

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

RELCO LOCOMOTIVES, INC.

and

BROTHERHOOD OF RAILROAD SIGNALMEN

Cases 18-CA-19175
18-CA-19350
18-CA-19367
18-CA-19499

**RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

The hearing in this matter, involving the above-captioned Charges, was held on September 14-16, 2010, in the Monroe County Courthouse, in Albia, Iowa, before the Honorable William Schmidt, Administrative Law Judge ("ALJ"). The Charges were all filed by the Brotherhood of Railroad Signalmen ("Union"). The matter was tried by ALJ William L. Schmidt. Respondent files these Exceptions to the Decision of the Administrative Law Judge dated March 28, 2011. References herein are made to the Official Reported Proceedings, as Transcript pages (Tr. ___), General Counsel Exhibits (GC Ex. #___), and Respondent Exhibits (R. Exh. #___).

I. STATEMENT OF FACTS

A. Background And Company Policies

Respondent, Relco Locomotive, Inc. ("Respondent," "Company," or "Relco"), is a modest, family owned business engaged in rebuilding, repairing and manufacturing locomotives and railcars. Relco's corporate headquarters is located in Lisle, Illinois. Mark Bachman is the Chief Operations Officer. His brother Doug Bachman, is the Chief Administrative Officer. (Opinion of ALJ Schmidt, referred to as "Op" at 3). The two brothers operate Relco. The Albia facility is located in south central Iowa and is Relco's only manufacturing facility. Op. at 3.

The Albia facility when in full production, runs seven days a week and employs about 100 people over four shifts. This matter involves employees assigned to the day shift, working Monday through Friday. Op. at 3.

Before each shift, management meets with the employees to discuss the day's work priorities, safety issues and other workplace matters. Employees of outside contractors are sometimes also included in the morning meetings. The meetings generally last between 10 and 15 minutes and are presided over by David Call the Albia facility Operations Manager or Cliff Benboe the Albia facility Fabrication Supervisor. Op. at 3-4.

Relco has an employee handbook which is periodically revised. The manual contains the essential employment policies and contains its rules and regulations including its attendance policy. Safety rules are also contained in the handbook and any additional safety rules that might be adopted between revisions of the handbook are discussed with the Albia facility employees as issues come up. The most recent version of the handbook in effect at the time of the incidents involved in this case was adopted on January 1, 2009. Op. at 4.

1. Relco's Attendance Policy

Relco's attendance policy is spelled out clearly in its employee handbook. Employees are assessed points each time they leave work early without a pre-approved excuse, they call in late without a pre-approved family or medical excuse, they call in absent without a pre-approved family or medical excuse, or they come in late or take off an entire day without calling in. If an employee is late or takes off due to medical reasons, if they provide proof of the medical reason they are not assessed points. Unexcused absences are not grounds for immediate termination. They are a concern for Relco because Relco like most companies with production line facilities, has a problem with attendance. The company fired 33 people for attendance reasons between mid-June 2008 mid-2010. Op. at 4.

The company terminates employees who accumulate 12 points in a rolling 12-month period. They are assessed points for each absence, with some offenses being assessed multiple points. Op. at 4-5; Tr. 80.279, 301, 532-39, 541, 612-21; R Exh. #5, 17 and 22; GC Exh. #3. Relco's terminations for attendance violations generally are delayed until the company verifies that the employee is eligible for termination. The delays take anywhere from one to three days from the date of the last incident.¹

No supervisor or manager is authorized to change the Policy -- including what type of documentation may excuse an absence. Such modifications can only be made by Chief Operations Officer, Mark Bachman, or the company's Chief Administrative Officer, Doug Bachman.² (Tr. 444-445).

Jeffrey Smith and Tim Kraber two of the claimants in this case, were terminated due to attendance violations. In Smith's case he was terminated for multiple reasons, any one of which could have resulted in his termination. There was even evidence he deliberately reported to work without wearing the required steel-toed safety shoes simply because he wanted to see how long he could "get away" with it. Tr. 80.279, 301, 532-39, 612-21; R Exh. #5, 17 and 22; GC Exh. #3.

In Kraber's case his termination was based on his attendance. Tr. 202-06, 441-48, 471-74, 548-52, 575-77, 587; R. Exh. #7, 11, 12, 13, 16; GC Exh. # 16.

2. **Relco's Other Employment Policies**

As noted above, the employee handbook contains rules besides attendance.

¹ See R. Exh. #5, and compare date of last incident triggering termination to date of letter for the following: Thomas Peters/June 24, 2010; Justin Bennett/June 17, 2010; David Bennett/April 1, 2010; Mike Rulis/January 22, 2010; Todd Ratliff/December 21, 2009; Raymond Strobe/February 24, 2009; Josh Gutcher/February 18, 2009; and Robert Smith/December 12, 2008.

² Throughout these Exceptions, Mark Bachman will be referred to as "Bachman," and references to his brother will be to "Doug Bachman."

a. **Progressive Disciplinary Policy**

Relco uses a progressive discipline system which is spelled out in its handbook. Some infractions can result in immediate termination such as insubordination, theft and dishonesty. Between June of 2008 and January of 2010, five employees were terminated for such offenses. One was terminated following his arrest for stealing company property and the property of a railroad. Two were fired for walking off the job and not returning. One who was a probationary employee and was discharged for not being able to perform his assigned tasks. The fifth was terminated for job safety reasons and because of poor performance. Op. at 4; R. Exhs. 6 and 7; Tr. 417-418. Respondent's Safety Policy.

b. **Insubordination**

If an employee is insubordinate they can be terminated by Relco, depending on the offense. The handbook has a section entitled "Standards of Conduct" which include a list of "Unacceptable Activities/Behavior." This section contains a laundry list of typical and other offenses including insubordination. Ron Dixon, one of the claimants in this case, was terminated for insubordination. He was terminated for disregarding a direct order from a supervisor.³ (Tr. 484). Depending on the severity, insubordination can be a terminable offense. Relco has terminated many employees for first time terminable offenses, without utilizing progressive discipline. (See R. Exhs. #6 & 7).

c. **Safety Policy**

Relco is concerned about safety. Relco is always trying to make the Albia plant safe. They are constantly educating and re-educating their employees on safety. This is accomplished

³ General Counsel's Exh. #11 does not show otherwise. If the General Counsel was trying to show that Dixon was disciplined for safety violations because of union organizing activity, the General Counsel should have produced an exhibit showing that others besides Dixon who had not engaged in union organizing activity, were not terminated for the same offense,. GC Exh. 11 does not show that.

through daily safety meetings, held each day before the beginning of the morning shift. Relco also provides safety incentives to employees who have no safety incidents, and to supervisors whose employees avoid accidents. The Company has worked with OSHA on safety issues and has implemented many safety requirements. The use of a harness is one of those. (Tr. 362, 422-425, 434; R. Exh. #8). The safety precautions taken depend on the task the employees are engaged in. (Tr. 498).

Relco, like many employers, requires its production workers to wear steel-toed safety shoes. This requirement varies depending upon the nature of the job being performed. Relco does not require steel-toed safety shoes on some projects, such as the hotel locomotive project described by several witnesses. On that project, safety shoes were not required after all of the production work had been completed, because there was a need to avoid scratching the paint with heavy shoes.⁴ (Tr. 435-436, 500).

There was no evidence produced at the hearing that Relco has ever knowingly permitted employees in the production areas to ignore this requirement.⁵ In fact, one of the General Counsel witnesses, Richard Purdun, was sent home for not wearing steel-toed boots four years ago, before the current point-based attendance policy was in effect. He returned to work the same day with the appropriate shoes. He received no points because the point system was not in effect. (Tr. 280-281, 288). Purdun also confirmed that other fabricators have been sent home for not wearing steeled-toed shoes. (Tr. 282).

⁴ Conversely there was no evidence produced at the hearing that employees working in fabrication (where Jeff Smith worked). were excused from wearing steel-toed shoes nor did anyone testify that the safety shoe requirement was waived in the area where Smith was found to be in violation of this Policy on June 11.

⁵ For example, General Counsel witness Tim Kraber's testimony about an employee in a medical boot provided no details regarding whether in fact there were special circumstances due to a medical issue, and conceded that he had no knowledge whether any supervisor knew of this incident. Kraber also conceded that Richie Purdun returned to work with the appropriate shoes on the same day that he was sent home. (Tr. 225).

B. The Union's Organizing Campaign

The employees of the Albia facility are not represented by a labor organization. An election was held in November of last year (2010), and the Brotherhood of Railway Signalmen (BRS) lost. This Board action was brought prior to the election as part of the union's organizing campaign. Op. at 4.

1. Jeffrey Smith's Termination

Jeffrey Smith was a welder in Relco's fabrication department. He worked for Relco from January of 2008 through June 12, 2009. As a chronic violator of Relco's attendance policy, Smith began complaining about the company's point system and about the fact that in 2009, he didn't get a raise. In the midst of his growing dissatisfaction with the company, Smith claims to have made a discovery. He says that while working inside a locomotive, he discovered a BRS insignia. He says he immediately went on the internet to read up on the union. Smith wrote an e-mail to the union to inquire about getting them to do an organizing drive. BRS organizer Mark Ciurej contacted Smith the following day and gave him all the information. He requested Smith's telephone number to make personal contact and asked about coming out to Albia to speak to the other employees. Op. at 4-5.

Smith's first act after talking to the union organizer was to prepare and deliver a lengthy letter to the company outlining his grievances. He gave this letter to the paint shop supervisor for delivery to Bachman. (Tr. 74). Smith testified at the hearing that after contacting Ciurej, he was given this advice and he followed it. *Id.* Ciurej testified that Smith never reported to him that he had been questioned by a supervisor or engaged in any Union activity in the presence of management. (Tr. 400-401).

There is no evidence whatsoever establishing that Respondent had any knowledge of Smith's purported Union activities. To the contrary, the management witnesses testified that

they had no such knowledge. Benboe was unaware of any Union activity by Smith, and first learned that Smith was making such a claim when Smith filed charges with the Labor Board. Similarly, Crall testified that he did not observe employees engaging in Union activity, nor was he told the names of individuals who were supporting the Union. (Tr. 529-530). Bachman also testified that he had no knowledge of the identity of any of the employees who were assisting the Union in its organizing efforts. (Tr. 440).

During his employment, Smith had attendance problems. He was often absent without excuse and accumulated points under Relco's attendance policy. Smith took many excused days under this program. In fact, Smith had five *excused* absences after he became involved in union organizing activity on April 10, and *after* he began soliciting union certification cards. (Tr. 41-43; GC Exh. #9). But, no matter how many excused absences Smith was given, he was never satisfied. By his own admission by early 2009, he had already accumulated 10 points under the company's points system. (*See* GC Exh. #3). On of June 11, Smith had 11 points, and knew that one more point would result in his immediate discharge. (Tr. 80, 279, 301).⁶

In the weeks immediately before his termination, Smith told another employee, Jonathan Graber, that he had not been complying with Relco's policy safety shoe Policy. Smith admitted to that he had been told to get new safety boots by Cliff Benboe, and that he was trying to "get away with" not wearing them for whatever reason, for as long as he could.⁷ (Tr. 317-318).

On June 11, just after the 7:00 a.m. safety meeting, Benboe noticed that Smith was wearing boots with white ties. Benboe asked him if he was wearing steel-toed shoes. Smith said

⁶ There is no evidence that any of the points assessed to Smith prior to June 11 were inconsistent with Relco's Attendance Policy. Nor is there any evidence that they were the result of any anti-union motive. In fact, Smith had five excused absences after he became involved in union organizing activity on April 10, and after he began soliciting union certification cards. (Tr. 41-43; GC Exh. #9).

⁷ Respondent provides an allowance for employees to use to pay for their safety shoes, which Smith had previously used in the Spring of 2009. (Tr. 54).

he was. Later that same day, at about 9:30 a.m., Benboe noticed that one of Smith's bootlaces was smoking due to hot steel on the floor. Benboe went over to warn him about it but when he did he noticed that Smith wasn't wearing steel-toed safety boots. Benboe again asked Smith if he was wearing the required safety shoes, at which point Smith conceded they were not. Benboe directed Smith to go to the break room. (Tr. 612-613, 632-634; R. Exh. #22).

Benboe then brought Operations Manager, David Crall ("Crall"), into the lunchroom and in Crall's presence, Benboe asked Smith if he had been lying when he stated earlier that day that he was wearing the required shoes. Smith admitted that he lied.⁸ Benboe told Smith that he had to leave work and that he could only come back when he had the appropriate shoes. Benboe also told Smith he would have to speak with him upon his return because Benboe did not know what impact the safety shoe violation would have on Smith's ability to continue working for Relco. (Tr. 531, 614). Smith's response was that he would not be able to buy new shoes until he got a "paycheck" the next morning.⁹ Smith did not ask if this was acceptable and neither Benboe nor Crall told Smith he would be excused if he were tardy because of his alleged need to wait for a paycheck to pay for the boots. (Tr. 532, 615). The fact that Smith was not wearing safety boots and the fact that he lied about it was enough to terminate Smith on the spot. However, Crall and Benboe left the final decision to Bachman. (Tr. 621, 537-538). At no time during this meeting did Benboe or Crall discuss whether or how many points Smith would be assessed for leaving

⁸ It is abundantly clear that Smith lied at the hearing as demonstrated by the discussion below. Any minor inconsistencies in the testimony of Relco's witnesses pale in comparison to the laundry-list of inconsistencies offered by Smith.

⁹ At the hearing, Smith claimed that it was his wife's paycheck that he needed in order to pay for new boots. However, in his meeting with Benboe and Crall, he did not specifically mention his wife's paycheck. Rather, he simply said a "paycheck." (See Tr. 615; R. Exh. #22). Respondent's employees are not paid by checks, but rather by direct deposits made near midnight between the Thursday and Friday of payday, and June 12 was not a payday. (Tr. 556).

early as a result of this safety violation.¹⁰ At the time neither Crall nor Benboe were aware of Smith's point total.¹¹ (Tr. 536, 619, 635).

There is no claim that either Benboe or Crall told Smith he could report to work late on June 12. (Tr. 532, 615). Smith did not report to work at the start of his shift at 7:00 a.m. on June 12. When an employee does not show up for work, Benboe checks the call-in log. (Tr. 619-620). Anna Hopkins ("Hopkins"), as of June 2009, was the person in charge of keeping a log of employee calls left on voice call system. After the information is entered into the log, the recording is erased. On the day in question, the log showed only one employee call-in, which was not from Smith.¹² (Tr. 533-535; R. Exh. #17).

Shortly after Benboe told Hopkins that Smith was absent, she told Benboe that Smith had exceeded 12 points in a 12-month period. This was as a result of the three points the Policy assesses for a no-show/no-call.¹³ (Tr. 620). At the time, Hopkins was not aware of the fact that Smith had left early on the prior day.¹⁴ Thus, at that time, Hopkins incorrectly concluded that

¹⁰ Relco's point system assesses points for leaving early (R. Exh. #4, p. 26), and Smith had been assessed points several months earlier for being sent home for not having the appropriate safety shoes. (Tr. 542, 556, 587; R. Exh. #5/William Wilson letter dated December 17, 2008).

¹¹ Benboe explained that he does not routinely give employees updates of their attendance points total, unless they ask for this information. (Tr. 638).

¹² See R. Exh. #17, which also shows numerous occasions on which Smith had properly followed the procedure between December 2008 and April 23, 2009.

¹³ Contrary to Smith's fabrications, Benboe did not leave *any* message on Smith's phone (Smith alleged that this purported message was that Smith was to come in at a later time on that day).. Similarly, Smith never called and spoke to Benboe that morning, as he testified. Benboe credibly denied any such call, and further stated that he was available to receive a phone call between 5:00 a.m. and 7:30 a.m., except for approximately 10 minutes starting at 7:00 a.m. when he was in a safety meeting. Thus, Benboe would have been available to take a call at 7:26 a.m. -- the time that Smith allegedly made this call -- if he had been paged. (Tr. 618). Although Smith presented evidence allegedly indicating that a phone call had been made from his wife's cell phone to the Company's main number at 7:26 a.m. on June 12, there is no evidence establishing who -- if anyone -- he spoke with, or whether he ever made that call. (See detailed discussions of this allegation as part of Smith's lack of credibility, Section II(A)(2)).

¹⁴ As of the morning of June 12, Benboe had not yet told Hopkins that Smith had left early on June 11. As explained by Benboe, absenteeism-related incidents are documented on the timesheets, which
Fn. cont'd.

Smith's point total was 14, when actually it was 15 because of the no show no call. Smith should have been terminated the day before because by sending him home on June 11, he had already accumulated 12 points. (Tr. 541).

Upon learning of Smith's point total, Benboe conferred with Crall and together they concluded that Smith would be terminated pursuant to the attendance policy. Although Crall and Benboe did not know on June 11 how Smith's conduct that day would impact his job¹⁵, ultimately it didn't matter, because Smith's leaving early on June 11, made him subject to discharge under the points system. (Tr. 537, 620-621). If Smith were to be fired for any reason other than attendance, policy dictated that the termination had to be approved by Mark Bachman. (Tr. 537-538, 621).

After determining that Smith had exceeded the maximum number of points, the decision to terminate Smith was made and a discharge letter was drafted. It was the practice at that time for termination letters to be form letters, which were generated and filled in by Hopkins.¹⁶ (Tr. 538).

Crall called Smith when he didn't show up to work on June 12, and told him to come to the plant to meet with him. When the two men met, Crall told Smith that he was being

information is subsequently used to first put the incident into the computer program that tracks attendance points. This necessarily involves some delay, which is typically at least one day -- and sometimes two -- after the date of the infraction triggering a point assessment. Once the incidents are listed on the point summaries, it may take some additional time to determine whether the relevant facts require that points be assessed -- or whether a zero should be entered to reflect no points. (Tr. 443-444, 502-504, 533, 634-636, 558-559). (*See also*, fn. 5, *supra*, for examples of such delays in the assessment of points which led to employee discharges.). The fact that a particular document -- such as GC Exh. #9 -- may show an incident with no point entry next to it only reflects that the paperwork had not been completed at the time that such document was generated. There is a difference between no entry -- as on GC Exh. #9 for June 11 -- and a "zero" assessment, as listed for other dates on that document. (Tr. 558).

¹⁵ Smith's testimony acknowledged the essence of this directive, in that he said that Benboe told him he did not know if this would be the "end of this or not." (Tr. 56).

¹⁶ Although the letter was for Benboe's signature, he neither made the decision nor directed what language would be put in the letter. (Tr. 621).

terminated due to the attendance policy.¹⁷ (Tr. 539-540). At the termination meeting, Smith was not dressed in work clothes, but rather was wearing shorts and sandals/flip flops.¹⁸ Normally, Smith would wear his work clothes to work. The fact that he came dressed this way indicates that he knew he was going to be fired. (Tr. 89, 321).

2. **Ron Dixon's Termination**

Ronald Dixon worked for Relco in Albia twice. The first time he worked for Relco, he was a seasonal lay off at the end of the year on December 22, 2008 when the facility closes down. (Tr. 104-105).¹⁹ In 2009 he was rehired. Dixon was involved in the union organizing campaign from the beginning, and under the direction of Union Business Agent Ciurej, began to discreetly distribute BRS organizing cards. He encouraged employees to sign them. Ciurej advised Dixon and other employees who were involved in Union organizing and card solicitation to be discreet. (Tr. 74, 400). After Smith was fired for attendance, Dixon became and remained the main union organizer at Relco. Op. at 5.

On September 21, 2009, Dixon was assigned to do work on top of a locomotive. Between 8:00 a.m. and 8:30 a.m., Bachman and Crall were in the office conference room, which has a window overlooking the production area. By coincidence, Bachman and Crall happened to see Dixon working on the top of a locomotive with his feet hanging over the side. Bachman became alarmed believing that Dixon's work position created a significant safety risk. He told

¹⁷ Contrary to Smith's assertions, he was not told then -- or any other time -- that he was terminated for a safety violation. Although the discharge letter (GC Exh. #8). made reference to safety violations, Crall's credible testimony was that the decision was made solely on the basis of the indisputable fact that Smith had exceeded the point total, and, for that reason, there was no reason to reach a final decision regarding the safety-related violations -- including Smith's act of lying to Benboe about his safety boots -- which occurred the day before.

¹⁸ Contrary to Smith's assertion, (Tr. 65). he was not wearing safety boots or jeans. The testimony of several other witnesses established that he was wearing shorts, a t-shirt and either flip flops or some type of sandals. *See* Section II(A).(2)., for a discussion of how the probative evidence proves this fact, contrary to Smith's assertions, and regarding Smith's overall lack of credibility.

¹⁹ *See* GC Exh. #27, second page from end, which is Dixon's first termination letter dated May 19, 2008.

Crall to have Dixon's supervisor (Benboe). order Dixon to stop working that way and to work in a safer manner. (Tr. 478-479, 543-545).

Crall relayed Bachman's concerns to Benboe, who in turn immediately went to Dixon and told him to either work in the center locomotive or place the ladder on the locomotive in a such a manner that he could work from it. Benboe did not tell him where to place the ladder.²⁰ Dixon acknowledged that he would comply with this order. (Tr. 608-609).

About 20 minutes later, while both Crall and Bachman were still in the conference room they noticed that Dixon was still working on top of the locomotive with his feet hanging over the edge. This time he was facing the other direction. Bachman shouted over the radio to get him down, and also directed Crall to tell Benboe to bring Dixon to the lunchroom. (Tr. 478-482; 543-546; 610; GC Exh. #12; R. Exh. #20).

Bachman considered Dixon's behavior to be deliberately insubordinate, a willful violation of a safety directive. Accordingly, Bachman directed Crall to terminate Dixon for violating a safety directive and for disregarding a direct order by a supervisor. (Tr. 481-482, 546). When Benboe met with Dixon in the lunchroom, he gave him a termination letter. (Tr. 611; GC Exh. #13).²¹

There is no evidence establishing that Relco had any knowledge of Dixon's organizing activities. To the contrary, the witnesses testified that they had no such knowledge. Benboe testified that he was unaware of it, and first learned of this allegation in Dixon's unemployment

²⁰ Dixon admits that he was told that he was observed hanging over the edge of the locomotive (Tr. 118)., but contends that Benboe specifically told him to place the ladder this way. (Tr. 120, 145). This claim was credibly refuted by Benboe. (Tr. 609, 625, 632; R. Exh. #20). Dixon also denies that his feet were hanging over the edge. (Tr. 142). To the extent that there are credibility disputes between Dixon and management witnesses, the latter should be credited for reasons discussed in Section II(B).(2)..

²¹ Respondent's work rules provide for immediate termination for certain offenses, including insubordination. (See R. Exh. #4, p. 23, Rule #2).

hearing. (Tr. 640). Crall testified that he did not observe employees engaging in any union organizing activity and that he was not told the names of the individuals who were supporting the Union. (Tr. 529-530). Bachman also testified that he had no idea who was involved in the union organizing efforts and made no attempt to find out. (Tr. 440). He first learned of Dixon's Union activity when Dixon raised it at the unemployment hearing. (Tr. 483). The Termination of Tim Kraber.

3. Timothy Kraber's Termination

Timothy Kraber ("Kraber") worked for Relco in 2007 and was laid off. Then he was rehired in March of 2008. (Tr. 160-161). In his second stint with Relco, Kraber had attendance problems. (Tr. 454-455, R. Exhs. #11, 12, & 13; GC Exh. #14).

In January 2010, Kraber had a five-day absence for which he had submitted two separate documents to support his absences. One document was from a chiropractor for January 19-20. The other was from a health clinic excusing Kraber for three days. (*See* R. Exhs. 14 & 15). Under Relco's Attendance Policy, Kraber was excused for the three days. (Tr. 459). He was assessed points for January 19-20, because he was not excused based on the chiropractor's letter. (Tr. 446, 462; Exh. #3).²²

Kraber testified that he had discussions about the Relco points system with Curt Peterson ("Peterson"), a former Relco supervisor. According to Kraber, Peterson told him that he would excuse those two days if he provided a doctor's note.²³ Kraber says he gave Peterson a note from a doctor, but Kraber conceded that Peterson raised an issue about the legibility of the note.

²² The Policy regarding chiropractic notes was posted in a letter to employees dated December 4, 2009. Kraber claims he did not see the posting. (Tr. 217).

²³ As noted in the record, Peterson would not voluntarily testify for the Company, and did not appear at the hearing, despite being subpoenaed by Respondent. (Tr. 603).

(Tr. 201-202). The note was introduced into evidence and it is that it is not legible particularly regarding the dates for the excuse.²⁴ (*See* R. Exh. #16).

Kraber claims that Peterson showed him a document which indicated these dates would be excused, but it was not signed by anyone. Kraber claims he lost the unsigned paper. (Tr. 202, 206). The evidence presented by the General Counsel did not establish that there was anything written on this document other than some circled dates,²⁵ nor is there any proof that a copy of the note was ever put in Kraber's personnel file. Kraber also testified that Peterson talked to someone at his doctor's office, and that they had explained to Peterson that the note was "okay."²⁶ (Tr. 204).

On February 26, Kraber had an unexcused absence, which brought his point total to more than 12. On that day, Crall advised Bachman that Kraber had exceeded the point total.

Bachman did not have a chance to review the information on Kraber until March 8. After seeing that Crall was correct, Bachman approved Kraber's termination. A letter confirming Kraber's termination was sent on March 9, 2010. (GC Exh. #14).

²⁴ Although not offered by the General Counsel, this note was admitted as R. Exh. #16. It is significant that General Counsel never submitted the document -- which undoubtedly was due to the fact that it is illegible, as determined by Respondent. Contrary to the implications of the questions of the Charging Party's attorney, the numbers clearly were not unambiguous. Crall credibly testified that he believed several sections were not legible, including the dates. (Tr. 582-585).

²⁵ The General Counsel presented two other witnesses who purportedly saw this document. However, neither of them testified that there was anything on this paper indicating that Peterson had actually agreed to approve these dates. Craig Batterson described what appeared to be a point summary (similar to GC Exh. # 9). Although Batterson said some points were circled because they were "supposed to come off" (Tr. 101-102), there was no foundation or other basis for this opinion. Thus, this testimony about the missing document is not probative of Peterson's alleged agreement to excuse any of Kraber's points.

²⁶ Per its objection at the hearing (Tr. 204), it is Respondent's position that Kraber's testimony -- regarding the allegation that Kraber's doctor confirmed the dates and/or validity of this note in a conversation with Peterson, and that Peterson allegedly agreed to accept this note based upon a conversation with Kraber's doctor -- was hearsay, and cannot be used to prove the truth of the matter asserted by the allegation.

Kraber contends he was active in the union organizing drive. The ALJ found in this case that Kraber made no effort to conceal his prounion sympathies. Op. at 5-6. Kraber says he solicited seven employees to sign Union “A-cards,” sometime in February 2010. However, there is no evidence that Relco was aware of this activity, and Kraber testified that he kept this conduct secret from supervisors (Tr. 220) which is exactly opposite to the finding of the ALJ in this matter. Cf. Slip Op. at 5-6. Bachman and Crall, the decision-makers regarding Kraber’s discharge, testified that they were unaware of his Union activity (Tr. 478, 553), and that, accordingly, his purported support of the Union played no role in his discharge decision.

Kraber also claimed that he was vocal in employee meetings where the issue about the cost charged for uniforms was discussed. However, the evidence established that, in a meeting conducted by Doug Bachman, the most vocal employee about the uniform issue was Tom Shipp (“Shipp”).²⁷ Shipp testified that there were other people who also spoke up, including Kraber and two other employees -- Jamie McKim (“McKim”). and Richie Purdun (“Purdun”). Like Shipp, both McKim and Purdun are still working for Respondent.²⁸ Shipp stated that although he had discussions with Bachman about his tone of voice at the meeting, no adverse action was been taken against him.²⁹

²⁷ Kraber’s self-serving claim was that he was the loudest and most aggressive spokesperson, although he admitted employee Tom Shipp was agitated and upset in his comments. (Tr. 223). In view of Kraber’s self-interest in this claim, Shipp’s unbiased testimony that he himself was in fact the loudest and most aggressive spokesperson -- which was also confirmed by General Counsel witness Dane See (Tr. 257) -- should prevail.

²⁸ Purdun and McKim both were General Counsel witnesses, who testified that they are still Relco employees. (Tr. 265, 364).

²⁹ Shipp testified that he later learned that Respondent had not been overcharging employees for uniforms, contrary to his belief on the day of the meeting with Doug Bachman. (Tr. 647, 651).

4. **Dane See's Termination**

Dane See ("See") worked as a fabricator for Respondent from January 2009 until he was terminated in March 2010. He attended the meeting where employees raised questions about uniforms, and recalled that Shipp was vocal about the uniform policy. He also recalled that other employees had asked questions, including Kraber and McKim. See conceded that he said nothing at the meeting, and just listened. Subsequently, See made a phone call to Relco's uniform vendor, Cintas, to ask how much the uniforms cost. See admittedly was not directed by anyone to do this, nor did he tell anyone that he was going to do it. (Tr. 257-258).

See was terminated on March 5, 2010, because of the call. (GC Exh. #18). Relco terminated him because he made the call and because he had an abusive interaction with the Cintas driver who delivers uniforms to the Albia facility. (Tr. 594). See testified that, in the period between his discharge and the week of the hearing, he was not looking for work because he was a full-time student at a training school out of state. (Tr. 259-261).

II. **ARGUMENT**

A. **The Discharges Would Have Occurred Anyway**

As the ALJ correctly noted, the employees in question were "at will" employees. An employer generally can discharge an employee for a good reason, a bad reason, or no reason at all. *L'eggs Products v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980). The only time there is liability under the labor Acts, is when the motive, or the "but for" cause of the termination is something that violates the Act, such as union organizing activity. *Ready Mix Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996). *See, also, Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119, 129 (2009) (while an employment discrimination case, discussing discriminatory motive and finding that it must be the "but for" cause of the termination).

The words “because of” mean “by reason of: on account of” 1 Webster’s Third New International Dictionary 194 (1966); *see also* 1 Oxford English Dictionary 746 (1933) (defining “because of” to mean “By reason of, on account of” (italics in original).); The Random House Dictionary of the English Language 132 (1966) (defining “because” to mean “by reason; on account”). Thus, the ordinary meaning of the Act’s requirement that an employer took adverse action “because of” the person’s union organizing activity is that the employee’s union activity was the “reason” that the employer decided to act. *Ready Mix Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996). *See, also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim “cannot succeed unless the employee’s protected trait actually played a role in [the employer’s decision making] process and had a determinative influence on the outcome” (emphasis added)).

To establish a disparate-treatment claim under the plain language of the Act therefore, the charging party must prove that union organizing activity was the “but-for” cause of the employer’s adverse decision. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, ___, 128 S.Ct. 2131, 2141, 170 L.Ed.2d 1012, 1024 (2008) (recognizing that the phrase, “by reason of,” requires at least a showing of “but for” causation (internal quotation marks omitted)); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63-64, and n. 14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (observing that “[i]n common talk, the phrase ‘based on’ indicates a but-for causal relationship and thus a necessary logical condition” and that the statutory phrase, “based on,” has the same meaning as the phrase, “because of” (internal quotation marks omitted)); *cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts* 265 (5th ed. 1984). (“An act or omission is not regarded as a cause of an event if the particular event would have occurred without it”).

The ALJ found nothing wrong with imputing or inferring knowledge to Relco of who was specifically engaged in union organizing activity (Slip Op. at 17), but the fact of the matter is that there is no evidence that management knew who the organizers were. In fact, the evidence from the union's organizer, Ciurej, was that he told them specifically to be discreet. Based on this record, there is no way the judge could have found that the charging parties' union activity was the but for cause of their terminations. The law is what it is, It is not for the ALJ to change it. That is a decision for Congress to make. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, ___, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008). Congress has not yet amended the National Labor Relations Act to include terminations where there are mixed motives and the General Counsel cannot show that anti-union animus was the but for cause of the termination.

The Board established the analytical framework for cases which turn on motive in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). In *Wright*, the Board held that where an unlawful motive only contributes to an employer's disciplinary decision, no unfair labor practice has been committed. If the Company would have made the same decision regardless of the unlawful motive, there is no claim.

It is the General Counsel's burden to establish a *prima facie* case of discriminatory conduct. To do so, the Union must prove by a preponderance of evidence that: (i) the employee engaged in support for, or activity on behalf of, the Union; (ii) the Company was aware of such activity; and (iii) such activity was a motivating factor in the Company's unlawful conduct. *Wright Line*, 251 NLRB 1083 (1980). Only then does the burden shift to the employer to rebut the *prima facie* showing by demonstrating that it would have taken the same action even in the absence of the employee's alleged union activity. *Id.* If the employer meets its burden, the

Union must demonstrate that the employer's proffered justification is a mere pretext for discriminatory conduct.

Even if the Union and General Counsel had met their burden of proving a *prima facie* case, Relco certainly has met its *Wright Line* burden of going forward with the evidence. Relco established at the hearing that the terminations would have occurred anyway. Each of the complaining parties was terminated based on undisputed violations of company policy.

The Board has found, in a number of similar cases that where the employer would have taken the same action anyway, there is no liability. In *Merillat Indus.*, 307 NLRB 1301 (1992), the Board found no violation of the Act, despite the General Counsel establishing a *prima facie* case for discharge based on union animus. The Board held that the employer had successfully demonstrated that the employee would have been discharged anyway for violating the company's rules against stealing regardless of his union activities. *Accord Carry Companies of Illinois, Inc. v. NLRB*, 30 F.3d 922 (7th Cir. 1994). The Board was persuaded by respondent's showing that its discharge of the alleged discriminatee was consistent with its treatment of other employees who committed similar offenses, which is the same as the evidence in the instant case pertaining to Respondent's attendance policy.

Similarly, in *Bashas' Inc.*, 2009 WL 2356673, the ALJ dismissed allegations that respondent violated 8(a)(3) by taking disciplinary action against three employees who violated company policy and the company's legitimate job expectations. The ALJ found that the Board established its *prima facie* case, but because the company put forth evidence that it disciplined other employees for violating the same policies, the ALJ found that respondent satisfied its burden of showing it would have taken disciplinary action even in the absence of the employees' protected activity.

The Charging Parties carry the burden of proving that the employer violated the Act. *See, e.g., Carpenters Health and Welfare Fund*, 327 NLRB No. 39 n. 15 (1998); *Repcos Dist'g, Inc.*, 273 NLRB 158, 163 n.10 (1984). (“It is my understanding that although the criteria set forth in *Wright Line* provides a framework for analyzing these issues, it does not purport to alter the longstanding rule that the ultimate burden of proof rests with the General Counsel.”). Clearly, that burden has not been met in this case.

B. Smith Would Have Been Terminated Anyway

1. There Is No Basis For Inferring That Relco Knew Of Smith’s Union Activity

The ALJ’s conclusion, utterly unsupported by the record, that Relco somehow knew who the employee organizers were is preposterous. First, the evidence of record shows that there were several other prominent employee Union supporters who are still working for Relco who have not been disciplined in any way. (Tr. 39). Although Smith was not required to name the other individuals, he did concede that they are still employed by Relco. (Tr. 76). This fact alone undermines any claim that Relco punished the “ringleaders.”

The evidence also shows that Relco’s Albia facility is large enough and spread out, enough so that it is easy for the Union organizers to avoid close supervision by management. The record also establishes that Relco’s management offices are separate from and above the production area. The management offices do not overlook the production area, only the conference room does. Since Relco’s production area houses the locomotives Relco works on, it is easy for the Union organizers to hide their activities from management. (*See R. Exh. #8*, photos showing locomotives in work areas). Any conclusion by the ALJ that Smith’s Union activities must have been noticed by management clearly has no merit.

(a) **Smith’s Inconsistent Testimony Undermines Conclusion That Management Knew Of His Union Activity**

Any conclusions reached by the ALJ that Relco knew of Smith's Union activity is erroneous because of Smith's inherently inconsistent testimony. If Crall and/or Benboe were aware of Smith's Union activity, why would they have offered to waive points for him on June 11? Why would they then change their minds on June 12? Since there was no testimony about any specific activities by Smith on the evening of June 11 (and/or the morning of June 12), what would suddenly have changed management's collective mind to reverse the point-waiving offer?

Smith testified that Benboe observed him not wearing safety shoes on the Monday of the week he was discharged.³⁰ Smith said that Benboe did not tell him he would be disciplined as a result of that safety violation, but told him that he needed to get a new pair of boots, and that Smith's purported cash-flow problem was not Benboe's concern. (Tr. 52-53). Smith claims he was fired for this same offense four days later. He also says he was engaged in Union activity on June 8. His testimony objectively makes no sense. If Relco did not terminate Smith for violating the safety shoe policy on June 8 because of Union activity -- which Smith alleges had been going on for about two months³¹ -- why would they do so for the same violation four days later?

b. The Absence Of Any Anti-Union Animus Further Refutes Smith's Section 8(a)(3) Charge

In addition to not knowing that Smith was a Union organizer, there is no evidence of record to support Smith's Section 8(a)(3) allegations. Despite the existence of an ongoing organizing campaign that began approximately 18 months before the hearing in this case began

³⁰ The record established that Smith was terminated on Friday, June 12, and was sent home the prior day -- June 11 -- for not wearing safety shoes. Thus, the "Monday" that Smith referred to was June 8. It is noteworthy that this was several weeks after the May 15 meeting when Bachman spoke about the Union, upon learning of the card signing activity. (Tr. 45). Thus, the incidents of the week of June 8 clearly occurred well after the onset of both Smith's alleged activity on April 10 (Tr. 41-45) and the date when the Company first addressed the Union issue.

³¹ Smith alleged that this conduct commenced on April 10. (Tr. 41-45).

and which resulted in the filing of an election Petition the week before the hearing, there are no Section 8(a)(1) allegations related to Respondent's response to Union activities.³² To the contrary, Smith's own testimony is that in Bachman's lone scripted talk with employees about the issue of unionization, he "started off telling us that he is not opposed to this, you know, it was our choice whether we wanted to or not . . ." (Tr. 46).

Since the Union organizing started in April 2009, both incidents of visible Union organizing activity and Relco's statements reflecting its opinion about the Union were few and far between. The organizing activity began in approximately Between April 2009 and when the hearing in this case was held in September of 2010, the only open Union activity was when outside organizer Ciurej, sent out two letters (GC Exhs. #24 & 26) and when he distributed leaflets outside the plant on one day in September 2009. As of the date of the hearing - almost 18 months later - Relco's response was to hold the May 2009 employee scripted meeting to address the Union issue, they had distributed one letter to employees in August 2009 (GC Exh. #25), and had periodic internal discussions about the Union during safety meetings. (Tr. 438-439). Such minimal Company campaign activity is entirely consistent with Smith's description of Bachman's saying he was not opposed to a Union.

Additional evidence in the record undermining Smith's claims includes the fact that there was no evidence produced at the hearing to prove that anyone other than the charging parties were retaliated against. Purdun is still employed. He testified that he was in favor of the Union, and that Relco saw a copy of his pro-union statement in December 2009. (Tr. 287).

³² The only Section 8(a)(1). violations were: (1). the alleged termination for protected concerted activity related to Dane See; (2). the General Counsel's belated alternative theory for Tim Kraber's discharge; and (3). issues related to Respondent's allegedly overly restrictive non-disclosure agreement. (See GC Exh. 1(x)).

Furthermore, in response to General Counsel questions, Purdun testified that he never had any fear of losing his job because of his Union activities at the plant. (Tr. 265).

Similarly, the ALJ's finding in favor of Smith is refuted by the fact that the only other employee who had talked openly about the Union in front of management was Kraber. Kraber testified that he made statements in favor of the Union during the May 15, 2009 meeting with by Bachman. (Tr. 179).³³ Clearly, if they were going to terminate people for Union activities, they would have retaliated against any employees who expressed pro-Union sentiments.

Any argument that Relco's conduct created an atmosphere of fear is unsupported by the record. It is further refuted by the fact that an election Petition was filed the week before the hearing began. (Tr. 44). This obviously demonstrates that employees were not so "frightened" "or "intimidated" that they wouldn't sign election cards hold an election.³⁴

C. Dixon Would Have Been Terminated Anyway

The testimony of the witnesses produced by the General Counsel in general were not credible the ALJ's crediting their testimony is puzzling even from a logic standpoint. Smith has been discussed above.

With respect to Dixon, he contends that he was not fired for disobeying a direct order by a supervisor. He disputes the fact that he was doing anything unsafe even though the testimony supports the view that he was observed doing working in an unsafe manner on two occasions (Tr. 478-479, 543, 546, 610).

³³ Bachman did not recall any statements made by Kraber, although he said it was possible that he spoke at the meeting. (Tr. 477).

³⁴ The General Counsel suggested that Respondent's changes in its Non-Disclosure Agreement (NDA") in July 2010 were part of an alleged scheme to interfere with employee rights. However, as demonstrated by R. Ex. #19, -- which shows the modifications made in the NDA at that time (Tr. 605). -- the changes therein had nothing to do with issues related to employee communication about working conditions, or with the sections previously alleged to be illegal by the General Counsel. Rather, the focus of that document was to protect Relco's intellectual property and proprietary information.

First, Dixon claims that Benboe told him to place the ladder on the right side of the locomotive as indicated on GC Exh. #12. He says he was told to do this to “catch” him if he were to fall off the locomotive. (Tr. 118, 123, 140-141). Apart from the fact that this testimony makes no sense, it is also improbable. No one could seriously contend that a ladder placed anywhere on a locomotive could prevent someone from falling off. Furthermore, Dixon did not include this improbable claim in the Affidavit he gave to the Board Agent before the hearing. (Tr. 141). In contrast, Benboe was consistent with his explanation of what happened, that he directed Dixon to either move to the center or to use a ladder. That kind of instruction makes sense. He did not tell him to put the ladder on one side to break his fall. GC Exh. #12.³⁵

Furthermore, Dixon conceded at the hearing that Benboe told him that he needed to put up a ladder or do something different to stay away from the edge of the locomotive (Tr. 118, 125).. That testimony is consistent with Benboe’s testimony that he told Dixon to work toward the center.. Dixon also claims he was told *exactly* how to place the ladder -- *i.e.*, as the depiction is shown on GC Exh. #12. (Tr. 120, 122). Dixon’s hearing description of his conversation with Benboe is significantly different than what he said in his affidavit to the Board Agent.

Dixon also contends that at his unemployment hearing, he told the hearing referee that Benboe told him to put the ladder up on the right side. (Tr. 133). However, this statement is not found in the transcript of the unemployment hearing (GC Exh. #20). Nor is it found in the referee’s fact finding in the unemployment case. (R. Exh. #2).³⁶ To the contrary, the

³⁵ Benboe repeatedly testified that he had not instructed Dixon to put a ladder in a particular location. Despite General Counsel’s effort to trick him into saying otherwise by asking this question again at the end of another line of inquiry, Benboe unhesitatingly reaffirmed what he had credibly testified in the first instance. (*See* Tr. 609, 625 & 632). Furthermore, Benboe’s testimony was entirely consistent with the incident report which he prepared on the day Smith was sent home. (*See* R. Exh. #22).

³⁶ There are references in G.C. Exh. #20 to discussions about ladders, although that transcript certainly is not clear, due to a lack of specific identifications of witnesses in some portions, and because of numerous sections where portions of the testimony was “inaudible.” Nevertheless, an examination of
Fn. cont’d.

unemployment referee found that Benboe told Dixon “either [to] work from the center of the locomotive or to put up a ladder on the locomotive walkway and work from the ladder.” (R. Exh. #2, ALJ decision, p. 2). That statement makes sense.

Dixon was also discredited by what he told two disinterested co-workers was the reason for his discharge. First, General Counsel witness Purdun testified that Dixon told him that Benboe had ordered him twice to change how he was working, and that Dixon said that he “blew Cliff [Benboe] off.” Purdun has no basis for fabricating his testimony. (Tr. 147).

Similarly, Jonathon Graber testified that after his discharge, Dixon told him he was terminated for safety reasons. At the time he was fired, he didn’t tell anyone he was terminated because of his Union organizing activity. (*Cf.* Tr. 322 *with* Tr. 147).³⁷

Relco’s work rules provide that insubordination is grounds for immediate discharge. The ALJ’s finding to the contrary is not supported by the testimony at the hearing.

The evidence at the hearing is that three different managers at Relco observed him working on the locomotive in an unsafe manner. Three people saw Dixon working with his legs were hanging off the side, as depicted in GC Exh. #12. This testimony is not credited by the ALJ. But the record establishes that after Dixon was told to either work closer to the center or work from a ladder, he was again observed working in an unsafe same manner by the same three Relco managers. The only difference was that after being warned Dixon dangled his legs off the opposite side of the locomotive.

both this document, and the paperwork in R. Exh. #2 involving statements of the parties (prior to the ALJ decision). only establish that in fact there were discussions about ladders. However, this occurred only in the context of the use of the ladder being an *option* -- as was the employee moving to the center of the locomotive top. There is nothing inconsistent in either of these documents with the unemployment ALJ’s factual findings, (R. Exh. #2/ALJ Decision, p. 2)., the testimony of Benboe, or his incident report (R. Exh. #22)., regarding what Benboe directed Dixon to do, as discussed above.

³⁷ Significantly, although the General Counsel had Affidavits from both Purdun and Graber, he did not use those documents to challenge their credible testimony.

As noted above, Relco's work rules allow immediate termination for offenses such as insubordination, which is why Dixon was terminated.

Further, there is no evidence he was treated differently than anyone else. There were no comparators produced by the General Counsel at the hearing. The General Counsel did not provide examples of anyone else who violated a direct order from a supervisor who was allowed to continue working at Relco. The ALJ's conclusion that the absence of proof demonstrates a positive is the age-old fallacy of the "Null Hypothesis," which is no hypothesis at all.

Relco's insubordination policy does not preclude it from firing an employee when an infraction occurs. In fact, other than attendance problems, Relco has had relatively few occasions to terminate employees for any other reason. In the two years prior to the hearing, Relco terminated five employees for performance reasons and none of the five were terminated for insubordination other than Dixon. (R. Exhs. #6 & 7, Tr. 415-417). Clearly, this shows that Relco has enforced its policies in a consistent manner and that Dixon was discharged due to insubordination.³⁸

Whether or not Dixon thought he was working in a safe manner is irrelevant. If Dixon "reasonably believed" he had been given an order to do something he might have had the right to refuse to do it. But if the employer reasonably believes that an employee is working in an unsafe manner, the employer's reasonable belief even if wrong, doesn't result in liability.

It is well-established that in order to meet its burden of going forward with the evidence under *Wright Line*, the employer does not have to prove that the employee committed the alleged offense. All the employer has to show is that it had a reasonable belief that the employee was

³⁸ This is contrary to Dixon's apparent misunderstanding of the disciplinary rules, based upon statements he made related to his unemployment claim, where he argued that he should have received progressive discipline. (See R. Exh. #2, p. 3).

committing or had committed the offense, and that it acted on that reasonable belief when it terminated him. *See McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002), *citing Yuker Construction*, 335 NLRB 1072 (2001). (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity).; *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999). (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient).; and *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989). (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because Relco reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself)..

Relco met its burden of going forward with the evidence in this manner and the ALJ simply chose to ignore this fact.

The General Counsel's response to Relco's good faith belief was to argue that Dixon had worked unsafely in the past without consequences. That argument hits the *Wright Line* case on its head.

Furthermore, if Dixon claims he did not hang off the edge when he worked on a similar project the week before (Tr. 142), he was not working in the same position when he was observed and warned by management.

Additionally, Benboe's testimony, not credited by the ALJ, was that he never observed Dixon's work on that project. Rather, after giving Dixon the assignment, Benboe's practice was to inspect Dixon's work when the project was over. He would only observe Dixon's work if there was a problem with it such as the job not getting done on time. (Tr. 627-628). Thus, how

Dixon did his job the week before is irrelevant, since he says he was not hanging over the edge in the prior week. Further, there is no evidence of record to suggest that any management personnel had a reason to or even actually did observe Dixon until the week he was discharged.

For these reasons, Dixon's charge should have been dismissed by the ALJ.

The ALJ also credited testimony that Dixon was working in the normal accepted manner for someone performing tasks on top of a locomotive. Again, this argument begs the question. The issue is not whether Dixon was following normal safety procedures at the time he was discharged. Dixon was not terminated for violating a safety rule, even though he did violate safety rules when he was warned by Benboe. Rather, his discharge was for disobeying a direct order.³⁹ Thus, issue before the ALJ was not whether he believed Dixon violated any safety rules. The issue is not whether other employees worked on locomotive in this same way. The issue is not whether Dixon's coworkers thought the way Dixon was working was okay. The issue is whether there was anyone else the General Counsel could point to who was directly warned by a supervisor about the way he or she was doing something, and that person ignored the direct order and was allowed to continue working at Relco.

The General Counsel presented testimony apparently intended to undermine the validity of Relco's safety concern, by attempting to establish (1) that the ladder position which Dixon claims he was using and/or the manner in which he was working was appropriate, and/or (2) Dixon was not working in the manner observed by management -- *i.e.*, on top of a locomotive with his legs hanging over the edge. However, the General Counsel's witnesses had limited knowledge and the circumstances they described were not the same as the circumstance involving Dixon on the day he was terminated.

³⁹ Kraber's testimony that there was no requirement that an employee use a ladder to work on top of locomotive (Tr. 175-176). which is also irrelevant, and not disputed by management.

Regarding Dixon's positioning of the ladder, General Counsel witness Anthony Gilland testified that he saw ladders in the position depicted on the right side of GC Exh. #12. But this was only when employees were working "inside the carbody" or "on the side of the carbody." (Tr. 334-335). This testimony proves nothing.

Similarly, General Counsel witness Mark Baugher testified that the position of the ladder on the right side (GC Exh. #12). -- which is the position which Dixon alleges he was told by Benboe to place the ladder -- is only used to perform work on the "side" of the locomotive. He testified and that a ladder is never used to perform work on top of a locomotive. (Tr. 356).

The ALJ apparently credited vague witness statements about the problems of using a ladder as depicted on the left side of GC Exh. #12. But this testimony is irrelevant because Dixon was not disciplined for refusing to use the ladder but, rather, for disobeying a direct order.⁴⁰

Baugher testified that there is no place to tie a safety hook or harnesses when working on top of a locomotive. (Tr. 362). If this is true, it makes the existence of a direct order even more important. It validates Relco's concerns about the manner in which Dixon was performing his work.

Kraber testified that he has worked on top of a locomotive "laying down, sitting down," but he never said that he was hanging over the edge (Tr. 176). Kraber's testimony is consistent with what Benboe and Bachman said Dixon was told to do. Furthermore, Kraber never said that he dangled his feet off the side of any locomotive. He never said he did so while being observed

⁴⁰ The fact that Baugher and other witnesses may have never seen anyone use a ladder in the position depicted on the left side of GC Exh. #12, proves nothing other than the fact that they had no personal observations themselves. Obviously, this testimony did not prove the negative -- *i.e.*, the limited observations of a witness does not establish that no one has ever used a ladder in that manner to work on top of a locomotive. In any case, as noted above, Benboe did not specify any particular placement of the ladder -- rather, he simply told Dixon that one option was to use a ladder to avoid hanging over the edge while performing the task in question.

by management, and/or that he refused to follow an order when told to cease working in a particular manner (either on top of a locomotive or elsewhere).⁴¹ There was is no evidence at the hearing establishing that any employee ever worked on the top of a locomotive with their feet hanging off while being observed by management. In the absence of such evidence, none of this testimony should have been credited by the ALJ.

Similarly, while Baugher testified that he did not see Dixon dangling his feet over the edge of a locomotive, he also admitted that he had only observed Dixon working for a “minute or two.” (Tr. 361).. That testimony doesn’t prove anything.

Baugher also testified that what Benboe and Bachman said is correct; that an employee has to be centered when working on top of locomotives. (Tr. 361). The fact that other employees also know that they must work in the manner Benboe directed Dixon to do, makes Dixon’s disobedience of Benboe’s direct order even more telling. (Tr. 295-296).

Furthermore, even if the record established a retaliatory motive, Dixon’s charge should still have been dismissed under the *Wright Line* line of cases. Even if the General Counsel had produced evidence of anti-union animus, even if the General Counsel had proven a discriminatory motive toward Dixon, the fact that Dixon would have been discharged anyway for

⁴¹ On cross examination, Kraber was asked if he had ever hung his legs off the top of a locomotive while working in that location at a time when he was observed by a supervisor. Kraber did not directly answer that question, but, rather, said that he had worked in that manner many times, without ever specifically stating that he had first-hand knowledge that a supervisor was actually aware that he had done so. (Tr. 221). In any case, unless he was observed by COO Bachman -- who made the determination that Dixon’s working manner was unsafe -- it would not be a comparable situation. Furthermore, to establish the existence of prior disparate treatment, Kraber would have had to actually have been ordered to stop working in that manner, and refused to do so, to put him in the same situation as Dixon. Finally, the fact that Kraber allegedly was an active Union supporter -- and is the only one of these employees who openly said anything that arguably could be construed to convey his pro-Union position to management -- any claim that he had worked in a similar unsafe manner without being disciplined would not show disparate treatment, since such a conclusion must necessarily compare a person who did not engage in the same protected activities that a discriminatee allegedly had.

insubordination undermines his entire case. It is puzzling to understand how the ALJ could rule otherwise.

Recently, the Board upheld an employer's decision to discharge an employee for insubordination under the *Wright Line* analysis. See *Amersino Marketing Group, LLC*, 357 NLRB No. 58 (Nov. 19, 2007). (employer properly discharged employee after employee's insubordinate announcement that he would not perform one of his required duties - the inventory - despite the employee's protected conduct in serving as the Union's election observer). See also, *Allied Mechanical*, 349 NLRB No. 117 (May 31, 2007) (the Board, in applying *Wright Line* analysis, upheld the employer's decision to terminate an employee for rude and insubordinate behavior); *Consolidated Biscuit Co.*, 346 NLRB No. 101 (April 28, 2006) (the Board held that the employer met its *Wright Line* burden by demonstrating that its decision to terminate the employee for insubordination based on his failure to comply with a supervisor's direct order was legitimate and would have occurred even in the absence of the employee's protected activity).

Even in those cases where an employer has been unable to show that it has disciplined other employees consistent with its treatment of the alleged discriminatee, the Board has still found in favor of the employer where the employee would have been discharged anyway. In *American Golf Corp.*, 338 NLRB 581, the Board reversed this ALJ's finding that the alleged discriminatee was unlawfully discharged because of his protected union activity. The Board found that he would have been discharged for disloyal conduct not protected by the Act, and that therefore there was no Section 8(a)(3) violation despite the fact that the respondent in that case was unable to show a past practice of discipline for the same kind of conduct involved. The Board recognized that although the respondent in that case could not cite any history of dealing with such an act, it simply had not previously been confronted with that level of disloyalty.

This ALJ himself has found that the presence of a compelling and legitimate explanation for an adverse action may negate the General Counsel's *prima facie* case. In *Providence Health Sys.*, 2003 WL 22988750, this ALJ dismissed the complaint where the alleged discriminatee had disobeyed an order not to leave a counseling session, finding it to be a legal discharge for insubordination, despite evidence of employer knowledge of Union activity. As in the instant case, in *Providence* there was no evidence of employer animus, and only mild opposition to Union activity. The same result is clearly appropriate herein.

D. The Evidence did not Show That Kraber was Terminated Due to Union-Related Or Other Protected Activity

1. There Is No Evidence That Relco Was Aware Of Kraber's Alleged Card-Signing Activity, And There was no Nexus Established Between any of Kraber's Pro-Union Statements and his Termination

The evidence of Kraber's Union activity was limited to two things: card solicitation and pro-Union statements in the presence of management personnel. First, with respect to the card solicitation, there is no evidence that management was aware of that Kraber was doing this. Kraber alleged he collected signature cards several weeks before his termination. However, neither in his testimony nor that of any other General Counsel witness demonstrated that Relco was aware of this activity. There was no testimony that he was ever observed by management soliciting cards, or that anyone told management that he was doing so. Nor was there any testimony that Kraber was ever spoken to by a supervisor about this alleged activity. As was the case with Smith and Dixon, Kraber admitted he acted in a discreet manner. Furthermore, knowledge of Union activity involving any individual employee -- including Kraber -- was credibly and specifically refuted by the management witnesses at the hearing.

The only knowledge of Kraber's activities produced at the hearing was the statements he made in the presence of management. First, Kraber contended that in Bachman's May 2009 meeting addressing the Union issue, he said that the Company could not change its rules if there

was a Union. (Tr. 179). However, there is no nexus between this statement and Kraber's termination because he was not terminated until approximately 10 months later. The lack of temporal proximity defeats his claims.⁴² See, e.g., *Edward T. Ellis & Suzanne O. Rudder, Current Developments in the Law of Retaliation, A.L.I.-A.B.A. Course of Study, Current Developments in Employment Law* 241, 246–57 (July 27, 2000) (identifying temporal proximity as the “single most important factor in a circumstantial retaliation case”). See, also, *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (finding three months not “very close” and therefore not sufficient evidence of temporal proximity). Similarly, see *Stein v. Kent State University*, where the Sixth Circuit held that temporal proximity may only “bolster” a causal connection and may not itself support an inference of such a connection. See No. 98–3278, 1999 WL 357752, at *7 (6th Cir. 1999). Although the Sixth Circuit had held previously that temporal proximity may suffice to establish a prima facie causal connection, the *Harris* court, too, seemed to require something adhering to more than a “de minimis” prima facie burden. See *Harris v. King*, No. 98–5826, 2000 WL 353676, at *2–3 (6th Cir. 2000).

Kraber also claimed that he made similar statements in February 2010. He allegedly said this to Relco supervisor Curt Peterson (Tr. 198), who Kraber claims excused Kraber's two days of absence on January 19 and 20, 2010. Clearly, Kraber's own testimony undermines any conclusions about a retaliatory motive. If, in fact, Relco was inclined to retaliate against an employee who it perceived to be pro-Union, it is totally illogical that Peterson would have offered to help excuse points for Kraber after learning he had made pro-Union statements.⁴³

⁴² See GC Exh. #14, which shows that Kraber had 15 days of excused absences in his last 12 months of employment with Respondent, including nine days that were excused after he spoke up about the Union at this May 2009 meeting. (See also, fn. 38, *supra*).

⁴³ Kraber also alleges that he made these same statements to Kraber and Benboe. (Tr. 198). However, Crall credibly denied any knowledge of Kraber's Union activity (Tr. 553). and Benboe had no knowledge concerning which employees were pro-Union. (Tr. 640).

The ALJ also apparently credited the notion that Relco knew of Kraber's pro-Union sentiments because Kraber claims that, on a few occasions, he wore a t-shirt from his former employer (John Deere) containing a UAW Union insignia.⁴⁴ Kraber conceded that neither Benboe nor any other supervisor ever said anything derogatory about this t-shirt. Kraber's own testimony was that Benboe praised his work skills (unrelated to his attendance) at the time of his termination. (Tr. 218). Even assuming that Benboe noticed the t-shirt on the "several" days Kraber alleges he wore it, this claim alone clearly does not support the ALJ's conclusion that it prompted management hostility toward Kraber. It is especially hard to understand in light of Benboe's Union background. (Tr. 641). Furthermore, simply wearing a Company t-shirt from a prior employer with a Union insignia does not by itself demonstrate pro-Union sentiment.

The ALJ also credited Kraber's testimony that his termination was part of an ongoing effort by Relco to terminate key employee organizers. However, any such analysis is not supported by the record. First, as noted above, Smith's testimony was that the two other unnamed principal organizers are still employed by Relco and Kraber's termination did not occur until a couple of months after he claims he began his organizing efforts. Furthermore, while Kraber claimed there was proximity in relation to Dixon's termination and a leafleting incident, there is no dispute that neither Dixon nor any other employees were part of the leafleting effort. There was also no evidence that Relco ever believed that any employees were involved in the leafleting incident.

In an apparent effort to extend this conspiracy theory to his case, Kraber claimed that, prior to his card-solicitation in February 2010, organizing activity at Relco had slowed down at the end of 2009. This testimony was credited by the ALJ, in the sense that the ALJ held that

⁴⁴ Kraber testified that he wore this shirt "several times throughout the whole time of being there." (Tr. 189, ln. 2).

Kraber was targeted because of his involvement in this alleged renewed activity. However, Kraber admitted that his claim of a slow down was based only on what he personally believed which he conceded did not necessarily reflect the belief of the other approximate 99 production employees. (Tr. 220). Furthermore, Baugher contradicted Kraber's claim that he started card solicitation in February 2010, by testifying that Kraber was doing so up to three months before his termination. (Tr. 98-100).⁴⁵

Kraber also challenged Relco's refusal to accept his chiropractic note for the January 19-20, 2010 absences, despite the fact that it is clear that this was Relco's policy. The policy was not applied only to Kraber.⁴⁶ Kraber admits that Relco advised him of this fact in January 2010, before he allegedly renewed his Union activity in mid-February 2010. (Tr. 190). Thus, the company's application of this aspect of its attendance policy should not have been construed by the ALJ to be evidence of retaliation.

It is also significant that Kraber admits that he was given attendance point summaries in March, 2009 and also in July and September of 2009 (R. Exhs. #11-13), both before he had engaged in any union organizing activity. This evidence, along with his testimony about a counseling session he had with Crall concerning his point total in December of 2009 - more than six weeks before he engaged in renewed Union activity - further undermines the ALJ's finding that he was discriminated.

Finally, since Bachman was informed by Crall on February 26, 2010 that Kraber was subject to discipline under Relco's attendance policy, there is no merit to any conclusion that

⁴⁵ See also footnote 48, *supra* regarding this argument.

⁴⁶ General Counsel presented no evidence whatsoever to contradict Respondent's application of its policy regarding chiropractic notes, or to the fact that this policy was reaffirmed via the posting of R. Exh. #3 on December 4, 2009. (The fact that Kraber alleges that he personally did not see the letter obviously does not prove that it was not posted as described by Bachman.). It is clear from Kraber's testimony that he continued to challenge the fact that chiropractic notes were not acceptable, notwithstanding Respondent's reaffirmation of the policy on December 4, 2009. (Tr. 199, 231, 236).

Bachman wanted to review Kraber's situation before terminating him because of a discriminatory motive. If Bachman's goal was to find a reason to terminate Kraber, there was no need for him to postpone the termination decision. If he knew of Kraber's alleged card-signing and wanted to retaliate, he simply would have directed Crall to apply the points and discharge him right away. Furthermore, if Bachman believed Kraber was soliciting cards, why would he have let him work another 10 days, thereby enabling him to continue his organizing efforts? The answer is obvious.

2. The Absence Of Any Anti-Union Animus Further Refutes Kraber's Section 8(a)(3) Charge

The same arguments pertaining to the absence of any anti-union animus raised regarding Smith and Dixon are also applicable to Kraber's Section 8(a)(3) allegation.

3. The Evidence Demonstrated That Kraber Was Not Terminated For the Uniform Issue

The ALJ's conclusion that Kraber was terminated because of his involvement in a uniform issue as concerted activity is also not supported by the record.⁴⁷ Kraber spoke up in a meeting about uniforms, but the most vocal complainer was Tom Shipp. Shipp testified that he was by far the most outspoken employee at this meeting, and he wasn't terminated or disciplined. Furthermore, when Kraber spoke at the meeting, he was already subject to termination because he had already exceeded 11 points in a rolling 12-month period.

It is also significant that Kraber concedes that at the uniform meeting he made a suggestion that the employees vote on maintaining the status quo until more information could be obtained. Bachman agreed with Kraber's suggestion. (Tr. 193-194). This clearly is not the act of a discriminatory employer.

⁴⁷ In fact, this theory was obviously an afterthought, based upon a Charge filed the week before the hearing. (See GC Exh. #1(4)(y)).

The Board has held that an employer's lack of animosity toward an employee's protected activity undermines any claim that it was a motivating factor. In *Copps Foods*, 323 NLRB 998, 1000 (1997), the Board dismissed Section 8(a)(1) allegations based on alleged protected activity, finding it significant that there was no evidence the employer had ever discharged or disciplined an employee for talking about matters of mutual concern. The Board noted that there was evidence in the record that employees who engaged in "unmistakable concerted activity" did not elicit a negative reaction from management, and that, to the contrary, those employees received satisfactory responses from the employer." *Id.*

4. Kraber Was Not A Credible Witness And All Disputed Facts Should Have Been Resolved Against Him

To the extent the ALJ based his decision on credibility, Kraber was not a credible witness. First, despite the fact that Relco issued a notice to all employees reaffirming its refusal to accept chiropractic notes (R. Exh. #3), Kraber testified that he was unaware of this letter. His highly unlikely and objectively self-serving. (Tr. 217-218).

Kraber also contradicted Shipp by exaggerating his role in uniform meeting. (Tr. 223). Shipp who at best had no personal interest in this hearing and who at worst should have been supportive of his co-workers, testified that he was the most outspoken employee at the uniform meeting, and that the other three employees who spoke up at this meeting -- including Kraber -- never got as carried away as Shipp did. (Tr. 647-648, 651-652). Similarly, Kraber embellished the facts by testifying that his card-singing activity began shortly before his discharge. (Tr. 183, 189-190). His testimony was contradicted by Baugher who testified that Kraber had been soliciting Union cards for up to three months prior to his discharge. (Tr. 98-100). Furthermore, Kraber testimony conflicts with Crall's testimony that subsequent to Kraber's termination, he told Crall that he should "watch his back," and that he knew where Crall's wife's new building

was which Crall construed as a direct threat. (Tr. 226, 551).⁴⁸ Kraber's claim that he didn't threaten Crall's is simply not credible.

5. Relco's Decision To Terminate Kraber Was Based On Relco's Legitimate, Correct And Permitted Conclusion Kraber's Absences Had Exceeded The Attendance Policy Maximum

a. Relco's Decision-Makers Believed In Good Faith That Kraber's Disputed Absences Had Not Been Excused By Supervisor Peterson

The evidence established that when Kraber was absent on February 26, Crall was advised that, according to Company records, he had reached the 12 point maximum. It is also undisputed that Crall called Bachman while Bachman was on vacation, to advise him of this fact. Because Bachman had started to review all attendance terminations as of the beginning of 2010, Kraber's termination was not immediately implemented. At the time, it was clear that neither Bachman nor Crall were aware of the chiropractor excuse allegedly approved by Peterson, and, thus, they acted in good faith.

There was no evidence to establish that subsequently Crall implemented any scheme to revoke Peterson's alleged decision to excuse Kraber's absences on January 19 and 20. The fact that Bachman made the decision to terminate Kraber before learning of the alleged approval of additional excused days itself undermines the existence of any discriminatory motive. Bachman and Crall did not learn of the alleged excuse of the January absences until after the decision to discharge Kraber was made on March 8. At that time, all Bachman saw in Kraber's file was a

⁴⁸ This threat was obviously not part of the decision to terminate Kraber, but was offered solely for the purposes of impeachment, which Respondent believes is established by Kraber's denial of Crall's credible recollection of this conversation. Similarly, whether or not Crall perceived it as a serious threat -- which apparently was the purpose of questions asked by General Counsel on cross examination (Tr. 578). -- is irrelevant. No Respondent witness ever contended that he was dangerous, and efforts to ask about his criminal record was solely for purposes of impeachment pursuant to FRE 609. (Tr. 227).

chiropractic note for January 19 and 20, which was not an excused absence under the company's policy.

Furthermore, as for the medical note that was illegible, in response to the ALJ's questions, Crall explained that Peterson told him that he had to get a legible note. Kraber's claim that Peterson's conversation with someone from the doctor's office had satisfied Peterson's concern is ridiculous. Whether or not that actually happened is irrelevant, because what is important is the information Crall and Bachman used to base their final decision. Again, under *Wright Line*, it doesn't matter whether they were right or wrong in their belief. All the employer need show is that it had a reasonable belief that the employee committed the offense, and that it acted on that good faith belief when it discharged him. See *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002), citing *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself). Clearly, Relco has met the burden required by *McKesson* by showing that its decision-makers decided that the doctor's note was illegible, had the good-faith belief that Peterson had told Kraber to get a new legible note, and relied upon that belief when reaffirming Kraber's termination pursuant to its attendance policy.

b. Even If Peterson Told Kraber His Disputed Absences Were Excused, He Had No Authority To Do So And Relco's Rejection Of This Excuse Was Not Evidence Of Pretext Or Discrimination

As described above, there is a dispute regarding whether Peterson allegedly told Kraber he would accept R. Exh. #16 to excuse the January 19-20 absences. Clearly Peterson had no authority to alter Relco's attendance. Furthermore, Peterson was not Kraber's supervisor at the time. Also, there is no way Peterson's authority would supersede that of Bachman, whether or not he actually told Kraber that he would accept the note in question. As discussed above, because of its attendance problem, Relco does not excuse points, despite frequent employee requests to do so. Thus, even if Bachman had known about any alleged decision to accept R. Exh. #16 as an excuse, his refusal to accept it is not be evidence of a discriminatory motive.

c. The General Counsel Did Not Meet Its Burden Of Proof To Establish That Former Supervisor Peterson Told Kraber That His January 19-20 Absences Were Excused

For the foregoing reasons, even if Peterson told Kraber he would be excused for his absences on January 19-20 on the basis of R. Ex. #16, that would not establish a violation of Section 8(a)(3).⁴⁹ The evidence of record does not show that Peterson excused Kraber for anything. First, it is not disputed that Peterson questioned the validity of the illegible note. Kraber admits this. (Tr. 202). The claim that Peterson told Kraber the note was acceptable is inconsistent with the information provided by Peterson to Crall, as explained by Crall in his response to the ALJ's questions. (R. Exh. #18). There is no reason Peterson would excuse an absence, and not tell his supervisors that he had done so. If he feared negative consequences by

⁴⁹ As noted above, Peterson was a former supervisor who did not respond to Respondent's subpoena, and thus could not be presented as a witness to rebut Kraber's claims about the illegible note, per Respondent's belief articulated in its position statement. (*See* R. Exh. #18).

a reversing his disallowance of the absences, logically he never would have considered the absences unexcused in the first place.

The ALJ apparently credited the testimony of Jamie McKim, who testified he heard Peterson say that he had spoken to the nurse and “got everything squared away about the note in question.” (Tr. 366). On cross-examination, when asked if Peterson had asked the doctors to send another note, McKim testified that Kraber “called and had them send another one.” (Tr. 371, Ins. 20-21). Thus, even McKim testimony shows that Peterson told Kraber to bring another note.

The ALJ’s role was not to judge whether this was sound labor relations policy, or even whether it was “fair” under the circumstances. Rather, the issue was whether Relco had a legitimate non-discriminatory reason for deciding that Kraber had exceeded the maximum point total under its attendance policy.

d. **The Delay In The Implementation Of The Kraber Termination Decision Does Not Support The ALJ’s Findings in Kraber’s Favor And, To The Contrary, Undermines His Section 8(a)(3) Charge**

Somehow, the ALJ concluded that the fact that Kraber was allowed to work for another week undermines the validity of Bachman’s ultimate to terminate him in accordance with the company’s attendance policy. In this regard, both Bachman’s testimony and the documentation offered in support of it (R. Exh. #10) establish that Bachman was out of town for all but one day between the end of his vacation and the beginning of a business trip during the first week of March 2010. This delay itself is not be evidence of any illegal motive, as apparently believed by the ALJ. The indisputable evidence establishes that Bachman didn’t terminate Kraber earlier because he did not yet have the chance to review Kraber’s attendance record. It is clear that the

delay was due to Bachman's decision to review all attendance disciplinary actions personally, and had nothing to do with Kraber specifically.⁵⁰

The fact that the company allowed Kraber to continue working until it was sure he should be terminated undermines any claim that Relco was motivated by illegal motive.

Thus, any conclusion that this delay is evidence of pretext is erroneous.

E. See Was Not Terminated For Protected Concerted Activity And His Section 8(a)(1) Charge Should Have Been Dismissed

1. See Did Not Engage In Protected Concerted Activity

The Charge alleges that See was terminated in retaliation for engaging in protected concerted activity. As discussed above, See was discharged because he contacted Relco's uniform vendor, Cintas. Although Relco incorrectly believed that he was abusive to the Cintas representative he spoke with, See was not engaged in any concerted activity when he called.

The doctrine applicable to this charge was articulated in *LaCorte Electrical Construction and Maintenance, Inc.*, 1994 NLRB Lexis 279 (ALJ Biblowitz, 1994) at p. 6. In order to find that an employer committed a Section 8(a)(1) violation, the evidence must establish that the alleged discriminatee was acting with the authority of other employees. It must also show that the employer was aware of this fact. Such knowledge is not inferred as the ALJ did in this case.

a. See Did Not Act On Behalf Of Other Employees

At the uniform meeting, See was not one of the people who spoke up. To the contrary, it was other employees who did the talking, most notably Shipp. Furthermore, See did not allege that any other employee authorized him to contact Cintas on their behalf. In *LaCorte*, the individual who engaged in concerted activity was the employee representative, and no

⁵⁰ (See Tr. 507, 512).

employees objected when he advised them he was going to raise the issue with the employer. There are no similar facts in this case.

This case is more like the fact situation in *Allied Erecting and Dismantling Company, Inc.*, 270 NLRB No. 84 (1984), where an employee working for a subcontracting company went directly to the project engineer to solicit information about the appropriate wage rates for employees working on that project. The ALJ in that case found that the respondent was upset that the employee had contacted another employer to inquire about the wage rates. He concluded that the petitioner's termination for that conduct violated Section 8(a)(1). However, the Board reversed the ALJ's decision, because it was undisputed that the alleged discriminate had gone by himself to visit the project engineer. There was no evidence that the employees in any way supported this conduct. Accordingly, the Board held that it could not conclude that this conduct was done with or on the authority of other employees. This case is virtually identical to the facts in *Allied*.

b. Even if See's Claims Are Credited, The Protections Afforded Concerted Activity Do Not Extend to Contact With Relco's Vendor

Even assuming that See had authority to contact Cintas, the doctrine of concerted activity does not extend to contact with Relco's vendor. The ALJ concluded that See's claims rise and fall on whether his contacting Cintas represents a continuation of the activity that occurred in the two employee meetings on the uniform issue. Op. at 21. The problem with this conclusion is the fact that See wasn't engaged in concerted activity in the two employee meetings. If he didn't engage in concerted activity at the employee meetings then there is nothing to "continue."

This case is not like the facts in *Every Woman's Place, Inc.*, 282 NLRB 413 (1986), as the ALJ claims. Op. at 22. That case is distinguishable from this one. The conduct involved in *Every Woman* involved contact with the U.S. Department of Labor. There is an obvious

difference between contacting a public agency that exists to protect employee rights, and contacting Cintas.

The ALJ also cited *Salisbury Hotel*, 283 NLRB 685 (1987) as support for his decision. Op. at 22. However, that case also is readily distinguishable. In *Salisbury*, the employee who was discharged had complained to other employees about the employer's lunch hour policy. She was the most vocal complainer to the employer about this issue, and there was "tacit" agreement among employees that this issue should be taken up with management. Finding that these facts met the requirement that the discriminatee's communication must appear calculated to induce, prepare for, or otherwise relate to some kind of group action, the Board found that the petitioner had engaged in protected concerted activity. The Board further found that her call to the Department of Labor grew out of her concerted efforts and was a continuation of that activity. Obviously, in this case there are no such facts. As stated above, See did not have any discussions with the other employees about the uniform issue, nor did he speak up at the uniform meetings when this topic was addressed. There also is no evidence that he was authorized -- either explicitly or implicitly -- to contact Relco's vendor. Thus, the *Salisbury* case does not support the ALJ's findings.

c. The Absence Of Any Relco Animus Regarding Concerted Activity Is Another Reason Why His Charge Should Have Been Dismissed

See's charge was further undermined by the fact that there was no evidence to show that the Relco harbored any animus toward employee concerted activity. In *Copps Foods, supra*, at 1000, when dismissing Section 8(a)(1) allegations based upon alleged protected activity, the Board found it significant that there was no evidence that the employer therein had ever discharged or disciplined any employees for talking about matters of mutual concern, or for otherwise engaging in any other concerted activity. The Board noted that there was evidence in

the record that employees who engaged in “unmistakable concerted activity” did not elicit a negative reaction from management, and that, to the contrary, those employees received satisfactory responses from the employer. In this case, employee Shipp was admittedly very angry and outspoken when raising the uniform issue in the March 4 meeting, yet no adverse action was taken against him. Applying the rationale in *Copps Foods*, this evidence, along with the fact that employees later got the uniform information which they had requested, clearly undermines this Charge, because it proves that Relco harbored no animus toward employee concerted activity.

2. Even Assuming That See Was Terminated For Concerted Activity, His Case Is Moot

See admitted at the hearing that he did not look for work during the period of time between his termination by Relco, and its phone call to him to offer him reinstatement. (Tr. 594). Because he did not attempt to mitigate his damages, no remedy exists.

F. No Relief Is Appropriate For The Alleged Section 8(a).(1). Violation Related To Relco’s Non-Disclosure Agreement

The ALJ concluded that Relco’s Non-Disclosure Agreement (“NDA”). (R. Exh. #19). contained provisions that violate Section 8(a).(1). of the Act. Although one of General Counsel’s witnesses did not recall seeing G.C. Exh. #23 -- which is a notice dated August 12, 2010 rescinding Relco’s Non-Disclosure Agreement -- this witness confirmed that he was not adversely affected by his refusal to sign the NDA. This witness also conceded that it was possible that he did not see the posting. (Tr. 346, 350-351).

Relco does not agree that its non-disclosure agreement violated the Act. However, because it was withdrawn in August 2010, and no employee suffered any adverse impact for refusing to sign it, the case is moot. Thus, the ALJ’s conclusion that the NDA violated the Act does not effectuate the purposes of the Act. At most it is a *de minimis* violation.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Post-Hearing Brief to the Administrative Law Judge was served on May 27, 2011, via first class mail, on the following:

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