a malicious reason, namely, trying to provoke or intimidate the supervisor.

Still another question asked during the predisciplinary interview also implicated the statements made on the unfair labor practice charge. After asking Cline if he had written on his

"3971" (leave request) that he had been threatened by the postmaster, the supervisors went on to pose this question:

> Do you know that the furnishing of false information *on Federal forms* including the 3971 may result in a fine of not more than $10,000.00 or imprisonment of not more than 5 years, or both?

(Emphasis added.) The unfair labor practice charge form, of course, also is a Federal form, and Supervisor Torres had called Cline a liar after reading the charge Jackson and Cline had served upon him.

In sum, the record indicates that management believed Cline had made false statements in a number of documents—the statement Cline gave the postal inspectors, the "3971" leave request, the unfair labor practice charge—and wanted to put an end to this practice. Management's lumping together of the "false" statements may be inferred from McGinnis' testimony.

When asked why he had included the "definition of slander" question, McGinnis explained that he had asked it because Cline "was uttering *these* false *charges*. We thought *they* were false charges." (Emphasis added.) As the italicized words indicate, McGinnis referred to "charges" in the plural, suggesting that he meant not only the accusation Cline made to the postal inspectors—that Torres had taken his notebook—but also Cline's comment on the leave request and the content of the unfair labor practice charge which prompted Torres to call Cline a "liar."

From the tenor of the questions McGinnis prepared, I conclude that he intended the predisciplinary interview to do more than gather information. Rather, management used these questions to send a warning which did not appear to be in the form of a warning. Although the disguised form of the warning conceivably might make the message harder to discern, Respondent had a way to make sure that Cline got the point. Respondent made Cline attend three separate predisciplinary interviews and answer the same questions each time.

McGinnis' intent in drafting the questions, although relevant to the 8(a)(3) and (4) allegations, does not determine whether or not they interfered with, restrained or coerced employees in violation of Section 8(a)(1). However, I conclude that a typical employee reasonably would understand these questions as a veiled threat. In other words, in context, the questions communicated the message that Cline must stop the kind of activities the questions described, including filing and serving unfair labor practice charges.

In the context of a predisciplinary interview, where an employee reasonably would expect his responses to affect whether he receives discipline and, if so, what kind of discipline, these questions would have a chilling effect on the exercise of protected rights, particularly an employee's right to file charges with the Board. That would be true even if Respondent only asked these questions one time rather than three times. Therefore, I conclude that by asking the questions discussed above at the November 16, 2005 meeting, Respondent violated Section 8(a)(1) of the Act.

The complaint alleges not only that Respondent unlawfully interrogated Cline but also that it subjected him to harassment by requiring him to attend these repetitive interviews. Specifically, both complaint subparagraphs 7(b) and (d) raise this allegation. For reasons discussed below in connection with complaint paragraph 7(d), I conclude that the repetition of the unlawful questions, and requiring Cline to answer them repeatedly, also violated Section 8(a)(1).

The complaint also alleges that this conduct violated Section 8(a)(3) and (4). The record provides extensive evidence of Cline's protected activities and Respondent's knowledge of them. However, requiring Cline to attend an interview and answer questions does not itself adversely affect his employment status, even though the discipline which Respondent later imposed certainly does. Additionally, finding a violation of Section 8(a)(3) or (4) would not change the remedy.

I conclude that although this interview violated Section 8(a)(1), it did not also violate Section 8(a)(3) and (4).

XIV. COMPLAINT SUBPARAGRAPHS 7(d) AND (e)

Complaint dubparagraph 7(d) alleges that on about December 12, 2005, Respondent harassed employee Cline by conducting an investigatory interview with Cline. Respondent's answer admitted that it "completed this investigatory interview with Mr. Cline on December 12, 2005," but otherwise denied the allegations.

Respondent also denied that it engaged in this conduct because Cline assisted the local union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 14. Similarly, it denied that it engaged in this conduct because Cline gave testimony to the Board at a hearing in Case 15–CA–17506, filed charges with the Board, and notified Respondent that he was filing additional charges against Respondent, as alleged in complaint paragraph 15.

Respondent further denied that the conduct alleged in complaint subparagraph 7(d) violated Section 8(a)(1), (3), or (4) of the Act, as alleged in complaint paragraphs 24 and 25.

Complaint subparagraph 7(e) alleges that on about December 12, 2005, Respondent interrogated employee Cline about pending unfair labor practice charges. Respondent's answer denied this allegation.

Respondent also denied that it engaged in the conduct described in complaint subparagraph 7(e) because Cline assisted the local union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 14. Similarly, it denies it engaged in this conduct because Cline gave testimony to the Board at a hearing in Case 15–CA–17506, filed charges with the Board, and notified Respondent that he was filing additional charges against Respondent, as alleged in complaint paragraph 15.

Respondent further denied that the conduct alleged in complaint subparagraph 7(e) violated Section 8(a)(1), (3), or (4) of the Act, as alleged in complaint paragraphs 24 and 25.

1. Facts

Cline received a letter from Officer-in-Charge Dossantos instructing him to report to the Fort Walton Beach, Florida post office on December 12, 2005, for another interview. He attended this interview, along with Local Union President Bobby Pruett. Also present were Supervisors Jerry Maynard and Lease Ginn.

Cline testified that Maynard "was asking the same questions all over again." Cline's account thus conflicts with the following testimony given by Maynard:

> Q. And did you ask questions at that time that were different from what you asked during the previous one?

A. Yes.

Maynard did not provide any further information concerning the questions he asked on December 12. Thus, he neither described the questions he said were different nor explained why he had added such questions. Moreover, his affirmative answer to the question—"did you ask questions . . . that were different"—does not constitute a denial that Maynard repeated the *same* questions Cline had answered twice before. A witness truthfully could answer that question in the affirmative if he simply had added two new questions to the others.

Although Maynard's testimony does not describe what new questions he asked, it does offer an explanation for scheduling a third interview. According to Maynard, he did not have the postal inspectors' report when he interviewed Cline on November 16, 2005, but received that report somewhat later. Therefore, he had to schedule another interview to ask Cline questions based on the content of that report and its exhibits.

This explanation does not withstand close examination. Postmaster McGinnis, not Maynard, wrote the questions used by the interviewers. One of these questions leaves little doubt that McGinnis knew the contents of the postal inspectors' report when he wrote it. The question states:

> *In your interview with Postal Inspector Guy Nelson* [on] August 31, 2005 you stated you did not take your notebook home since nothing happened on that particular Friday August 26, 2005. Yet you stated Mr. Torres allegedly called you a liar that day. This did not warrant your writing in your notebook?

(Emphasis added.) In view of this difficulty with Maynard's explanation, and considering that Maynard did not describe any questions, I conclude that Maynard's testimony is not as reliable as Cline's, which I credit. Accordingly, I find that during the December 12, 2005 interview, the supervisors asked the same questions which Cline had been asked in the two earlier interviews. Further, I find that Maynard did not ask any additional questions.

2. Analysis

The allegations associated with complaint subparagraph 7(e) will be addressed first. For the reasons discussed above, I have found that Respondent did ask Cline the same questions on December 12, 2005, it had asked him on two earlier occasions. Because the questions asked are identical, the same legal analysis applies.

Accordingly, for the reasons stated above in connection with complaint paragraph 6 and complaint subparagraph 7(c), I conclude that Respondent interrogated Cline about his protected activities on December 12, 2005, and that this interrogation violated Section 8(a)(1) of the Act. However, I also conclude that the evidence does not suffice to establish that the interrogation constituted an "adverse employment action" sufficient to satisfy the third *Wright Line* requirement. Therefore, I do not find that the interrogation also violated Section 8(a)(3) and (4) of the Act.

The analysis of complaint subparagraph 7(d) presents a little more difficulty. Like complaint subparagraph 7(b), it alleges that Respondent "harassed" Cline by conducting this investigatory interview. For the same reasons discussed in connection with complaint subparagraph 7(b), I conclude that this one interview, even considered by itself, interfered with the exercise of protected rights in violation of Section 8(a)(1).

Moreover, subjecting Cline to the same violative questions on three separate occasions also chills the exercise of protected rights. The repetition reasonably would communicate to an employee the degree to which Respondent disapproved of the employee's protected activities, and it also would make clear to the employee that Respondent would be tireless in its opposition to those activities.

The remedy for this 8(a)(1) violation remains the same whether Respondent conducted the same unlawful interrogation once or three times. An order that Respondent cease and desist from interrogating employees about protected activities would, of course, prohibit repeated interrogations.

The complaint also alleges that these interviews violated Section 8(a)(3) and (4) of the Act. Although requiring Cline to attend these interviews arguably might constitute an "adverse employment action," I do not conclude that it is sufficient to satisfy the third *Wright Line* criterion. Therefore, I do not recommend that the Board find that this conduct, which violated Section 8(a)(1), also violated Section 8(a)(3) or (4).

3. Continuing *Wright Line* Analysis

Because the Government has not proven the third *Wright Line* element—that Cline suffered an adverse employment action—it is not necessary to proceed to the fourth criterion. However, in case the Board disagrees with my conclusion that there was no adverse employment action, I will continue the *Wright Line* analysis here.

At the fourth step, the General Counsel must prove a connection between the protected activities and the adverse employment action. For reasons discussed above, I have found that unlawful animus motivated Respondent's decision to suspend Cline on September 2, 2005. Considering the relatively brief time which elapsed between that the suspension and the predisciplinary interviews in November 2005, that same evidence of animus helps the government prove the fourth *Wright Line* element here. That evidence of animus need not be discussed further, but the record also includes other evidence specific to the issue here.

Requiring an employee to answer the same questions three times, during three separate interviews is unusual. It doesn't happen often because generally, employers try to eliminate expenses which foreseeably will not increase profits. Paying a supervisor and an employee to participate in one interview may be necessary to obtain facts before deciding upon discipline and, as in this case, complying with a collective-bargaining agreement. However, the record does not indicate that Respondent had entered into any collective-bargaining agreement requiring it to conduct three predisciplinary interviews.

Moreover, there is no obvious benefit in asking an employee the same questions on three different occasions. Certainly, a supervisor may decide to conduct a followup interview to ask the employee further questions because an investigation has turned up some new information requiring explanation. But in such an instance, unlike here, the supervisor asks the employee *different* questions.

The record does not reveal any other instance in which Respondent subjected an employee to three different predisci-

plinary interviews and asked him the same questions each time, and Respondent hasn't claimed to have such a practice. Accordingly, I conclude that when Respondent made Cline attend three such interviews and repeated the same questions at each, it was departing from its usual practice.

Such a departure from the norm does not compel an inference of unlawful animus at work and I do not infer animus from the mere fact of multiple interviews. However, Respondent's attempt to explain away the triple interviews resulted in evidence which does point to an unlawful motivation.

During the hearing, Respondent tried to establish that it had a legitimate reason through the testimony of Supervisor Jerry Maynard. As discussed above, Maynard did not participate in the November 8, 2005 interview, but at some time, higher management assigned Maynard to complete the investigation.

Maynard explained that he could not read the notes taken at the first interview. For the reasons discussed above, I have not found that explanation convincing. His explanation for conducting a third interview—that he didn't have the postal inspectors' report before the second interview—is even less persuasive. As noted above, Postmaster McGinnis obviously did have information from the postal inspectors at the time he drafted the questions which Maynard would ask. Moreover, I have concluded that Maynard added no new questions during the third interview.

Assuming, for analysis, that Maynard received the postal inspectors' report sometime after the second interview, as he claimed, then he had two options. If the report prompted new questions, he would have asked them, but did not. But if the report did not raise any new questions, then there would have been no need for a third interview, but he conducted one.

The fact that Maynard's testimony fails to persuade doesn't inevitably lead to a conclusion that animus motivated Respondent's conduct. However, Postmaster Paul McGinnis' testimony, and a statement McGinnis made earlier to Cline, provide additional evidence of motive.

As discussed above, McGinnis wrote the questions which Ouellette and Ginn asked Cline during the first interview, and which Maynard and Ginn asked Cline during the second and third interviews. McGinnis' testimony gains added relevance because of his participation in, and direction of, the investigation. During this testimony, McGinnis did not deny a statement attributed to him by Cline.

Specifically, Cline testified that on March 15, 2005, he had had a conversation with McGinnis, who told him that "if the Post Office would give him power to handle all the grievances in the Postal Service nationwide, that he would bankrupt the unions and do away with them." Cline further testified:

> He [McGinnis] said, I don't even have to win all the grievances. He said, The Post Office has a lot of money, a lot more than all the unions in the Post Office. He said, I will drag these things out as far as I can, and he said, The unions don't have the resources if I do that.

McGinnis took the witness stand after Cline gave this testimony, but he did not deny making the statements quoted above. Considering the significant nature of the comments attributed to McGinnis, his failure to deny or repudiate them is significant. Based on Cline's uncontradicted testimony, which I credit, I find that McGinnis did say that he would "bankrupt the unions" and "drag these things out as far as I can. . . ."

Although McGinnis made the comment about "dragging things out" in the context of grievance processing, more generally it signifies a strategy of exhausting the Union's resources through protracted proceedings. Based on this undenied remark, I conclude that McGinnis favored a strategy of wearing down the Union by dragging out the grievance process.

However, particular care must be taken at this point because it is not clear that McGinnis' strategy, when applied to the grievance process, would be unlawful. Indeed, for purposes of analysis, I will assume here (without deciding) that McGinnis' proposed strategy of forcing every grievance to arbitration would be lawful. May evidence of a respondent's willingness to use a tough-but-lawful tactic be used to infer willingness to cross the line of legality?

Here, at least, where the record discloses other evidence of intentional unlawful conduct, a "get-tough-with-unions" comment certainly does have relevance. Other documented instances of Respondent crossing the line certainly depict an environment in which animus trumps restraint. Specifically, the record reveals three instances in which Respondent falsely accused employees of misconduct to retaliate against them for engaging in protected activities. In the most extreme instance, Postal Service management lied about Cline making a "threat" and then placed him on emergency suspension because Cline had filed and assisted the Union in filing unfair labor practice charges, had given testimony in a Board proceeding, and engaged in other protected activities. This type of retaliatory conduct makes it plausible that McGinnis' hostility towards unions found expression in his actions.

The absence of any credible, legitimate reason for conducting the same unlawful interrogation three times also increases the relevance of Postmaster McGinnis' "bankrupt the unions" remark. Moreover, apart from the unlawfulness of the questions about Cline's protected activities, Respondent also instructed the union president that he could not speak or ask questions.

Other Board decisions have found this Respondent guilty of refusing to permit a union representative to participate in an investigative interview or to consult with the employee before the interview. In those instances, the Board has ordered this Respondent to cease and desist and to post notices to that effect. *Postal Service*, 288 NLRB 864 (1988); *Postal Service*, 303 NLRB 463 (1991) (nationwide posting requirement); *Postal Service*, 314 NLRB 227 (1994); *Postal Service*, 345 NLRB 426 (2005); *Postal Service*, 347 NLRB 885 (2006).

Respondent's *Weingarten* violation in the present case, discussed above, took place after all but the last of these cited cases. Thus, Respondent clearly was on notice that it could not lawfully engage in such conduct, but it did so anyway. At the least, this new violation demonstrates Respondent's *inattention* to the law, if not indifference. In these circumstances, when Respondent has repeatedly been placed on notice of its legal obligations, the occurrence of another, similar violation suggests that it has failed to take adequate measures to assure that its managers understand that whatever their personal feelings about unions, they may not let those sentiments push them across the line of legality. In this environment, Postmaster McGinnis'

"bankrupt-the-unions" remark does have relevance to the issue of animus because there was more than a remote possibility that his antiunion hostility would affect the conduct of the investigation.

The November 8, 2005 *Weingarten* violation described above not only violated past Board and court cease-and-desist orders, but also contravened Respondent's own agreement with the Union. As discussed above, on June 10, 2004, Respondent agreed to a "Joint Contract Interpretation Manual." Both the Respondent and the National Union signed this agreement, which remained in effect in November 2005. Article 17.4 includes the following agreement about an employee's *Weingarten* rights:

> The employee has the right to a steward's assistance, not just a silent presence, during an interview covered by the Weingarten rule. *An employee's Weingarten rights are violated when the union representative is not allowed to speak* or is restricted to the role of a passive observer.

(Emphasis added.) This agreement constitutes an admission by Respondent that it knew it could not lawfully instruct a union representative that he was not allowed to speak during the predisciplinary interview. Moreover, Cline's credited testimony establishes that he and the union president reminded the supervisor of the union representative's right to speak. That reminder did not change the supervisor's instruction.

Respondent's November 8, 2005 *Weingarten* violation must therefore be considered willful. This willful violation occurred during an investigation for which Postmaster McGinnis had at least ad hoc responsibility. McGinnis admitted writing the questions which the various supervisors asked during all three interviews.

Moreover, McGinnis' testimony indicates that his role extended beyond drafting these particular questions. Besides this investigation, a predicate to imposing on Cline a 14-day disciplinary suspension, McGinnis also was involved in preparing Respondent's defense against the grievance Cline already had filed over being placed on emergency leave.

Stated another way, McGinnis' testimony shows that he was doing more than guiding an investigation to determine whether Cline should be disciplined. He also was trying to build a case against Cline for use when Cline's grievance went to arbitration. When asked by Respondent's counsel to explain why he wanted Cline to answer this question—"Were you trying to instigate a reaction or intimidate Mr. Torres?"—McGinnis testified in part as follows:

> Q. Okay. What was the reason for that question?
>
> A. Well, basically, once again, I had just gotten done with the emergency placement grievance, and I knew it was going to be a credibility issue if something came about with any kind of corrective action for the threat or the deals with Pete Torres notebook being supposedly—well, accusing Mr. Torres of stealing a notebook. So I was trying to build a pattern. . . .

McGinnis' further testimony indicated that he wasn't acting alone. To the contrary, Cline's protected activities concerned others in Respondent's management. McGinnis testified that he was trying to find out

> [W]hat was the reasoning for [Cline] to be a witness for [service of] the NLRB charge? Was it trying to get Mr. Torres to react? Was it an intimidation thing? Is it a bullying thing? *We were just trying to find out once again what was his role*, why did he have to be there when Mr. Jackson gave the NLRB charge.

(Emphasis added.) In the italicized sentence, McGinnis essentially admits that he was using this investigation not merely to determine whether Cline had broken a work rule or policy, but also *to learn about Cline's protected activity and the reason for it*. Moreover, his use of the word "we" indicates that McGinnis wasn't simply indulging his own personal curiosity but rather was involved in a management team effort prompted by Cline's protected activity.

Indeed, the incident upon which McGinnis focused—Cline's acting as a witness while Union Steward Jackson served the unfair labor practice charge—entailed three separate activities which enjoy the Act's protection: Concerted activity by two employees, union activity, and filing a charge with the Board.

McGinnis' testimony leaves no doubt that this teaming up of Cline and Jackson concerned him: "I was trying to figure out why it took two people to hand a labor charge to Mr. Torres." Moreover, McGinnis observed that in all his years as a manager, he had never before seen someone hand a charge to a supervisor rather than serve it by certified mail, and he had never seen someone serve as a witness while someone else served the charge.

When McGinnis' testimony is considered along with his earlier "bankrupt-the-unions" remark, it becomes clear why this new union militancy concerned him. McGinnis perceived it as a threat.

McGinnis, who was calling the shots in the investigation of Cline, had both the power to implement his "drag it out" strategy and a motive to do so: To put the brakes on the Union's new assertiveness. It was disturbing when the Union picketed the Destin facility. It was also disturbing when Cline testified in a Board proceeding and when the judge in that proceeding ordered Respondent to cease and desist and post a notice. But those activities, troubling as they were, had taken place *outside*. When Jackson and Cline brought the unfair labor practice charge *inside* the workplace and served in on a first-line supervisor, they took their union activity to a level McGinnis had not previously experienced.

Also, as mentioned above, McGinnis' testimony establishes that he also was developing Respondent's defense to Cline's grievance, and was using the investigatory interview process for an unlawful purpose—obtaining information about Cline's protected activities—unrelated to the ostensible purpose of the predisciplinary interview. The more often Cline was forced to answer questions about his protected activities, the more likely that he would either disclose useful information or respond intemperately, opening himself up to further discipline. Noting the absence of any plausible, legitimate reason for asking an employee the same unlawful questions in three separate interviews, I conclude that Respondent embarked on a calculated course to discredit and neutralize Cline before he further embarrassed management with more protected activities.

In sum, if subjecting Cline to three separate predisciplinary interviews constituted an "adverse employment action" sufficient

to satisfy the third *Wright Line* criterion, I would conclude that the General Counsel also has proven the fourth *Wright Line* element. Therefore, the burden would shift to Respondent to prove that it would have taken the same action against Cline in any event, even in the absence of his protected activities.

Respondent has not met such a burden. In particular, I note that the evidence does not establish that Respondent made any other employee attend three separate disciplinary interviews and answer the same questions at each. Moreover, because many of these questions concerned Cline's protected activities, they obviously would not have been asked if he had not engaged in such activities.

Accordingly, should the Board conclude that Respondent's conduct resulted in an adverse employment action, I would recommend that the Board find that Respondent violated both Section 8(a)(3) and (4) of the Act. However, because I do not conclude that the three interviews constituted an adverse employment action, I recommend only that the Board find that this conduct, alleged in complaint subparagraphs 7(d) and (e) violated Section 8(a)(1) of the Act.

XV. COMPLAINT PARAGRAPHS 13(a) AND (b)

Complaint paragraph 13(a) alleges that on about March 13, 2006, Respondent issued Cline a written notice of disciplinary action involving a proposed April 1 through 14, 2006 suspension. Complaint paragraph 13(n) alleges that on about April 1 through 14, 2006, Respondent suspended Cline. Respondent has admitted both of these allegation. Respondent has denied that these actions violate Section 8(a)(3), (4), and (1) of the Act, as alleged in complaint paragraphs 24 and 25.

1. Facts

The notice of disciplinary action dated March 13, 2006, notified Cline that he would be on suspension beginning April 1, 2006, and ending at the end of his "tour" (shift) on April 14, 2006. This notice gave three reasons for the suspension: (1) Falsely reporting to the Postal Inspection Service that Supervisor Torres had taken Cline's notebook; (2) Threatening Supervisor Grossi on September 2, 2005; and (3) the March 4, 2005 warning letter which Cline received on March 7, 2005.

As discussed above, I have concluded that Cline was not engaged in protected activity when he notified the postal inspectors that his notebook was missing and strongly insinuated that Supervisor Torres had taken it. Cline maintained that he only told the inspectors that Torres had the opportunity to take the notebook and a motive to do so. However, the record reveals at least one instance in which his statements to the inspectors slipped into the realm of accusation. Cline admitted writing and sending to the postal inspectors an August 28, 2005, "To Whom It May Concern" note which stated as follows:

> On Friday August 26, 2005 at 1710 Destin Supervisor Pete Torres was given a copy of labor charges that were filed against him. The charges were filed on my behalf by union steward Marcus Jackson. I was asked to be present by Mr. Jackson as a witness. Mr. Torres told me that I was a liar. I told him that I had notes and I knew exactly what happened when he threatened me. He told me that I should read my notes again. I told Mr. Torres that I would not argue with him and just let the Labor Board handle it.
>
> On Sunday August 28, 2005 I went to the Destin office to retrieve the notebook as I should half [sic] on Friday. The notebook was in my locker with a small lock attached. When I opened the locker I found that the notebook had been stolen. I know that Mr. Torres is the only one that had reason to steal the notebook. *He is a hot head and took it to protect himself.* Mr. Torres did not know that I had already typed the notes on my home computer. I feel very angry that not even my locker is safe anymore! I would gladly open my locker for inspection anytime. To have my personal items stolen further shows that I am working in a hostile environment.
>
> I reported the theft to the Inspection Service from the Destin office. I will make formal charges to see that either my notebook is returned or Mr. Torres is punished for the theft.

(Emphasis added.) As noted above, Torres admitted calling Cline a liar. However, he vigorously denied, both to the Postal Inspection Service and while testifying at the hearing, that he had taken Cline's notebook. The postal inspectors found no evidence to indicate that Torres had taken the notebook and took no action against him.

Based upon the record and my observations of the witnesses, I conclude that Cline was upset to discover his notebook missing and sincerely believed Torres had taken it. This belief arose not from any objective evidence, such as Torres' fingerprints or the reports of eyewitnesses, but instead from Cline's reasoning that only Torres had both access to the locker and a motive, which Cline's "To Whom It May Concern" note described. The words "he took it to protect himself" support a conclusion that Cline accused Torres of stealing his notebook without having objective evidence to support that claim. I so find.

The second stated reason for suspending Cline is different. For the reasons discussed above, I have found that Cline did not make the September 2, 2005 threat which Grossi attributed to him. Further, I have concluded that when Respondent placed Cline or emergency leave, it was seizing upon the "threat" as a pretext for removing Cline from the workplace.

Respondent also based the March 13, 2006 suspension on a warning letter, dated March 5, 2005, which Cline had received. For the reasons discussed above, I have concluded that Respondent unlawfully issued this warning letter.

2. Analysis

Although the March 13, 2006 notice of disciplinary action describes the notebook accusation before discussing the asserted "threat," beginning the analysis with the latter will make this section more concise. Respondent offers the threat as the sole justification for the emergency placement and as a partial justification for the 14-day suspension. The same reasons which led me to conclude that the "threat" was a pretextual justification for the emergency placement bring me to the same conclusion regarding the 14-day suspension.

Most of the facts to be examined here also formed the basis for the *Wright Line* analysis applied above in connection with complaint paragraph 10. The main difference is that the "adverse

employment action" at issue here is a 14-day suspension during the first part of April 2006 rather than the emergency placement leave which began on September 2, 2005. Moreover, one of Respondent's asserted reasons for imposing the 14-day suspension—Cline's accusing Torres of taking the notebook—is not protected activity. In this mixed-motive situation, Respondent may present evidence that the presence of the unlawful animus did not affect the outcome.

Clearly, the General Counsel has proven the first three *Wright Line* elements. Cline certainly engaged in numerous protected activities known to Respondent. Moreover, there can be no doubt that a 14-day suspension constitutes an "adverse employment action."

With respect to the final *Wright Line* requirement, the same evidence of animus discussed above also supports the Government's case here. Such evidence notably included Postmaster Malishan calling Cline a "troublemaker," which Malishan did not deny, and Supervisor Torres calling Cline a "liar," which Torres admitted.

In addition to the evidence considered in connection with complaint paragraph 10, other manifestations of animus bolster the conclusion that the General Counsel has proven the fourth *Wright Line* element. Before examining this additional evidence it may be noted that to carry the Government's initial burden under *Wright Line*, the General Counsel does not have to prove that unlawful animus was the "proximate cause" for the decision to discriminate. Similarly, the government does not have to establish that in the absence of such animus, no adverse employment action would have taken place. Rather, the General Counsel only must prove, by a preponderance of the evidence, that union animus was a "substantial or motivating factor" in the adverse employment action. *Desert Toyota*, 345 NLRB 1335 (2005).

The additional evidence of unlawful motive inheres in the unfair labor practices Respondent committed while conducting its predisciplinary investigation of Cline. As discussed above, before deciding to suspend Cline for 14 days, management required Cline to attend three separate investigatory interviews and, on each occasion, interrogated Cline about his protected activities. The discussion above focused on the effect these questions reasonably would have on the exercise of protected rights. The discussion here examines what these same questions reveal about Respondent's motivation.

Respondent typically interviews the affected employee before imposing discipline. Because such "predisciplinary interviews" serve the precise purpose of acquiring information to be used by the discipline decisionmaker, the nature of the information sought sheds light on the factors management weighed in deciding upon discipline. Logically, management would not waste time gathering information about matters which could not affect the outcome of the discipline decision.

In Cline's case, it is true that the manager who drafted the questions, Postmaster Paul McGinnis, had an additional purpose in mind. His testimony indicates he sought to use the predisciplinary interview as a kind of discovery device to obtain information which might be useful in defending against Cline's grievance. However, the fact that McGinnis used the predisciplinary interview for a secondary purpose does not negate the primary and ostensible purpose, gathering information which would be considered while making the discipline decision.

Respondent has not claimed, and no witness testified, that Respondent segregated Cline's answers to the questions about protected activity from Cline's other responses so that the former would not be considered by the discipline decisionmaker. Absent such a claim and evidence to support it, I conclude that Respondent used all the information obtained during the predisciplinary interviews for its primary purpose, determining whether to impose discipline.

By itself, the fact that Respondent gathered information about Cline's protected activities and considered it while deciding upon discipline, establishes that animus played some kind of role in the decision making. The other evidence of animus, including Postmaster Malishan calling him a "troublemaker," compels the conclusion that Cline's protected activities weighed significantly in the decision to suspend him. In light of all the evidence reflecting Respondent's hostility towards the Union, I conclude that unlawful animus was both a substantial factor and a motivating factor in Respondent's decision to suspend Cline for 14 days.

In sum, I conclude that the General Counsel has established the initial four *Wright Line* elements. Thus, the burden shifts to Respondent to prove, as an affirmative defense, that the presence of an unlawful motivation during the decisionmaking process did not change its outcome. *North Fork Services Joint Venture*, 346 NLRB 1025 (2006), citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

In *Lampi LLC*, 327 NLRB 222 (1998), the Board stated that in assessing whether a respondent has established this defense, "we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its 'Personnel Policy' handbook, and to the evidence of how it treated other employees with recorded incidents of discipline." 327 NLRB at 222–223.

Here, Respondent has not established that, in other instances which were similar except for protected activities, it imposed the same discipline Cline received. Thus, it did not prove that it would have imposed the same discipline on Cline even in the absence of protected activities. Therefore, I conclude that Respondent has not carried its *Wright Line* rebuttal burden.

The March 13, 2006 notice of disciplinary action lists one other ground for the 14-day suspension: The warning letter dated March 4, 2005. However, for reasons discussed above, I have concluded that Respondent unlawfully discriminated against Cline by issuing this warning. Therefore, this warning must be rescinded, and may not afford a basis for further disciplinary action.

In sum, Respondent predicated its decision to suspend Cline on three grounds, two of which—the March 4, 2005 warning and the September 2, 2005 emergency placement—were unlawful. The remaining ground—Cline's accusation that Supervisor Torres had

stolen his notebook—did not concern a previous unlawful personnel action. However, the evidence established that unlawful animus was a substantial and motivating factor in the decision to impose discipline, and Respondent did not carry its rebuttal burden.

Accordingly, I conclude that the March 13, 2006 notice of disciplinary action and the 14-day suspension it described violated Section 8(a)(4), (3), and (1) of the Act.

XVI. THE INFORMATION REQUEST ALLEGATIONS

As discussed above, under the "Admitted Allegations" heading, Respondent has admitted and I have found that the National Union and Local Union are labor organizations within the meaning of Section 2(5) of the Act, that the National Union is the exclusive representative of employees in an appropriate bargaining unit, that the National Union and the Respondent have entered into a collective-bargaining agreement, and that the Local Union is the National Union's agent for administering this agreement at the Destin facility.

Complaint paragraph 20 alleges, and Respondent's answer has admitted, that since on or about September 15, 2005, the local union, by hand delivered note, has requested that Respondent furnish it with a copy of the postal inspector's notes regarding the investigation of an alleged threat made by Cline on September 2, 2005. Respondent also has admitted that this information is necessary for and relevant to the local union's performance of its duties as the National Union's agent for administering the collective-bargaining agreement at Respondent's facility, as alleged in complaint paragraph 21.

Complaint paragraph 22 alleges that since on or about September 15 until about December 14, 2005, Respondent unreasonably delayed in providing the local union with the requested information described in complaint paragraph 20. Respondent's answer states:

> The allegations of paragraph 22 are denied, except that Respondent admits that it complied with the September 15, 2005 request on or about December 14, 2005. Further, respondent avers that, in mid-October, the new Officer-In-Charge met with APWU local president and steward, asked the Union for all outstanding issues, and honored all outstanding information requests brought to his attention by the Union. Respondent reasonably believed that the Inspection Service notes were no longer an issue as the matter was not identified by the Union as still outstanding.

Thus, Respondent has admitted that it did not provide the requested information until December 14, 2005, but has denied that this delay was unreasonable. Further, it has asserted, in essence, that it acted reasonably and with the good-faith belief that it no longer had to provide the requested information.

1. Facts

As noted above, Respondent has admitted that on about September 15, 2005, it received an information request from the local union. Based on the testimony of Local Union President Pruett, which I credit, I find that Postmaster Leon Malishan actually received the information request on September 16, 2005. The request sought the following:

> 1. Any & all documentation concerning Bobby Cline's emergency placement. This includes all statements from all managers, clerks & carriers.
>
> 2. Copy of the Postal Inspection IM report including their handwritten notes.
>
> 3. Copy of the Okaloosa Sheriff's report from this placement on 9–2–05.

Union President Pruett's signature appears at the bottom, just below these handwritten words: "The Union demands full & complete disclosure at this time. We request & demand all documents used against Bobby Cline, statements, notes, everything."

Union President Pruett credibly testified that he gave copies of this information to Postmaster Malishan and Supervisor Torres on September 16, 2005. I so find.

About a month later, Respondent reassigned Malishan and another manager, Billy Dossantos, took charge of the Destin facility. After assuming the position in Destin, Dossantos met with Union President Pruett and Shop Steward Jackson. Also present were the former postmaster, Leon Malishan, and a supervisor, Jerry Maynard.

During this transition period, the presence of the former postmaster at the meeting isn't surprising. However, the record does not establish why Maynard attended. Dossantos testified that Maynard did not work in the Destin facility and Dossantos did not know Maynard's title within the organization. When Maynard testified, he neither referred to this meeting nor explained why he was present.

When asked if the subject of information requests came up during the meeting, Dossantos at first expressed uncertainty. He explained that the meeting was heated and Malishan left. Then, Dossantos turned to the union representatives and asked them what they needed. According to Dossantos, he "wrote it all down" and "complied with everything on the list."

This testimony sounds plausible. Uncontradicted testimony, discussed above, establishes that on September 2, 2005, Malishan had gotten close to Cline and loudly called him a "troublemaker." Considering Malishan's strong feelings and apparent temperament, it would not be surprising if he began to get loud again during this meeting with union officials.

The record does not establish that the new manager, Dossantos, harbored similar hostility. For example, Cline's testimony establishes that when he told Dossantos that he had not received any paycheck even though he was supposed to be on administrative leave, Dossantos insisted that Cline accept some compensation then and there. Dossantos then said he would make sure that Cline received a paycheck.

Considering the steps Dossantos took when he learned that Cline was not being paid, it is not difficult to believe that Dossantos also demonstrated an accommodating attitude when he and the union officials discussed the information request. Union President Pruett's testimony also portrays Dossantos as being helpful on this occasion. According to Pruett, Dossantos said that "[t]his is all the documents that the postal inspector told me they had in their possession."

Pruett did not specifically testify that Dossantos then gave him the documents, but that is the most reasonable inference.

Additionally, Pruett's testimony does not establish whether Dossantos tendered these documents at the mid-October "labor management meeting" or sometime later. However, the most logical sequence of events would place this tender during the "labor management meeting" which took place about October 15, 2005.

In that regard, Pruett testified that what the Postal Inspection Service had provided to Dossantos concerned "the interview with Mr. Cline over Mr. Cline's complaint of his notebook being stolen" rather than Cline being placed on emergency leave. That would be consistent with Dossantos' testimony, quoted below, which indicated that his predecessor had not tried to obtain any postal inspectors' documents concerning Cline's emergency suspension.

As noted above, Dossantos' "labor management meeting" with Union President Pruett and Steward Jackson took place on about October 15, soon after Dossantos' arrival as officer-in-charge of the Destin facility. Although Dossantos left that meeting with a list of information the Union needed, the record does not establish what he did first to obtain the information or when he took that action.

Dossantos testified that at some later date, he spoke with Union Steward Jackson, who told him that the Union no longer needed the postal inspectors' notes. Dossantos could not pinpoint the date of this conversation with Jackson, but only said that it "could have been a few weeks" after the mid-October meeting. However, Dossantos then added, "I really don't know."

Jackson, who testified before Dossantos, did not refer to any occasion when he told Dossantos that the Union no longer needed the postal inspectors' notes. Dossantos' testimony to that effect remains uncontradicted, and I credit it. Thus, I find that Jackson did tell Dossantos that the Union no longer needed the postal inspectors' documentation. Further, I find that Jackson made this statement to Dossantos some time after October 15, 2005, but otherwise reach no conclusion regarding the precise date.

Dossantos further testified that some time later, when he told Union President Pruett about Jackson's statement, Pruett contradicted Jackson. According to Dossantos, he asked Pruett to look through Dossantos' information request log "and make sure that I've given you everything." After examining the log, Pruett told Dossantos that the Union had not received "the notes." Dossantos replied, "I'll get you the notes."

Pruett, who testified before Dossantos, neither contradicted nor corroborated Dossantos' account. Crediting Dossantos, I find that Pruett did tell him that the Union needed the notes and that he replied that he would get Pruett the notes. However, Dossantos' testimony does not establish when this conversation with Pruett took place. Presumably, it occurred some time around the first of November 2005, but that date could be off by a couple of weeks in either direction.

Dossantos contacted a postal service lawyer, John Oldenburg, asked for the notes, and got a copy within "a couple of days." Dossantos then provided them to the Union. Dossantos testified that he decided to involve the attorney because he had heard that the former postmaster, Malishan, had been unable to obtain the notes.

What Dossantos had heard—that Malishan had been unable to obtain the notes—implies that Malishan had *tried* to get the notes. However, Malishan's own testimony establishes that he did not:

> Q. Prior to your leaving the Destin Post Office, do you know what, if any, efforts were made to comply with the information request?
>
> A. From the postal inspection?
>
> Q. Yes.
>
> A. Peter Torres should have—*I can't say that he did*—should have requested from the postal inspector—he should have informed Marcus Jackson that he was going to request the information from the postal inspection in order to get that information form. . . .
>
> Q. Were you involved at all with any of these—any discussions regarding the documents?
>
> A. Not from the postal inspection. No.

(Italics added.) Torres' testimony does not address whether or not he requested the documents and the record does not establish that he made any attempt. I conclude that he did not. Indeed, a close examination of Malishan's testimony does not establish that Malishan even asked Torres to seek the notes. Malishan only testified that Torres *should have* requested them.

The record establishes that Malishan and Torres both harbored animus towards Cline and I have concluded that they bore responsibility for Cline's emergency placement. Additionally, I have concluded that Respondent's asserted reason for this action was pretextual. In these circumstances, it seems quite unlikely that either Malishan or Torres would have expended much effort to assist the Union in obtaining the postal inspectors' notes.

Indeed, the record suggests that when Respondent changed Cline's leave status from nonpaid to paid, the duty fell on Torres to make sure that Cline received a paycheck, but Torres did not perform that duty. Only after Dossantos took over did Cline get paid. Considering that the combined efforts of Postmaster Malishan and Supervisor Torres failed to correct Cline's payroll status, it is not surprising that they also failed to request the postal inspectors' notes.

Dossantos proved to be more conscientious about these matters but there were still problems. During the hearing, Pruett identified portions of the requested documents which he had not received until December 14, 2005. One of these documents is a lined sheet of paper with the date "9/2/05" in the upper right and bearing these words in handwriting: "The US Postal Inspection Service has received the following property from Bobby Cline on 9/2/05 @ 4:55 pm CST. . . ." The sheet then listed one identification badge and seven keys. Towards the bottom of the page, following the words "Witnessed By," appear the putative signatures of two postal inspectors, Cline, and Steward Jackson.

Pruett identified another page which, he testified, he did not receive before December 14, 2005. This lined sheet also bore handwritten notes. The unidentified writer described contacting Cline by telephone on September 2, 2005, and notifying him that he would have to turn in his keys because he was on emergency placement. The notes correspond with Cline's testimony concerning the afternoon of September 2, 2005. From that testimony, I infer that Postal Inspector Jennifer McDaniel prepared the notes.

Respondent had attached these two documents, among others, to a position statement it sent by facsimile to the Board's New Orleans office on December 14, 2005. In a later fax to counsel for the General Counsel, Respondent identified these two pages as copies of postal inspectors' handwritten notes.

Respondent had also attached to its December 14, 2005 position statement another page bearing postal inspectors' notes. (In evidence, it is the last page of GC Exh. 35.) Union President Pruett credibly testified that he had never seen this document before the day of the hearing.

Pruett's testimony that he had not received some of the requested information until December 14, 2005, is consistent with the admission in Respondent's answer "that it complied with the September 15, 2005 request on or about December 14, 2005." Additionally, no evidence contradicts Pruett's testimony that he never received one document and had not seen it until the hearing. I credit this testimony.

2. Analysis

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow." *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (internal quotation marks omitted), citing *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

In this case, Respondent has admitted the relevance and necessity of the requested information and has not asserted that the information was confidential. Instead, it argues that a misunderstanding, not bad faith, caused a delay. Relying on Jackson's statement, Dossantos did not try to obtain the notes until Pruett informed him that the Union still wanted them.

This argument, of course, does not explain why Respondent never provided the Union with one document, even though it had sent a copy to the Board's Regional Office on December 14, 2005. This document—the last page of General Counsel's Exhibit 35—is a photocopy of notes taken by a postal inspector. The notes include a reference to an Officer Taylor at the Okaloosa County Sheriff's Department, and the words, in quotes, "When I come back it won't be pretty." This note has particular significance when considered together with the sheriff's department's log, discussed above.

Although that log included a quotation different from the words Grossi attributed to Cline, it provided no particulars. Thus, the log did not indicate who had contacted the sheriff's department and did not reveal what officer had taken the call. The postal inspectors' note did identify a person: Officer Taylor.

Even if Respondent had provided this information as late as December 14, 2005, it would have given the Union an investigative lead to follow before the arbitration of Cline's grievance on January 31, 2006. However, Union President Pruett testified that he had not seen the document before the unfair labor practice hearing in June 2006.

Pruett discovered the document after the General Counsel handed him Respondent's position statement and elicited testimony about other documents attached to that position statement. Looking at these attachments, Pruett spotted the note he had not seen before.

Respondent sent this position statement and attachments to the Board on December 14, 2005, the same date it furnished other documents to the Union. Thus, Respondent could have provided the Union with a copy of this note at the same time but, crediting Pruett, I find that Respondent did not. However, the failure to furnish the Union with this one document certainly does not prove that Respondent was acting in bad faith. Its omission from the material send to the Union on December 14, 2005, might have resulted from clerical error.

The information request allegation encompasses more than failure to produce one document. The General Counsel alleges that Respondent breached its duty to bargain in good faith because of an unreasonable delay in furnishing the requested information. Crediting Pruett's testimony, I find that Respondent did not provide until December 14, 2005, certain other documents the Union had requested on September 16, 2005. Respondent's answer, which admits that Respondent furnished the Union with some documents on December 14, 2005, is consistent with this finding.

As stated above, the Board has not established a set of deadlines to determine whether an employer's response to an information request is timely. Rather, the Board examines whether a respondent has made a "reasonable good-faith effort" to comply with the information request. *West Penn Power Co.*, above; see also *Postal Service*, 337 NLRB 820 (2002).

On September 16, 2005, the Union made its information request to Postmaster Malishan, who then ran the Destin facility, and to Supervisor Torres, who reported to Malishan. To comply with the information request, these local managers had to obtain the documents from one of Respondent's other branches, the Postal Inspection Service. Malishan's own testimony establishes that he did nothing. Moreover, the record fails to establish that Torres took any action. I have concluded that neither Malishan nor Torres made any effort to obtain the documents.

Even if the evidence revealed no reason for this inertia, the lack of action itself would call into question whether Respondent had made a reasonable good-faith effort. However, much credible evidence demonstrates that bad faith prompted the foot dragging.

After Dossantos replaced Malishan, the Union began receiving some, but not all, of the requested information. So, the period of blatant, bad-faith inaction lasted only a month or slightly longer. Should the Board find an 8(a)(5) violation based on so short a period? Prior cases involving this same Respondent answer that question "yes."

In *Postal Service*, 308 NLRB 547 (1992), the Board adopted the administrative law judge's finding that a 4-week delay breached the duty to provide information. That conclusion did not require the kind of bad faith obvious here. The judge wrote:

> The information requested . . . has not been shown to be complex or difficult to retrieve: the information consists of only a few documents. Respondent has not explained why it did not produce the requested documents until about 4 weeks had passed and why it waited until after the charge had been filed to comply with the Union's request. Thus, I conclude

that Respondent violated Section 8(a)(1) and (5) of the Act by delaying for 4 weeks to furnish the Union with information requested by Brister. *Bundy Corp.*, 292 NLRB 671, 672 (1989); *Postal Service*, 276 NLRB 1282, 1288 (1985).

Similarly, Respondent has not shown in this case that the requested information was complex. I conclude that it was not. Likewise, Respondent has not shown that it experienced any difficulty obtaining or retrieving the requested information. Rather, the record establishes that for a month, Respondent didn't even try.

After Malishan left the Destin facility, Dossantos did seek the information the Union had requested. Based on the credited evidence, I conclude that he acted in good faith when he relied on Steward Jackson's statement that the Union no longer needed the requested information. He could not, of course, undo the 1-month delay resulting from bad faith.

In sum, I find that Respondent breached its duty to provide relevant and necessary information to the requesting union in a timely manner and thereby violated Section 8(a)(5) and (1) of the Act. These violations include both the 1-month period beginning September 16, 2005, when Respondent did nothing to obtain and provide some of the requested information, and the period thereafter, when Respondent still did not furnish the Union with all of the requested documents.

REMEDY

Except in extreme cases, the Board issues a narrow cease-and-desist order which enjoins a respondent from committing any "like or related" violations in the future. The Board doesn't simply assume that a respondent which violated one section of the Act yesterday will commit some other type of unfair labor practice tomorrow. Powerful reasons must drag the Board reluctantly to such a pessimistic conclusion.

In *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), the Board described two circumstances warranting a broad cease-and-desist order, which enjoins a respondent from violating the Section 7 rights of employees "in any other manner." The evidence must show either that (1) the respondent has a proclivity to violate the Act, or (2) has engaged in such egregious or widespread misconduct as to demonstrate "a general disregard for the employees' fundamental statutory rights."

In either situation, the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests "an attitude of opposition to the purposes of the Act to protect the rights of employees generally," which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. *Five Star Mfg., Inc.,* 348 NLRB 1301 (2006), citing *Postal Service*, 345 NLRB 409, 410 (2005).

The Board issued a broad cease-and-desist order against Respondent in the *Postal Service* case cited in the paragraph above. In that case, the Board found that Respondent had violated Section 8(a)(5) by failing to provide a union with requested information in a timely manner, but it did not find that Respondent had committed other types of unfair labor practices. The United States Court of Appeals for the Fifth Circuit concluded that the Board's "broad order" was, in this instance, overly broad, and modified it. The court held that the Board had articulated the correct standard in *Hickmont Foods*, above, but had not applied it correctly. *NLRB v. Postal Service*, 477 F.3d 263 (5th Cir. 2007).

The present record, involving the same Respondent, establishes a much more alarming set of facts. Section 8(a) of the Act includes five subparagraphs listing the types of employer conduct which the Act prohibits. In the present case, Respondent violated four of these five subsections, namely Section 8(a)(1), (3), (4), and (5). (The complaint did not allege that Respondent had dominated or contributed support to a labor organization in violation of Sec. 8(a)(2) of the Act.) Thus, this case may be distinguished from *NLRB v. Postal Service*, above, in which the Board found only an information request allegation.

However, the fact that Respondent violated more than one subsection of the Act is not as significant as what the pattern of unfair labor practices reveals about Respondent's attitude and intent. For the following reasons, I conclude that Respondent has demonstrated "an attitude of opposition to the purposes of the Act to protect the rights of employees generally."

This analysis begins by noting that on July 13, 2005, the Board published the decision of Administrative Law Judge Marcionese in Case 15–CA–17506(P). Judge Marcionese found that Respondent, at the same facility involved in the present proceeding, had unlawfully threatened an employee with a lawsuit and other reprisals. Employee Bobby Cline had filed the charge which began that proceeding, and testified at the hearing.

Cline engaged in other protected activity, described above, including accompanying a union steward who was serving another unfair labor practice charge on one of Respondent's supervisors. The present record shows that Respondent retaliated against Cline for engaging in such protected activity and then asserted a pretextual reason for its action.

Respondent's retaliation against Cline for filing charges and testifying in unfair labor practice proceedings provides one indication that it harbors an attitude of opposition to the purposes of the Act. Congress created the Board to enforce the Act, and the Board's existence derives from the Act. Hostility to the Board's processes pretty clearly suggests an opposition to the Act and its purposes.

Besides creating the Board, the Act also empowered employees to select a labor organization to represent them and conferred upon such an exclusive representative certain rights and duties. A persistent pattern of unfair labor practices which undermine a union's ability to perform that function also suggests hostility to the purposes of the Act.

Respondent disciplined a union steward for misdeeds he did not commit, told the union president he could not speak or ask questions during a predisciplinary interview, and failed to provide the Union with information which, Respondent admits, was relevant and necessary for the Union to perform its representation functions. This constellation of unfair labor practices indicates an unwillingness to accept the Union's statutory role as exclusive bargaining representative and an intent to curtail that role.

An "attitude of opposition" also manifests itself when a respondent flouts Board and court orders to cease and desist and, despite those orders, repeats the offending conduct. Similarly, when a respondent continues to commit similar violations notwithstanding a series of orders to refrain from that conduct, it demonstrates a "proclivity to violate the Act."

As the cases cited below establish, Respondent has a long history of violating Section 8(a)(5) by failing and refusing to provide information needed by a requesting union to perform its representation function. The Board also has found Respondent guilty, although not as frequently, of denying employees their *Weingarten* right to union representation during predisciplinary interviews, as it did here when Respondent prohibited the union representative from asking questions. Both the information request and the *Weingarten* violations impede the union, and the latter type manifests overt hostility to the union's function.

Specifically, the Board has found that Respondent unlawfully failed and refused to furnish a requesting union with relevant and necessary information in the following 25 cases: *Postal Service*, 276 NLRB 1282 (1985); *Postal Service*, 280 NLRB 685 (1986), enfd. 841 F.2d 141 (6th Cir. 1988); *Postal Service*, 289 NLRB 942 (1988), enfd. 888 F.2d 1568 (11th Cir. 1989); *Postal Service*, 301 NLRB 709 (1991), enfd. 980 F.2d 724 (3d Cir. 1992); *Postal Service*, 303 NLRB 502 (1991); *Postal Service*, 305 NLRB 997 (1991); *Postal Service*, 307 NLRB 429 (1992); *Postal Service*, 307 NLRB 1105 (1992), enfd. 17 F.3d 1434 (4th Cir. 1994); *Postal Service*, 308 NLRB 358 (1992), enfd. in part 18 F.3d 1089 (3d Cir. 1994); *Postal Service*, 308 NLRB 547 (1992); *Postal Service*, 308 NLRB 1305 (1992); *Postal Service*, 309 NLRB 309 (1992); *Postal Service*, 310 NLRB 391 (1993); *Postal Service*, 310 NLRB 530 (1993); *Postal Service*, 310 NLRB 701 (1993); *Postal Service*, 314 NLRB 901 (1994); *Postal Service*, 321 NLRB 1199 (1996); *Postal Service*, 332 NLRB 635 (2000); *Postal Service*, 337 NLRB 820 (2002); *Postal Service*, 339 NLRB 400 (2003); *Postal Service*, 339 NLRB 1162 (2003) [broad cease-and-desist order]; *Postal Service*, 341 NLRB 655 (2004); *Postal Service*, 341 NLRB 684 (2004); *Postal Service*, 345 NLRB 409 (2005); and *Postal Service*, 345 NLRB 426 (2005).

In the last of these cases, *Postal Service*, 345 NLRB 426, the Board issued a broad cease-and-desist order against Respondent less than a week before Respondent embarked upon a new series of violations. These violations began with Cline's September 2, 2005 suspension, followed by other unfair labor practices directed at Cline, including subjecting him to unlawful interrogation, and interfering with the Union's ability to represent him by failing to honor the Union's information request and denying the Union representative the right to speak at a disciplinary interview.

The similarity of Respondent's violations here to the violations in *Postal Service*, 345 NLRB 426, also warrants comment. Although the Board there issued a broad cease-and-desist order prohibiting Respondent from violating the Act "in any other manner," even a narrow order should have prevented Respondent's in the present case, because the violations here are so similar. In its August 27, 2005 Order, the Board *specifically* ordered Respondent to cease and desist from disciplining employees because of their union activities, from denying an employee the right to union representation during an investigatory interview, and from failing and refusing to furnish a union with requested information relevant to and necessary for the union to perform its representation functions. However, in the 3 months following that order, Respondent committed almost identical violations in the present case.

The Board's August 27, 2005 Order also failed to prevent Respondent from committing violations at other facilities besides Destin. As already noted, that order specifically prohibited Respondent from denying an employee's *Weingarten* right to union representation during a predisciplinary interview. Yet on October 4, 2005, at one of Respondent's facilities in Columbus, Ohio, Respondent announced at a predisciplinary interview that the union representative attending the interview could not speak. *Postal Service*, 347 NLRB 885 (2006).

The Columbus *Weingarten* violation occurred less than 6 weeks after the Board specifically prohibited this conduct, and the Destin *Weingarten* violation occurred less than 11 weeks after this same cease-and-desist order.

To summarize, for the following reasons, I conclude that Respondent has demonstrated a proclivity to violate the Act: (1) Respondent broke the law again within weeks (and in one instance, within days) of the broad cease-and-desist order which the Board issued on August 27, 2005; (2) the new unfair labor practices violated four different subsections of the Act; (3) the new violations repeated the specific types of conduct prohibited by the Board's August 27, 2005 cease-and-desist order; (4) in approximately 2 dozen prior cases, the Board had issued orders prohibiting "information request" violations, but despite those orders, Respondent committed a similar violation in the present case; and (5) Respondent continues to commit *Weingarten* violations notwithstanding a number of prior cease-and-desist orders and also notwithstanding its own written agreements to recognize this right.

In view of this demonstrated proclivity, I recommend that the Board issue a broad cease-and-desist order. See *Postal Service*, supra at 426; *Postal Service*, supra at 1162; cf. *Postal Service*, supra at 684 fn. 4 ("In light of three Houston districtwide Board orders recently enforced by the Fifth Circuit, we find no need for the judge's recommended special remedies of districtwide notice posting and a broad order.").

Although I recommend that the Board issue a broad cease-and-desist order, Respondent's past conduct causes me to doubt whether even a broad order will have much effect. The alacrity with which Respondent returned to violative conduct after the Board's August 27, 2005 order raises the following tough question: If this broad cease-and-desist order did not prevent Respondent from violating the Act again, very quickly, and if quite specific cease-and-desist language did not deter Respondent from committing the same type of violations, what kind of remedy can be fashioned which will, in fact, stop the unfair labor practices? Something more than a broad order may be needed here.

The Act is remedial rather than punitive and I do not review the past cases in which Respondent violated the Act with any notion of recommending a stiffer "penalty" because of recidivism. That concept from the criminal law has no place here. Rather, the goal must be simply to figure out what kind of a remedy will repair the damage the current unfair labor practices have caused and will prevent similar violations in the future. It cannot be assumed that a more burdensome remedy necessarily will be a more effective one.

However, something has to be done. For Respondent to begin violating the Act again less than a week after the Board's broad cease-and-desist order simply isn't satisfactory. For Respondent

to violate the Act again in a number of specifically proscribed ways is both unsatisfactory and discouraging.

An examination of Respondent's *Weingarten* violations may reveal the depth and extent of the problem. A *Weingarten* violation—denying an employee the right to union representation during an interview which reasonably may result in discipline—provides a good "marker" for the existence of animus because it is a clear and unequivocal act overtly antagonistic to the purposes of the statute. When a supervisor announces that a union representative may not attend such an interview, or that the representative must remain silent, that manifestation of hostility to the union's statutory role cannot easily be disguised by a pretext or explained away.

Moreover, a respondent's management logically should be able to stop its supervisors and agents from committing these violations, and doing so should not be difficult. However, Respondent's efforts have failed to end the violations.

It is appropriate here to take official notice of *United States Postal Service,* JD(ATL)–38–06 (Oct. 20, 2006) for a limited purpose. In that decision, Judge John H. West found that Respondent had violated the *Weingarten* rights of a number of its employees at a number of its facilities. However, I do not cite this decision as proof that Respondent committed still another such violation. Rather, the decision is relevant here because it describes a nationwide training program which Respondent conducted as part of a settlement agreement.

Specifically, the decision in *United States Postal Service*, JD(ATL)–38–06 quotes a notice to employees which Respondent posted pursuant to an order of a United States Court of Appeals. This notice read, in part, as follows:

> PLEASE TAKE NOTICE that on December 18, 2003, the United States Court of Appeals for the District of Columbia Circuit issued a Consent Order against the United States Postal Service approving a settlement between the Postal Service and the National Labor Relations Board. Under that Consent Order the Postal Service is required to institute a nationwide educational program directed at all supervisors, acting supervisors, postal inspectors and managers with direct responsibility for bargaining unit employees concerning employee rights in investigatory interviews, otherwise known as Weingarten rights. As part of that education program, we list below a summary of such employee rights. . . .

The notice continued with a detailed description of an employee's *Weingarten* rights, including the right to confer with a union representative before the investigatory interview, and the right to have the union representative speak during the interview. The notice stated, in part:

> At the investigatory interview, the employee is entitled to a union steward's assistance. The Postal Service violates the employee's rights if it refuses to allow the steward to speak or tries to restrict the steward to the role of a passive observer.

Pursuant to the Court's order, Respondent posted this notice *employerwide* in 2003. But notwithstanding this nationwide notice and training, Respondent then committed additional *Weingarten* violations in the present case and in *Postal Service*, supra, 347 NLRB 885.

Additionally, as discussed above, Respondent entered into a June 10, 2004 agreement with the Union which *specifically* stated that "[a]n employee's *Weingarten* rights are violated when the union representative is not allowed to speak or is restricted to the role of a passive observer." This agreement was in effect on November 8, 2005, when Respondent specifically prohibited the union representative from speaking during Cline's first predisciplinary interview. Moreover, Cline and the union representative reminded the supervisor of this right, but to no avail.

Thus, broad cease-and-desist orders, a court-ordered nationwide training program and notice posting, specific language in a collective-bargaining agreement, and a reminder at the time of a predisciplinary interview *all* failed to prevent Respondent from violating the Act in the same way. If those remedial measures failed to prevent a violation, then what will?

Another consideration makes the problem puzzling as well as frustrating. No apparent incentive exists which might motivate a supervisor to disregard the notices, training, and collective-bargaining agreement, and, indeed, not merely disregard these instructions but do exactly the opposite. Supervisors typically follow rather than flout orders from higher management.

Respondent's vice president, labor relations, signed its June 10, 2004 agreement which acknowledged and described employees' *Weingarten* rights, but that didn't stop the violations. Therefore, I recommend that the Board require that the notice to employees be signed by Respondent's chief executive officer.

This notice still would be posted only at the Destin facility. The record does not establish the existence of any nationwide policy which would require posting the notice at any other location. Cf. *Postal Service*, 303 NLRB 463 at fn. 5 (1991) (employerwide policy resulted in *Weingarten* violations, warranting an employerwide notice posting).

Requiring that Respondent's chief executive officer sign the notice to employees clearly would convey that Respondent seriously intended to abide by the law and expected its supervisors to do so. This additional remedy imposes minimal burden and certainly does not constitute a penalty. However, the postmaster-general's signature may command the attention of supervisors in a way that the vice president of labor relations' signature did not. Moreover, like the sign which graced President Truman's desk, the postmaster-general's signature would show where the buck stops.

Respondent also should be placed on notice that if it commits further *Weingarten* violations requiring a Board order, it will be assessed the expenses of that litigation. *Weingarten* violations do not involve any gray or unsettled area of the law and do not present any factual ambiguities. Their blatant nature makes them obvious and unmistakable. Moreover, Respondent clearly knows the line it must not cross because its written agreement with the National Union precisely describes the boundaries. If Respondent commits another *Weingarten* violation which burdens the Board's docket and consumes the Board's time, clearly it should bear the expense.

With respect to the 8(a)(3) and (4) violations, Respondent must rescind the disciplinary actions and expunge all references from its files. Moreover, it must make employee Cline whole, with

interest, for all losses he suffered because of Respondent's unlawful discrimination against him.

Respondent's threat assessment and emergency suspension procedures seek to prevent a recurrence of certain violent and tragic events which have taken place at Postal Service facilities. These events, and other recent tragedies not involving the Respondent, have been associated with individuals having mental illness. Respondent's placement of Cline on emergency suspension after an "assessment" that he posed a threat foreseeably would be stigmatizing, by creating the false impression that he was mentally ill and violently so. Similarly, requiring Cline to report to a psychologist for a fitness-for-duty examination reinforced the impression created by Respondent's false claim.

The gravamen of Respondent's actions against Cline can be appreciated by comparison with another instance in which Respondent falsely claimed an employee had made a threat. Although Respondent pretextually accused Union Steward Jackson of "threatening" a postmaster, it did not place Jackson on emergency leave, require him to turn over his keys to a postal inspector or change the lock combinations to keep him out of the building. Similarly, it did not perpetuate the falsehood by requiring Jackson to take a psychological fitness-for-duty examination. Thus, in Jackson's case, it did nothing to communicate that this particular employee was deranged and could be violent.

However, it did take these actions against Cline. Moreover, by placing Cline on administrative leave, rather than recalling him to work after he was found fit for duty, Respondent may have aggravated the harm by making it appear, falsely, that Cline had not passed the psychological examination.

In these circumstances, the notice to employees which Respondent will post should clearly retract its false claims. Additionally, Respondent should be required to provide to employee Cline, on his request, a signed and dated copy of this notice. Cline is a Charging Party and thus entitled, upon request, to a copy of the signed and dated notice. See *General Counsel's Casehandling Manual, Part III*, Section 10518.4.

CONCLUSIONS OF LAW

1. Respondent, the United States Postal Service, is subject to the Board's jurisdiction pursuant to section 1209 of the Postal Reorganization Act.

2. The National Union, American Postal Workers Union, AFL–CIO, and its Local 5643, are labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit constitutes a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees in the bargaining unit for which the American Postal Workers Union, AFL–CIO has been recognized and certified at the national level, excluding managerial and supervisory personnel, professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service Employees, employees in the supplemental work force as defined in Article 7 [of Respondent's collective-bargaining agreement with the American Postal Workers Union, AFL–CIO], Rural Letter Carriers, Mail handlers, and Letter carriers.

4. At all material times, the National Union has been, and has been recognized by Respondent to be the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3, above, within the meaning of Section 9(a) of the Act.

5. At all material times, Local 5643 has been, and has been recognized by Respondent to be the National Union's agent for administering the collective-bargaining agreement at Respondent's Destin, Florida facility.

6. On about February 22, 2005, Respondent discriminated against employee Marcus Jackson by issuing him a warning letter, in violation of Section 8(a)(3) and (1) of the Act.

7. On about March 4, 2005, Respondent discriminated against employee Bobby Cline by issuing him a warning letter, in violation of Section 8(a)(4), (3), and (1) of the Act.

8. On about September 2, 2005, Respondent discriminated against employee Bobby Cline by placing him on an emergency suspension, in violation of Section 8(a)(4), (3), and (1) of the Act.

9. On about October 1, 2005, Respondent discriminated against employee Bobby Cline by requiring him to undergo a fitness-for-duty examination, in violation of Section 8(a)(4), (3), and (1) of the Act.

10. On about October 26, 2005, Respondent discriminated against employee Bobby Cline by placing him on administrative leave, in violation of Section 8(a)(4), (3), and (1) of the Act.

11. On about November 8, 2005, Respondent denied an employee his right to union representation during an interview which the employee had reasonable cause to believe would result in disciplinary action against him, in violation of Section 8(a)(1) of the Act.

12. On about November 8 and 16, 2005, and December 12, 2005, Respondent unlawfully interrogated an employee about his union and other protected activities in violation of Section 8(a)(1) of the Act. Also on about November 8 and 15, 2005, and December 12, 2005, Respondent interfered with, restrained, and coerced an employee in the exercise of rights guaranteed by Section 7 of the Act by subjecting the employee to harassment in the form of unlawful interrogations concerning the employee's union and other protected activities, in violation of Section 8(a)(1) of the Act.

13. On about March 13, 2006, Respondent discriminated against employee Bobby Cline by imposing a suspension without pay for the period April 1 through April 14, 2006, in violation of Section 8(a)(4), (3), and (1) of the Act.

14. On about September 15, 2005, Local 5643, acting as the National Union's agent at the Destin, Florida facility, requested that Respondent furnish information relevant to, and necessary for, its representation of a bargaining unit employee. Respondent failed and refused to provide all of the requested information in a timely manner and thereby failed and refused to bargain in good faith the exclusive bargaining representative in violation of Section 8(a)(5) and (1) of the Act.

15. Respondent did not violate the Act in any other manner alleged in the complaint.

[Recommended Order omitted from publication.]