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Tenneco Automotive, Inc. and Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Cases 7-CA-49251, 7-CA-50000, 7-CA-50159, and 7-CA-50256

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On April 16, 2008, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed answering briefs to the General Counsel's and Charging Party's exceptions, and the General Counsel and Charging Party each filed a brief in response to the Respondent's answering brief.

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

The Board has considered the decision in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

I. INTRODUCTION

This case involves allegations of unlawful conduct during and immediately after the Union's strike of the Respondent's facility that lasted from April 2005 through January 2006. The judge found that the Respondent violated Section 8(a)(5) of the Act by failing to furnish the Union with requested information concerning: (a) its plan to install video surveillance cameras; (b) its discipline of employee Joseph Helton; and (c) its use of an outside contractor to provide services usually performed by unit employees during the strike.³ The General Coun-

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

² In addition to modifying the judge's recommended Order in accordance with our findings herein, we shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

³ The judge also found that the Respondent violated Sec. 8(a)(5) of the Act when it refused to continue processing the grievance of em-

sel has filed limited exceptions to these findings. As explained below, we find merit to these exceptions.⁴ The judge also dismissed allegations that the Respondent: (a) violated Section 8(a)(5) by refusing to furnish the Union with requested information concerning the home addresses of its permanent replacement employees; (b) violated Section 8(a)(3) of the Act by disciplining employee Joseph Helton for displaying the slogan "Thou Shall Not Scab" on his shirt, and then thereafter changing the slogan rather than covering it as directed; (c) violated Section 8(a)(1) of the Act by directing employees to refrain from making statements to other employees that could "evoke a response"; (d) violated Section 8(a)(5) of the Act by requiring employees to obtain supervisory approval prior to posting materials in the facility; and (e) violated Section 8(a)(5) by withdrawing recognition from the Union. The General Counsel and the Union except to the dismissal of these complaint allegations.⁵ We find merit to these exceptions and, as explained below, we reverse the judge's dismissals of these complaint allegations.

II. FACTUAL BACKGROUND

The Respondent, a manufacturer and distributor of automotive parts, has recognized the Union as the representative of its production and maintenance employees since 1945. The parties' most recent collective-bargaining agreement expired on May 12, 2004. There-

employee Steven Prysiazny following its withdrawal of recognition. There are no exceptions to this finding.

⁴ With respect to the finding concerning the Union's request for information on employee Joseph Helton's October 13, 2005 discipline, the General Counsel correctly notes in his exceptions that the judge failed to include the Respondent's lack of a timely response in his conclusions of law. We shall accordingly include the Respondent's lack of timeliness in our Amended Conclusions of Law, Order, and Notice.

With respect to the Respondent's failure to furnish the Union with certain requested contract and voucher information, we adopt the judge's finding of a violation, but we do not rely on his comment that the failure to provide this information was "more in the nature of a technical violation of the Act."

Further, and as explained below, we find merit to the General Counsel's contention that the 8(a)(5) finding concerning the request for information on the plan to install surveillance cameras is not de minimis.

⁵ The judge also found that the Respondent did not violate Sec. 8(a)(5) of the Act by its postwithdrawal assignment of unit work to a supervisor (i.e., the operation of a tractor to remove snow at the Respondent's facility). In adopting the judge's dismissal of this allegation, we rely only on the fact that the record shows that assignment of this work occurred at a time that the Respondent had no unit employee available who had been properly trained to safely operate the tractor as required by state safety regulations. See generally, *North Atlantic Medical Services*, 329 NLRB 85, 102 (1999), *enfd.* 237 F.3d 62 (1st Cir. 2001) (adopting judge's finding that an employer did not violate Sec. 8(a)(5) by refusing to bargain over its recruitment of drivers for a route that none of the unit employees were willing to drive).

after, the employees worked without a contract while the Union and the Respondent negotiated for a new contract. On November 4, 2004, the Union rejected the Respondent's final offer and, in turn, the Respondent informed the Union that it would implement four provisions in that offer⁶ while keeping in effect the other terms of the expired contract.

On April 26, 2005, the Union commenced a strike. During the strike, the Respondent continued its operations by outsourcing certain work, contracting with another firm to provide certain services, hiring 16 permanent replacement employees, and using certain employees who either did not participate in the strike or later decided to cross the picket line and return to work.

On January 27, 2006,⁷ Union Representative James Walker wrote to the Respondent's human resource representative, Terry Youngerman, and made an unconditional offer for the strikers to return to work. On February 6, four of the strikers were permitted to return to work, but the vast majority of the strikers were not recalled because their positions were either filled with permanent replacement employees or were eliminated due to downsizing. On February 10, some of the unit employees filed a decertification petition with the Board. Thereafter, the Regional Director for Region 7 informed the petitioning employees that the petition would be held in abeyance pending resolution of unfair labor practice charges that had been filed by the Union on February 1, 2006 and February 15, 2006.

On December 4, 2006, employees presented the Respondent with another petition for decertification; this one signed by 24 of the 31 employees in the bargaining unit. Based on this petition, the Respondent, by letter dated December 4, 2006, informed the Union that it would no longer recognize it as the bargaining representative of its unit employees.

III. DISCUSSION

A. Information Requests

1. Installation of surveillance cameras

On August 29, 2005, after the strike had commenced, Valerie Balog, the Respondent's human resources manager, wrote to Union Representative Walker informing him that—due to reports of tampering with the natural gas valves in the test lab—the Respondent planned to install video surveillance cameras in that lab. By letter dated September 2, 2005, Walker requested information concerning the incidents that were the basis for the Re-

⁶ Those provisions were union security, dues checkoff, no strike-no lockout, and arbitration.

⁷ All dates hereafter are in 2006, unless stated otherwise.

spondent's decision to install surveillance cameras. The Respondent did not respond to the information request, and at some point thereafter decided not to install the surveillance cameras.

The judge found that the Respondent's failure to respond to the information request was unlawful, but added that because the Union did not pursue its request, the "issue was no longer of moment to the Union," and thus the 8(a)(5) violation was "close to de minimis." Later in his decision, however, in considering the impact of the Respondent's failure to respond to this information request on employee support for the December 4 decertification petition, the judge stated that a "violation [was] found; but de minimis; dismissal recommended." The judge did not explain this discrepancy.⁸

Although we agree with the judge that the Respondent's failure to respond to the information request violated Section 8(a)(5), we do not agree with his characterization of the violation as de minimis, or even "close to de minimis." It is well settled that "[t]he relevancy of the information . . . is determined as of the time the information [request is] made." *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 110 (1996).⁹ Here, the Union's request was relevant, as it came as a timely response to the Respondent's announced intent to install the cameras. The Respondent's subsequent decision not to install the cameras did not absolve it from its responsibility to timely respond to the Union's information request. Contrary to the judge and our dissenting colleague, in these circumstances a finding of a violation is warranted. However, because the Respondent subsequently reversed its decision to install the cameras, the remedy for this violation shall be limited to an order requiring the Respondent to cease and desist from engaging in this unlawful conduct. See generally *Wayne Memorial Hospital Assn.*, supra; *Woodland Clinic*, 331 NLRB 735, 742 (2000).

2. Home addresses of permanent replacement employees

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by refusing to comply with the Union's January 26 request for the home addresses of employees hired by the Respondent as permanent replacements. The judge found that the Respondent's refusal to provide this information was lawful because there was a "clear and present danger" that the Union

⁸ The judge did not include the violation in his conclusions of law or in his recommended Order.

⁹ See also *Finn Industries*, 314 NLRB 556, 558 fn. 13 (1994) ("The union's reasons for requesting information and the employer's refusal to comply with the request are evaluated when the demand for information and subsequent refusal were made.")

would misuse the information.¹⁰ In support, the judge relied on the following factors: (a) five of the permanent replacement employees testified that they were opposed to releasing addresses to the Union; (b) there were “particularly hard feelings” that lingered after the strike ended; and (c) 7 months before the strike ended (in June 2005), Union Representative Walker, along with members of a sister union, staged a protest outside the home of two former strikers who had crossed the picket line and returned to work for the Respondent. The judge further noted in support that the Union could post notices on a bulletin board in the Respondent’s facility, and that workplace conversations between returning strikers and the permanent replacements were permitted.

Contrary to the judge, we find that the Respondent was obligated to furnish the addresses to the Union as requested.

A union is presumptively entitled to the names and addresses of bargaining unit employees, including permanent replacement employees.¹¹ In order to rebut the presumption, an employer must demonstrate that there is a “clear and present danger” the union will misuse the information.¹² Here, neither the factors cited by the judge, nor the record as a whole, demonstrate that the Respondent satisfied its burden.

As the judge noted, five permanent replacement employees testified that they did not want their addresses given to the Union, expressing a desire not to receive mail, phone calls, or visits from union officials. However, the expression of such personal preferences does not suggest a likelihood of misuse by the Union. Further, although the judge noted that there were “particularly hard feelings” between the strikers, the crossovers, and the permanent replacements, the record reveals that at least some replacement employees were on friendly terms with the union officials who were reinstated after the strike.

The judge and our dissenting colleague highlight the protest at the home of two former strikers. The protest occurred on a single day, 7 months before the strike ended, across the street from the former strikers’ home.

¹⁰ Under the Board’s “clear and present danger” test, an employer is obligated to furnish the union with requested information regarding permanent strike replacements unless there is a clear and present danger that the information would be misused by the union. See *Page Litho, Inc.*, 311 NLRB 881, 882 (1993), enf. granted in part and denied in part mem. 65 F.3d 169 (6th Cir. 1995).

¹¹ *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). Further, the Union does not have to particularize its need when requesting this information. *Brown & Sharpe Mfg. Co.*, 299 NLRB 586 (1990), remanded on other grounds sub nom. *Machinists District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991).

¹² *Page Litho*, supra.

It was conducted by members of a sister local who, while picketing in a show of support for the striking employees, recognized employee Sue Neal as she crossed the picket line to go to work. Specifically, they recognized Neal as one who had previously crossed a picket line by their own local against another employer. As she crossed the picket line to enter the Respondent’s facility, Neal made angry and profane gestures at the members of the sister local.¹³ The members of the sister local present on the picket line decided to picket Neal’s house. Union Representative Walker was the only member of the Union who attended this protest, and he testified without contradiction that he decided to attend “to make sure nothing happened.” In fact, the protesters remained across the road from Neal’s residence, and there is no evidence that they engaged in any acts of violence.

Neal’s husband testified that he found the protest highly disturbing, a feeling undoubtedly exacerbated by the fact that his son suffered a seizure at that time. The issue before us, however, is not whether the protest was wrong in some way, but whether it establishes that there was a clear and present danger of misuse of home addresses by the Union. We find that it does not. The protest was organized by members of a different union, was based in large part on an unrelated dispute between members of the other union and Neal, and was triggered by provocative conduct by Neal. The record establishes by uncontroverted evidence that the only member of the Union who had anything to do with the protest played a constructive role in limiting the confrontation. While the incident may have been regrettable, it simply does not establish any danger of misuse by the Union, much less a clear and present danger.

In addition to the reasons relied on by the judge, the Respondent and the dissent reference picket line misconduct as a reason for not furnishing the addresses of the replacement employees. However, the purported incidents were few and relatively mild. Thus, the record reveals that during the 10-month strike there were a few instances of abusive language and gestures both by picketers and by employees crossing the picket line. In addition, the Respondent filed charges with the Board alleging two instances where a vehicle was struck by the picketers. One instance alleged that a retiree hit a van with poster board, and the other instance alleged that Union Representative Walker struck the tire of a van with his cane after the driver stopped the vehicle near the picketers, “revved the motor,” and “squealed the tires.”

¹³ Neal’s husband also worked for the Respondent, and he too crossed the picket line and returned to work during the strike.

The charges were subsequently settled.¹⁴ Given the length of the strike, these few and relatively mild¹⁵ allegations of misconduct do not demonstrate a likelihood that the Union would use the addresses for purposes other than legitimate representation matters.

Finally, the judge's contention that the Union had alternative means to communicate with the permanent replacement employees is not relevant to whether there was a clear and present danger of misuse by the Union. Moreover, reliance on a union bulletin board and on in-plant conversations between former strikers and replacement employees is simply no substitute for the Union's ability to communicate directly with all of its unit employees for the purpose of representation, filing grievances, and negotiating a collective-bargaining agreement.¹⁶ Accordingly, and for all these reasons,¹⁷ the Respondent's failure to furnish this relevant information violated Section 8(a)(5) of the Act as alleged.

B. Discipline of Joseph Helton

The judge found that the Respondent did not violate Section 8(a)(3) of the Act when it issued a written disciplinary warning to employee Helton for displaying the message "thou shall not scab," and later displaying other similar messages on his t-shirt. For the reasons set forth

¹⁴ The charges also alleged that employees were photographed as they crossed the picket line. However, Walker testified that the photographing occurred after the Union reported to the police that some of the crossover employees were driving their cars toward the picket line only to turn away at the last minute, and the sheriff's department advised the Union to take pictures of any such occurrences in the future.

We also note that Respondent Manager Mark Kortz testified that, on one day in October or November, he observed eggs being thrown from an area near the picket line, where the Union had a makeshift hut. The Respondent's unfair labor practice charge included no such allegation, and we find this testimony unavailing on the issue of the requested addresses of the replacement employees.

¹⁵ See generally, *Medite of New Mexico*, 314 NLRB 1145, 1146 (1994), *enfd.* 72 F.3d 780 (10th Cir. 1995) (strikers hitting a car with cardboard picket signs did not constitute serious strike misconduct).

¹⁶ We further note, as discussed below, that the Respondent unlawfully restricted in-plant communications among its employees by announcing new restrictions on bulletin board postings and by directing employees not to engage in conversations that could "evoke a response" from other employees.

¹⁷ We further find, contrary to the judge, that even under the "totality of circumstances" approach adopted by the Seventh Circuit in *Chicago Tribune v. NLRB*, 79 F.3d 604 (7th Cir. 1996), the Respondent's refusal to provide the addresses would constitute a violation of Sec. 8(a)(5). Thus, the record here does not include evidence of a "pattern of violence [and threats of violence] that surrounded the strike." 79 F.3d at 608. Further, the alternative means provided to the Union—described above—are a far cry from the examples of access that were noted in support by the court in *Chicago Tribune* (i.e., ensuring personal communication with replacement workers during nonwork times, and distribution of materials to those employees in nonwork areas, and providing "information in any mutually agreeable manner proposed by the [union]"). *Id.*

below, we reverse the judge and find that the Respondent's discipline of Helton was unlawful.

The Respondent hired Helton in February 2005, approximately 2 months before the strike began, and discharged him the following March. Helton filed an unfair labor practice charge, which was settled in September 2005 with an offer of reinstatement. Although Helton was supportive of the Union and the strike, he returned to work with the Union's permission. Helton testified that, as the only union supporter in the facility during the strike, he believed that other employees viewed him as a "mole" for the Union.

On January 19 (while the strike was ongoing), Helton wore a T-shirt to work displaying the slogan, "Thou Shall Not Scab." The Respondent's supervisor, Dan Eggleston, told Helton to change his shirt because some employees would not like the message. Rather than changing his shirt, Helton covered the word "scab" with tape, and wrote the word "steal" on the tape (so that the slogan read "Thou Shall Not Steal"). Eggleston again objected to the message on Helton's shirt, and told him to put another strip of tape on his shirt, this time over the word "steal." Helton then placed tape over the word "steal" and wrote the words "be a low life" on it. Eggleston again objected, and ordered Helton to put another piece of tape over the slogan and leave it blank. After further discussion, Helton suggested that he go home for the day, and Eggleston agreed.¹⁸

The following day, Helton received a written reprimand. The reprimand admonished Helton for wearing the "scab" slogan on his shirt and, thereafter, altering the message on the shirt, thereby "goad[ing] fellow employees inappropriately and unnecessarily."¹⁹

The judge found that Helton's reprimand did not violate Section 8(a)(3) of the Act. Analyzing the allegation under *Wright Line*,²⁰ the judge first found that the General Counsel satisfied his initial burden of showing that Helton's protected activity was a motivating factor in the Respondent's decision to discipline him. In particular, the judge found that Helton was a known union activist and participant in the picketing, and that the discipline was motivated in part by the Respondent's animus toward Helton's protected activities, and by its animus toward the protected speech displayed on his shirt.

The judge further found, however, that the Respondent met its burden, under *Wright Line*, of demonstrating that

¹⁸ The complaint does not allege that the Respondent unlawfully sent Helton home from work that day.

¹⁹ The Respondent does not contend that Helton violated a work rule by wearing clothing that displayed a message.

²⁰ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

it would have disciplined Helton even in the absence of his protected activity. In support, the judge found that Helton attempted to “bring the strike into the workplace,” and that the Respondent’s directives to Helton were an effort to prevent acrimony among employees. The judge also found that, by repeatedly changing the slogan on his shirt, Helton had engaged in insubordination, and that his “message was unreasonably provocative.” Having found that the Respondent sustained its rebuttal burden under *Wright Line*, the judge dismissed the allegation.

At the outset, we note that there are no exceptions to the judge’s finding that the General Counsel met his initial burden under *Wright Line*, i.e., that Helton’s protected activities were a motivating factor for Helton’s discipline. Rather, the exceptions to the judge’s finding are limited to whether the record establishes that Helton would have been disciplined even in the absence of his protected conduct.²¹ Contrary to the judge, and in agreement with the General Counsel, we find that it does not.

First, the written warning referenced Helton’s display of a protected message on his shirt. The message, admonishing employees not to cross the picket line, was a clear expression of support for the strikers. As such, the communication was clearly of a protected nature. The use of the word “scab” in this context did not remove the message from the Act’s protection. See e.g., *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000) (employee’s use of the word “scab” did not deprive him of the protection of the Act and, consequently, his discipline for repeatedly calling another employee a “scab” violated Section 8(a)(3)). Nor did the subsequent rephrasings of the message on Helton’s shirt (i.e., replacing the word “scab” with “steal,” and then with “be a low life”) contain language so offensive as to remove it from the Act’s protection. Thus, the Respondent’s desire to prevent acrimony among its employees “is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights.” *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994), quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976).

²¹ Our dissenting colleague argues that the “need to protect the safety of its employees . . . and to maintain discipline and order in the workplace” justified the Respondent’s discipline of Helton. This argument, however, goes to the issue whether the Respondent’s discipline of Helton was motivated by animus toward Helton’s protected activity and, of course, there are no exceptions to that finding. Moreover, while our colleague characterizes the circumstances as a “powder keg environment,” he fails to explain how the discipline was necessary to protect employee safety and maintain employee discipline. A bare assertion of generalized danger cannot justify the infringement of an employee’s statutory rights.

Additionally, we find no merit to the judge’s finding that Helton engaged in insubordination. It is well-settled that a refusal to comply with a directive to cease protected communications does not constitute insubordination. See *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977) (finding that employee did not engage in insubordination by refusing to accede to directive to stop making a pronoun speech in the employee lunchroom). Finally, the record does not show reliance on any conduct other than Helton’s protected activity as a basis for his discipline.

Accordingly, as Helton’s protected conduct was a motivating factor in the Respondent’s decision to issue the discipline, and as the evidence fails to show that the Respondent would have disciplined Helton in the absence of his protected activity, we find that the Respondent’s discipline of Helton violated Section 8(a)(3) of the Act as alleged.

C. Prohibition of Employee Speech Intended to “Evoke a Response”

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by directing employees to refrain from saying anything to each other that might be deemed offensive or “evoke a response” from another employee. We find, contrary to the judge, that this directive was unlawful.

On February 6, a day when four strikers returned to work following the Union’s unconditional offer to return, Manager Mark Kortz held a mandatory meeting for all employees. Kortz began the meeting by describing the Respondent’s work force as one consisting of employees who crossed the picket line, permanent replacement workers, and reinstated strikers. Kortz then directed employees to refrain from inciting tensions, and to “not . . . engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker.” Kortz also distributed a letter to employees memorializing this directive.

In determining whether Kortz’s directive was unlawful, the judge applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). In that case, the Board held that if a work rule does not explicitly restrict Section 7 activity, it will still be found unlawful if one of the following factors are present: (1) an employee would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, supra, 343 NLRB at 647. The judge found that none of the factors were present, and accordingly dismissed the complaint.

We disagree with the judge's application of these factors. First, we find that employees in this circumstance would reasonably construe Kortz's directive as one that applied to Section 7 activity. The timing of the speech (the day that former strikers returned to work) and the introduction of the speech (i.e., describing the employees in terms relating to their position vis-à-vis the strike), clearly created the context of Kortz's directive. Thus, Kortz's reference to conduct that may "evoke a response" would reasonably be construed in this context as referring to discussions about the strike and/or other union-related matters protected by Section 7. Therefore, we find that two of the three *Lutheran Heritage* factors are present, as the directive was initiated as a response to union activity, i.e., the strike that had just ended, and as it would reasonably be construed as referencing discussions about Section 7 activity.²²

In addition, while the judge found that Kortz was motivated by a desire for employees to "get along with each other, and get a quality product out to the customers," there is no evidence demonstrating that Kortz's directive was necessary to maintain production or discipline. Therefore, this motivation does not explain the necessity for prohibiting such speech.

Further, "motive is not a necessary element of an 8(a)(1) violation." *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 987 (2007), enf. denied on other grounds 570 F.3d 354 (D.C. Cir. 2009). The central question under Section 8(a)(1) is whether the employer's conduct tended to interfere with the exercise of Section 7 rights, not whether the employer deliberately sought to interfere with employee rights. Because Kortz's directive would have tended to chill the exercise of employees' Section 7 rights to discuss the strike and the Union, it was unlawful regardless of whether Kortz intended it to have that effect.

The dissent suggests that the only reasonable interpretation of Kortz's statement is as a directive against threatening conduct not protected by the Act. In so doing, however, it ignores the fact that the statement was made in the context of Kortz describing the work force in terms of strike status—those who crossed the picket line, permanent replacements, and reinstated strikers. Given this context, and absent any reference to unprotected employee conduct, it is simply not reasonable to conclude that employees would narrowly interpret the statement to exclude all Section 7 activity.

Accordingly, we reverse the judge's dismissal of this allegation and find that, by prohibiting employees from

²² There is no evidence regarding the third factor, whether the rule was enforced to prohibit workplace discussions about the strike.

engaging in communications intended to "evoke a response," the Respondent violated Section 8(a)(1) of the Act.

D. The Posting Rule

At the same meeting where Kortz directed employees not to engage in discussions intended to "evoke a response," Kortz also announced that the posting of signs, letters, or printed materials would be subject to supervisory approval. The judge found that, although the Respondent did not notify the Union about this change, the announcement did not violate Section 8(a)(5). In so finding, the judge explained that Kortz was concerned about "vituperative postings," and was therefore reminding the work force of a long established rule (rule 30) prohibiting employees from posting anything without the approval of management unless otherwise provided by agreement.²³ The judge further stated that "it seems that other bulletin boards were in continuous use by the employees . . . after February 6."

Contrary to the judge, we find that Kortz's announcement constituted an unlawful unilateral change.

The record shows that, despite the existence of rule 30, the Respondent's longstanding practice allowed employees to freely post materials without obtaining prior approval. Plainly, Kortz's announcement declared a substantial change to this past practice.²⁴ It is undisputed that the change was made without notifying the Union or giving it an opportunity to bargain. Such a change violates Section 8(a)(5), even when the change conforms to the language of a previously unenforced written policy. See *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (finding unlawful an employer's unilateral change requiring 3 days' notice before taking vacation, where past practice had always been to require 1 day's notice even though written policy required 3 days' notice).

We find inapposite the judge's observation that "it seems that other bulletin boards were in continuous use by the employees . . . after February 6." This was an apparent reference to Kortz's testimony that the Respondent did not discipline anyone for unauthorized posting after February 6, and that he could not recall an instance where the Respondent had asked someone to take down a posting after February 6.²⁵ Pointing to an absence of specific evidence of enforcement does not, however, show that the policy did not change. See *Flambeau Air-*

²³ Rule 30 states as follows: "There shall be no posting of notices, letters, or printed material of any description on company property by any employee (unless otherwise provided by agreement.)"

²⁴ Contrary to our dissenting colleague's contention, nothing in Kortz's statement limited this restriction to work areas.

²⁵ There is no other record evidence concerning employee postings occurring after February 6.

mold Corp., supra, 334 NLRB at 165–166 (in finding unilateral change of sick leave policy unlawful, Board found “immaterial” the fact that no employee had been disciplined for violating new policy).

The judge also noted that a provision in the expired collective-bargaining agreement provided the Union with a bulletin board for its exclusive use.²⁶ However, the record shows that there were other bulletin boards in the facility on which employees posted materials. Kortz’s announcement broadly covered all postings by employees, and did not specifically refer to matters posted on the Union’s bulletin board. Thus, the practice and policy relating to the use of the Union’s bulletin board is not instructive as to the issue of employee postings generally.

For these reasons, we find that Kortz’s announcement requiring supervisory approval for employee postings violated Section 8(a)(5) of the Act. See generally, *Severance Tool Industries*, 301 NLRB 1166, 1171 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992) (employer violated Section 8(a)(5) by unilaterally removing bulletin boards and replacing them with glass-enclosed—and locked—bulletin boards, thus preventing employees from posting materials without prior approval).

E. The Respondent’s Withdrawal of Recognition

On February 10, employees filed a decertification petition with the Board. The petition, however, was held in abeyance pending resolution of charges filed by the Union on February 1 and 15. Thereafter, on November 30 and December 1, 24 of 31 unit employees signed a new petition for decertification and, on December 4, presented that petition to the Respondent. Later that day, the Respondent sent a letter to the Union stating that, having been presented with the decertification petition, it was withdrawing recognition of the Union as the bargaining representative of its employees at the facility.

The judge found that the Respondent’s withdrawal of recognition did not violate Section 8(a)(5) of the Act. Citing the factors set forth in *Master Slack*, 271 NLRB 78, 84 (1984), for determining whether there is a causal connection between unfair labor practices and loss of majority support for a union, the judge found that Respondent’s unfair labor practices did not have a lasting or detrimental effect on the signers of the petition.²⁷

As explained above, we have reversed the judge’s dismissal of several unfair labor practice allegations. We find that certain of these unfair labor practices tainted the

petition, and that the withdrawal of recognition was therefore unlawful.

Master Slack sets forth the following factors to consider in determining whether there is a causal connection between a union’s loss of support and an employer’s unfair labor practices: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on the employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack*, supra, 271 NLRB at 84.

Here, the unfair labor practices were committed about 10 months prior to the petition and withdrawal of recognition. While this is a relatively long period,²⁸ the nature of some of the violations would tend to have a lasting detrimental effect on the employees’ view of the Union.²⁹ In particular, the Respondent’s failure to provide the Union with the addresses of the replacement employees severely impacted the Union’s ability to communicate with a substantial number of employees throughout the 10-month period. The Union’s lack of access to the addresses hindered its ability to personally contact the permanent replacement employees, thus depriving the Union of opportunities to meaningfully address any lingering feelings of disconnect that would naturally exist in the aftermath of a contentious and divisive strike.

Further, by unlawfully prohibiting employees from having discussions that could tend to “evoke a response” from other employees, the Respondent maintained a rule significantly restricting the ability of its employees to communicate with each other, and share their views, about union matters during the entire 10-month period. The Respondent further interfered with employee communication by its unilaterally imposed requirement that employees first obtain supervisory permission before posting materials. Moreover, the Respondent’s disci-

²⁸ See, for example, *Champion Home Builders*, 350 NLRB 788, 791–792 (2007) (finding that employer’s refusal to bargain and threats to employees approximately 7 months prior to employee petition were too remote in time to have a causal connection to loss of support among employees); *Quazite Corp.*, 323 NLRB 511, 512 (1997) (finding that prestrike unfair labor practices committed 6 months prior to the filing of a decertification petition were too remote in time to taint that petition).

²⁹ See generally *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1328–1329 (2006) (finding that a 6–8 month period between unfair labor practices and the decertification petition was not too long to preclude finding a causal connection, where conduct included access violations, removal of union materials from a bulletin board, discriminatory discharge of a prounion employee, and unilateral changes concerning employee hours and vacation).

²⁶ To that end, he noted that rule 30 provided an exception for postings made pursuant to the collective-bargaining agreement.

²⁷ The judge also stated that the unfair labor practice allegations that he dismissed did not affect the signers of the petition.

pline of Helton, discussed above, illustrates the Respondent's hostility toward the free expression of employee views about union matters, and shows a determination to prevent the occurrence of protected prounion speech in its workplace.

By imposing rules that significantly interfered with protected speech among its employees, and by unlawfully withholding from the Union the contact information of a significant number of unit employees (i.e., those hired as permanent replacements), the Union and its supporters were significantly restrained in their ability to discern and address any employee concerns and disaffection that may have existed and lingered following the strike. This was of particular significance here, where the majority of the unit consisted of employees who either crossed the picket line or were hired as permanent replacements.

In addition, the Union's inability to communicate with a significant number of employees interfered with its ability to fully perform its representational obligations, which would naturally tend to have a detrimental effect on union membership and support. Thus, by its unlawful conduct, the Respondent "interjected itself between the Union and the employees." *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 577 (2000), affirmed in relevant part *Allied Industries Employees, Teamsters, Local 481 v. NLRB.*, 47 Fed. Appx. 449 (9th Cir. 2002).

We recognize that a lack of union support may be attributed to the particular circumstances, i.e., that some of the unit employees were hired as permanent replacements and others had crossed the picket line and returned to work before the strike had ended. However, these factors do not outweigh the fact that the Respondent's unlawful conduct hindered the Union's ability to engage in organizational and representational activities, and thereby make its case to these employees for continuing its representation. At a minimum, it deprived employees of an atmosphere where they could meaningfully and freely consider whether they desired to continue being represented by the Union. We thus find that there is a sufficient and substantial causal connection between the Respondent's unfair labor practices and the petition on which the Respondent relied in withdrawing recognition. Accordingly, we reverse the judge's dismissal of this complaint allegation, and find that the Respondent's withdrawal of recognition violated Section 8(a)(5) of the Act.

AMENDED CONCLUSIONS OF LAW

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

2. Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by directing employees to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Joseph Helton because of his support for and activities on behalf of the Union.

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

(a) Failing and refusing to furnish the Union with requested information regarding the planned installation of video cameras at the Respondent's Grass Lake facility.

(b) Failing and refusing to furnish, and failing to timely furnish, the Union with requested information concerning employee Joseph Helton's October 13, 2005 discipline.

(c) Failing and refusing to furnish the Union with requested information concerning the home addresses of the Respondent's permanent replacement employees.

(d) Failing and refusing to furnish the Union's with certain information concerning work performed for the Respondent by an outside contractor during the strike.

(e) Promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at its Grass Lake facility.

(f) Failing and refusing to bargain with the Union at the third step of the grievance procedure regarding the discharge of unit employee Steven Prysiazny.

(g) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All hourly production and maintenance employees in the Grass Lake Engineering and Research Center, but excluding payroll and wage control employees, clerical employees, office janitors, engineering, designing and drafting employees, facility guards, supervisory employees and administrative and executive employees.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by directing employees not to say anything to each other that might be deemed offensive or

evoke a response from other employees, we shall order that the Respondent rescind this directive.

Having found that the Respondent violated Section 8(a)(3) and (1) by issuing a written warning to employee Joseph Helton because of his protected activity, we shall order the Respondent to rescind the written warning, remove from its records any reference to that warning, and notify Helton in writing that this has been done and that the warning will not be held against him in any way.

Having found that Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union relevant and necessary information, or by failing to timely provide it with requested information, we shall order the Respondent to furnish the Union with the requested information.³⁰

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at its facility, we shall order the Respondent to rescind this rule.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union at the third step of the grievance procedure regarding the discharge of a unit employee, we shall order the Respondent to meet and bargain with the Union at the third step of the grievance procedure.

Finally, having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we shall order the Respondent to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit described above, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68. In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727

(D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. Consistent with the court's requirement, we have examined the particular facts of this case and we find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and resulting refusal to collectively bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the order's duration is not indefinite but only for a reasonable period of time sufficient to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees' Section 7 right to union representation is vindicated. It will also give employees an opportunity to fairly assess the Union's effectiveness as a bargaining representative and determine whether continued representation by the Union is in their best interests.

(2) An affirmative bargaining order also serves the Act's policies of fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table—results that might not be in the employees' best interests. It fosters industrial peace by reinstating the Union to its rightful position as the bargaining representative chosen by a majority of the employees. Also, as mentioned, providing this temporary period of insulated bargaining will afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the effects of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recogni-

³⁰ As explained above, because the Respondent no longer intends to install surveillance cameras in its facility, we will not require the Respondent to furnish the Union with the requested information concerning the Respondent's plans to install the surveillance cameras.

tion and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair given that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violation in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Tenneco Automotive, Inc., Grass Lake and Jackson, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Directing employees to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

(b) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the Union.

(c) Refusing to bargain collectively with the Union, Local 660, International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW), AFL-CIO by failing and refusing to furnish it with requested information, or by failing to timely provide it with requested information, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) Unilaterally changing the terms and conditions of employment of its unit employees by promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at its Grass Lake facility.

(e) Refusing to bargain collectively with the Union by failing and refusing to process grievances.

(f) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its unit employees.

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

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

(a) Rescind its directive that employees refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

(b) Within 14 days from the date of this Order, rescind and revoke the written warning issued to Joseph Helton on January 20, 2006.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning issued to Joseph Helton and, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

(d) Furnish to the Union the information it requested in its letters dated October 19, 2005, January 27, and February 13, 2006.

(e) Rescind its rule requiring supervisory approval prior to posting signs, letters, or printed material in its Grass Lake facility, which was unilaterally implemented on February 6, 2006.

(f) Meet and bargain collectively and in good faith with the Union at the third step of the grievance procedure, as set out in the last collective-bargaining agreement (effective March 12, 2000 to May 12, 2004) between the Union and the Respondent, regarding the discharge of unit employee Steven Prysiazny.

(g) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All hourly production and maintenance employees in the Grass Lake Engineering and Research Center, but excluding payroll and wage control employees, clerical employees, office janitors, engineering, designing and drafting employees, facility guards, supervisory employees and administrative and executive employees.

(h) Within 14 days after service by the Region, post at its Grass Lakes, Michigan facility, copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized repre-

³¹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

sentative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 2005.

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

Dated, Washington, D.C. August 26, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

The parties' collective-bargaining agreement expired in May 2004. They bargained for a new contract, but could not reach agreement. In April 2005, the Union began an economic strike that lasted until January 2006, when it made an unconditional offer for the strikers to return to work. During the strike, the Respondent continued its operations by, inter alia, using employees who crossed the picket line and by hiring permanent replacements. Having listened to the testimony of those who manned the picket line and those who crossed it, and having heard descriptions of the events that occurred there and elsewhere, the judge determined that hostilities and tensions had coalesced over time into an acrimony that did not abate, but only worsened, when strikers returned to work. Concluding that the Respondent took the actions my colleagues now find unlawful in order to preserve order and productivity in the workplace, and to protect employees in their homes, the judge dismissed

certain alleged violations either as de minimis intrusions or conduct consistent with the Respondent's right to prevent violence and maintain production. The majority's reversal of the judge's carefully balanced analysis undermines legitimate management prerogatives and paves the way for discord and acrimony sown on the picket line to flourish in the plant after a strike. I therefore dissent.¹

1. A primary issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by refusing to accede to the Union's demand for the home addresses of replacement workers. Applying the Board's "clear and present danger" test,² the judge found that the Respondent "very persuasively established legitimate reasons" for withholding the information. In this regard, the judge emphasized the fact that in June 2005, during the strike, members of a sister local, accompanied by Union Representative Walker, picketed the home of two employees, the Neals, union members who had crossed the picket line, with signs that proclaimed "Do you know your mom and dad's a scab?" and "Do you know your neighbor's a scab?" Mr. Neal received a frantic call from his 12-year old son and rushed home from work to find the police on the scene and his son experiencing a seizure, events Mr. Neal testified were highly traumatic to

¹ For the reasons set out in my dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), I would not require electronic distribution of the notice.

I agree with my colleagues that the Respondent violated Sec. 8(a)(5) by failing and refusing to furnish the Union with complete information, and by failing to furnish information in a timely fashion, in response to the Union's Oct. 19, 2005 information request regarding employee Helton's discipline. Contrary to my colleagues, however, I would adopt the judge's recommendation to dismiss the allegation that the Respondent violated Sec. 8(a)(5) by refusing to furnish the Union with information regarding its plan to place surveillance cameras in its test lab. Since the Respondent ultimately decided not to put the surveillance cameras in place, I agree with the judge that any violation was "de minimis," and that a cease-and-desist order would be cumulative. Finally, in finding it unnecessary to pass as cumulative on the judge's finding that the Respondent violated Sec. 8(a)(5) by refusing to furnish the contracts and vouchers requested by the Union on Feb. 13, 2006, I agree with him that any failure on the Respondent's part to furnish the requested information was at most a "technical violation" of the Act.

² While a union is presumptively entitled to the requested information, "[t]he employer may withhold the information if there is a clear and present danger that the information would be misused by the union." *Page Litho, Inc.*, 311 NLRB 881, 882 (1993) (footnote omitted), enf. granted in part and denied in part mem. 65 F.3d 169 (6th Cir. 1995). I have previously expressed my opinion that this test is inappropriate and that I would adopt the Seventh Circuit's "totality of circumstances" standard in which the legitimate concerns about the harassment and safety of replacements are balanced against the requesting union's legitimate need for this information. *NTN Bower Corp.*, 356 NLRB No. 141, slip op. at 1 fn. 3 (2011), citing *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 247-248 (7th Cir. 1992). I recognize, however, that the Board's "clear and present danger" test is current Board law and, absent others willing to reconsider it, apply the standard for institutional reasons.

his family. As the judge found, reports of this incident circulated widely and employees testified that they were afraid that something similar could happen to them. That fear, which the judge characterized as “more than hypothetical,” was reinforced by testimony, cited by the judge, confirming that “particularly hard feelings . . . had developed and hardened into a fairly strong antipathy during and in the aftermath of the strike.” The judge also cited the fact that strikers had hurled abusive language at those who crossed the picket line, had made gun gestures with their hands, and had struck vehicles that crossed the picket line. Based upon the totality of evidence, the judge, who heard first hand the level of hostility described by the witnesses, concluded that there was a clear and present danger that the disclosure of the home addresses of replacements could result in the harassment of replacements. The judge further found that the Respondent reasonably acted upon those concerns, and not “a desire to be uncooperative,” in denying, at the request of the replacements themselves, the union’s demand for their home addresses.

In reversing the judge, my colleagues make light of the picketing at the Neals’ home, explaining that Walker only attended “to make sure nothing happened,” and finding, in effect, that nothing did happen because there is no evidence that the picketers engaged in any acts of violence. Similarly, they downplay the incidents on the picket line as “few and relatively mild,” and ignore altogether the judge’s findings with respect to the pervasive atmosphere of fear and hostility that permeated the facility in the aftermath of the strike. In essence, my colleagues find that there was no clear and present danger that the Union would misuse the addresses of the replacement employees because there was no actual “pattern of violence.”

The obvious problem with my colleagues’ analysis is that the Board’s standard does not—and should not—require showing a pattern of violence to prove a clear and present danger; it requires simply a showing of likely misuse of information, to which the Union is entitled, after all, only for representational purposes. Walker’s self-serving testimony that he went with the picketers to the Neals’ home to make sure nothing happened, and the fact that no violence occurred there, hardly establish that the Union did not and would not misuse the replacements’ addresses. The participants may not have engaged in physical violence, but their activity plainly distressed and embarrassed the Neals and threatened the health of their son. Given this concrete evidence of harassment, the other unruly conduct on the picket line, and the “powder keg” environment described by the judge, I do not believe that the judge erred in finding that a suffi-

ciently clear and present danger existed that the Union would misuse the replacements’ addresses. I would affirm the judge’s dismissal of this allegation.³

2. Contrary to my colleagues, I would also affirm the judge’s dismissal of the allegation that the Respondent violated Section 8(a)(3) by issuing employee Helton a written reprimand for insubordination. Helton was the only employee to whom the Union gave permission to cross the picket line and was the only union supporter working during the strike. On January 19, 2006,⁴ shortly before the strike ended, Helton wore a T-shirt to work with the words “Thou shall not scab” on it. Fearing that it would provoke coworkers, a supervisor asked Helton to change his shirt or cover the word “scab.” Helton initially complied, placing a piece of tape over “scab,” but then wrote over that “steal,” a reference that others would reasonably view as accusing replacements of stealing the jobs of striking employees. His supervisor again asked that he change or cover the provocative word. Helton did so, but promptly substituted “be a low life,” referring to the replacements and crossovers. Helton then told his supervisor that since they couldn’t reach a compromise, perhaps he should leave for the day. When his supervisor concurred, Helton left work but was paid for his time.⁵

The Respondent subsequently issued Helton a written reprimand for wearing the “scab” message on his shirt and thereafter altering the message on the shirt to “goad” fellow employees. In light of the “bitter and acrimonious” strike, the “gauntlet of abuse” endured by the replacements when crossing the picket line, and the various incidents discussed above, the judge determined that the Respondent reasonably concluded that Helton’s T-shirt messages were “unreasonably provocative and potentially disruptive of the workplace,” and that his insistence on reinserting other offensive messages after having been cautioned constituted insubordination, for which he was legitimately disciplined.

Contrary to my colleagues, I would affirm the judge’s dismissal of this allegation. The fact that the Board has found the use of the word scab to be protected in some circumstances does not mean it has a talismanic quality that necessarily shields its use in all others. Context mat-

³ In dismissing this allegation, the judge noted that alternative means of communication were available, but he did not expressly rely on that fact in finding that there was a real possibility that the Union would misuse the requested information. Alternative means is not a factor in the “clear and present danger” test and I do not rely on it here in finding that the Board’s test has been satisfied.

⁴ All dates hereafter refer to 2006, unless otherwise stated.

⁵ As my colleagues note, there is no allegation that the Respondent unlawfully sent Helton home from work that day.

ters.⁶ Here, the Respondent was confronted with a powder keg environment in which an open and vocal union supporter, one who had himself pointed his finger like a gun at replacements crossing the picket line, worked among those replacements, after they had endured months of abuse from Helton and other union supporters, wearing a T-shirt clearly intended to insult and provoke them. Given those facts, I agree with the judge, that the Respondent's legitimate and paramount need to protect the safety of its employees, including Helton, and to maintain discipline and order in the workplace, justified the minimal intrusion on Helton's Section 7 interests caused by the directive to cover the word scab on his shirt. Because I agree that the Respondent could lawfully order Helton to cover the word scab while in the workplace, I also agree that the Respondent could lawfully reprimand Helton for his obstinate and insubordinate refusal to comply.⁷

3. I would also affirm the judge's dismissals of allegations relating to two statements made by Manager Kortz at a mandatory meeting for employees held by the Respondent on February 6, the date some of the former strikers first returned to work. The Respondent called the meeting to attempt to diffuse the poststrike acrimony and to discuss with employees how to move forward with the business of the company and the jobs they were hired to perform. The General Counsel first alleged that Kortz's request at the meeting that employees "not . . . engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker" violated Section 8(a)(1) because it would prohibit Section 7 activity. The judge disagreed, finding that, in the context of the events leading up to the statement and given the purpose of the meeting itself, Kortz's statement did not explicitly restrict Section 7 activities and would not be perceived as such a restriction by employees.⁸ Rather, the judge

found, and I agree, that the "clear and unmistakable" import of Kortz's statement was "that in spite of the recently concluded job action and their individual roles in and opinions about the matter, the workers were there to work, to respect one another, and to conduct themselves in an appropriate fashion."

In reversing the judge, my colleagues' simply dissect from its context the phrase "evoke a response from a coworker," finding those words to be broad enough to encompass discussions about the strike and/or other union related matters. But those words do not stand in isolation; they immediately followed the proscription against "taunting, verbal or physical threats, or other conduct which is confrontational," activities not necessarily protected by Section 7. Only by excerpting certain words from the sentence in which they were used, and ignoring the broader context in which they were uttered, can the majority find that employees would reasonably construe Kortz's statement as a prohibition against the type of protected discussions in which the employees freely engaged following the February 6th meeting. My colleagues' interpretation of the statement contravenes the Board's directive in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2007), to "give the rule a reasonable reading" and "refrain from reading particular phrases in isolation." Because the judge's analysis, unlike the majority's, hewed to both the letter and spirit of *Lutheran Heritage*, I would adopt his findings and dismiss this allegation of the complaint.⁹

As to the second allegation, that the Respondent promulgated a new rule at the meeting that required prior approval by the Respondent of employee postings, I agree with the judge, based on his specific crediting of Kortz's testimony, that the rule Kortz announced applied to employee work areas, not to bulletin boards, and that such a rule had been in place for many years. Therefore, con-

⁶ See also my dissenting opinion in *AT&T Connecticut*, 356 NLRB No. 118, slip op. at 2 (2011).

⁷ In finding otherwise, my colleagues rely especially on the fact that there were no exceptions to the judge's finding that the General Counsel met his initial burden of establishing a violation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I fail to see the significance of this point given that the judge immediately thereafter found that the Respondent successfully rebutted the prima facie case and recommended that this allegation be dismissed. Further, since the judge cited many specific examples of misconduct to support his finding that the Respondent had a legitimate interest in ensuring employee safety (some of which are set out at Sec. 1 above), I fail to see the significance of their statement that "a bare assertion of generalized danger cannot justify the infringement of an employee's statutory rights."

⁸ The judge noted that employees continued to openly participate in discussions about the strike, Union, and terms and conditions of employment without repercussion following the meeting.

⁹ In reversing the judge, my colleagues find that two of the three factors set out in *Lutheran Heritage* for determining whether a work rule that does not explicitly prohibit Sec. 7 activity is nevertheless unlawful are present here. I disagree. As to the first factor, that an employee would reasonably construe the language to prohibit Sec. 7 activity, I find, as stated above, that employees would not, and did not, construe Kortz's statement as prohibiting protected activity. As to the second factor, that the rule was promulgated in response to union activity, the union activity at issue, the strike, was over by Feb. 6 and the rule was promulgated in response to the strikers' return to work and the necessity of maintaining a harmonious work environment when they did. As I explained in my dissenting opinion in *Boulder City Hospital*, 355 NLRB No. 203, slip op. at 5 (2010), absent any indication that the Respondent would not have promulgated the same rule in response to a need to maintain order and harmony in the workplace unrelated to protected activity, "there is no warrant for inferring unlawful purpose in the [promulgation]."

trary to my colleagues, I would find that the Respondent did not promulgate a new rule on February 6.

4. Finally, because I would adopt the judge's dismissals of these allegations, I would also adopt his conclusion that, under the Board's *Master Slack*¹⁰ test, the few remaining unfair labor practices, which were remote in time from the petition to withdraw recognition of the Union, were insufficient to establish a causal nexus between the unfair labor practices and the loss of union support. Consequently, the Respondent did not improperly rely on the employee petition, which was signed by an overwhelming majority of employees, to withdraw recognition from the Union on December 4.¹¹

Dated, Washington, D.C. August 26, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT direct you to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

WE WILL NOT issue disciplinary warnings to you because of your support for and activities on behalf of the Union.

¹⁰ 271 NLRB 78, 84 (1984).

¹¹ Since I would find that the Respondent lawfully withdrew recognition, I would adopt the judge's dismissal of the 8(a)(5) allegation arising from a supervisor's performance of unit work in March 2007, on the ground that there was no contract in effect at that time. I would also rely, as do my colleagues, on the fact that, in any event, no employee was available to perform the work.

WE WILL NOT refuse to bargain collectively with the Union, Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, by failing and refusing to furnish it with requested information, or by failing to timely furnish it with requested information, that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT unilaterally change your terms and conditions of employment by promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at our Grass Lake facility.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to process grievances.

WE WILL NOT withdraw recognition from, and fail and refuse to bargain with, the Union as the exclusive collective-bargaining representative of our unit employees.

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

WE WILL rescind our directive that our employees refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

WE WILL furnish to the Union the information it requested in its letters dated October 19, 2005, January 27, 2006, and February 13, 2006.

WE WILL, within 14 days from the date of the Board's Order, rescind and revoke the written warning issued to Joseph Helton on January 20, 2006.

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

WE WILL rescind our rule requiring you to obtain supervisory approval prior to posting signs, letters, or printed material in our Grass Lake facility.

WE WILL meet and bargain collectively in good faith with the Union at the third step of the grievance procedure as set out in our last collective-bargaining agreement with the Union, effective March 12, 2000, to May 12, 2004, regarding the discharge of unit employee Steven Prysiazny.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All hourly production and maintenance employees in the Grass Lake Engineering and Research Center, but excluding payroll and wage control employees, clerical employees, office janitors, engineering, designing and drafting employees, facility guards, supervisory employees and administrative and executive employees.

TENNECO AUTOMOTIVE, INC.

Donna Nixon, Esq., for the General Counsel.
Gregory J. Utken, Esq. and *Brian R. Garrison, Esq. (Baker and Daniels LLP)*, of Indianapolis, Indiana, for the Respondent.
Stephen A. Yokich, Esq. (Cornfield and Feldman), of Chicago, Illinois, for the Charging Party.
Lonnie Tremain, of Jackson, Michigan, Amicus Curiae.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me in Jackson, Michigan, on October 9–11, 2007, pursuant to an original charge filed in Case 7–CA–49251 on January 31, 2006, by the Charging Party, Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), against Tenneco Automotive, Inc. (the Respondent); an amended charge in this case was filed on March 6, 2006. The Union filed additional charges against the Respondent on December 5, 2006, in Case 7–CA–50000; on February 15, 2007, in Case 7–CA–50159; and on April 3, 2007, in Case 7–CA–50256.

On July 31, 2007, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a consolidated complaint against the Respondent and scheduled the matter for hearing. On August 7, 2007, the Respondent timely filed its answer to the complaint essentially denying the commission of any unfair labor practices.

The consolidated complaint alleges that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) on numerous occasions during calendar years 2006 and 2007. At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence.

On the entire record, including any observation of the demeanor of the witnesses and after considering the posthearing briefs submitted by the General Counsel, the Union, Amicus Curiae,¹ and the Respondent, I make the following

¹ On October 2, 2007, a group of employees employed at the Respondent's facility filed a motion with Region 7 to intervene or participate by amicus curiae in this matter. I considered the motion and ruled at the hearing that the group of employees would not be permitted to intervene in these proceedings. However, I allowed the employees to participate as amicus curiae. Certain members of this group of employees testified at the hearing and later submitted a brief regarding their position.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with offices and places of business in Grass Lake and Jackson, Michigan, is engaged in the manufacture and nonretail sale and distribution of automotive products. During the calendar year 2006, the Respondent, in conducting its business operations, purchased and received at its Michigan facilities goods and materials valued in excess of \$50,000 directly from points located outside the State of Michigan.

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

II. THE LABOR ORGANIZATION

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT OF EMPLOYEES

The Respondent admits, and I find and conclude, that the following employees, sometimes herein referred to as the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All hourly production and maintenance employees in the Grass Lake Engineering and Research Center, but excluding payroll and wage control employees, clerical employees, office janitors, engineering, designing and drafting employees, facility guards, supervisory employees and administrative and executive employees.²

IV. THE EXCLUSIVE COLLECTIVE-BARGAINING REPRESENTATIVE OF THE UNION

The Respondent admits, and I find and conclude, that from about 1945 until December 4, 2006, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL–CIO (the International Union) has been the exclusive collective-bargaining representative of the unit and had been so recognized by the Respondent. This recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from March 12, 2000, to May 12, 2004. At all material times from 1945 to December 4, 2006, the Respondent admits, and I find and conclude, that the Union has been the exclusive bargaining representative of the unit herein.³

² As will be further discussed, this case involves the Respondent's alleged unlawful withdrawal of recognition of the Union on December 4, 2006. The Respondent admitted in its answer that the unit as stated in the main text was an appropriate unit for purposes of the Act up to the time of the Company's withdrawal of recognition on December 4, 2006.

³ The undisputed date of the Respondent's withdrawal of recognition of the Union is December 4, 2006. There is no dispute that the UAW International assigned its representational responsibilities with respect to the unit to Local 660 since about 1945.

V. BACKGROUND AND OTHER MATTERS NOT IN DISPUTE⁴A. *The Parties' Bargaining Relationship in 2004 and 2005; the Union Calls a Strike in 2005*

This case involves the Respondent's operations at its Grass Lake, Michigan facility. Grass Lake operates as a prototype shop as opposed to a typical manufacturing facility. Accordingly, employees there are engaged in the design, manufacture, and sale of emission control (exhaust systems), ride control, and other products for the automotive industry.

The Grass Lake facility consists of four separate areas for muffler fabrication, pipe bending, final assembly, and shipping and receiving. Employees generally are not stationed in one area and operate multiple pieces of equipment located throughout the facility. The instant litigation mainly focuses on events occurring at the Grass Lake facility, as opposed to the Respondent's facilities located in Jackson.

The Respondent and the Union's collective-bargaining relationship began around 1945 and lasted formally until May 12, 2004, when their collective-bargaining agreement—styled Working Agreement—expired.

After the expiration of the working agreement, the parties worked without a contract but continued to negotiate for a new contract throughout the balance of 2004. However, some time in December 2004, the Union rejected the Respondent's November 4, 2004 last offer, which was described by the Company as its last, best, and final contract offer.

The Respondent also informed the Union that four provisions of its last offer—those dealing with union security, dues checkoff, no-strike-no-lockout, and arbitration—would be implemented.⁵ The other terms of the expired contract would

⁴ The parties stipulated and agreed that certain exhibits would be jointly offered and received into the record. I concurred with the parties' stipulation and agreement and received Stipulated Exhs. 1–28. These exhibits consist of various documents, mainly correspondence, which pursuant to the parties' stipulation and agreement are deemed authentic and accurate records of the matters addressed therein. In this section of the decision, I have considered Stipulated Exhs. 1–28, in pertinent parts thereof, to contain established and/or undisputed facts, as well as certain other evidence, both documentary and testimonial, including the reasonable inferences taken therefrom.

⁵ The Respondent's letter included the following timetable for its proposed implementation of the terms of its last, best, and final offer:

<i>Effective</i>	<i>Implementation Timetable</i>
	<i>Grass Lake Last-Best-Final Offer</i>
	<i>Table Provision</i>
1/17/05	Wage increase
1/17/05	A&S benefit increase
2/01/05	Life insurance benefit increase
3/01/05	Increase in medical insurance contribution rate
3/01/05	Increase in dental contribution rate
3/01/05	Medical plan changes to HMO and PPO. New hires PPO only. Spousal restriction does not apply
3/01/05	RX co pay plan changes
2/01/05	Pension benefit increase
7/01/05	JEF position
1/17/05	All other provisions of Company LB&F, including all economic and noneconomic language changes. Company will begin filing Plant Service positions immediately at pay rate of \$16.50 per hour.

remain in effect.

In April 2005, the Union began what later was determined by the Board to be an economic as opposed to an unfair labor practice strike. However, the Company continued its operations using salaried employees and temporary contract employees obtained from a local engineering firm—Strom Engineering. Additionally, certain bargaining unit employees chose not to join the strike; then later, 10 unit employees decided to cross the picket lines. Ultimately, the Respondent hired 16 permanent replacement workers.

On August 29, 2005, Valerie Balog,⁶ the Respondent's human resources manager, wrote to James Walker, the Union's International representative, stating in pertinent part:

We have recently discovered an occurrence of purposeful tampering with natural gas valves in our test lab. As you are aware, there was a previous incident involving similar equipment. Given the significance and obvious impact of this issue, we intend to install video cameras in the test labs to deter any future incidents of such tampering and to assist in identifying those responsible for this dangerous activity. We write to inform you regarding our intentions and to invite your questions or concerns regarding this information. Please let me know if you wish to discuss this matter. We look forward to your prompt response within 3 business days as we consider this matter to be a safety concern which we must move quickly to address. If we have not heard from you we will assume that the union has no interest in further discussion of the matter.

On September 2, 2005, Walker responded to Balog, stating in pertinent part:

Re: Video Device Installation

Dear Ms. Balog:

The installment of video devices in the workplace is an issue subject to mandatory bargaining. Information is needed so that the Union may review, study and bargain intelligently regarding this issue with the Company. Having no information regarding the incidents, the Union's position is one of opposition to any unilaterally or arbitrary installation of any video equipment in the workplace.

Please provide the Union with copies of any and all correspondence (including police reports) written, photographic and investigative information/documentation regarding the two incidents cited in your August 22, 2005 letter regarding the tampering with natural gas valves.

In addition, please provide the dates, meeting minutes and correspondence of any and all meetings regarding the two incidents.

⁶ The Respondent admits that Balog is a statutory agent and/or supervisor. On this record, the evidence supports a finding and conclusion that based on her role and functions within the Company's operations, she meets the statutory definitions of agent and/or supervisor under Sec. 2(13) and (11), respectively, of the Act. Balog did not testify at the hearing.

Please provide all information as to how a decision by the Company to consider placing video equipment in the workplace was determined.

Please forward this information to my office.

The Respondent never acted on the proposed installation of the video cameras, nor did the Company ever respond to Walker's letter. Moreover, the Union at no time followed up on its request for the requested information Walker's September 2 letter.

On October 13, 2005, the Respondent issued a written (verbal) discipline to a unit employee, Joseph (Joe) Helton, for spraying body spray at two other employees (unnamed) while he was leaving work, in violation of its work rules 12 and 33.⁷

On October 18, 2005, the Union filed a grievance (No. 054499) over Helton's discipline, stating that the collective-bargaining agreement (article 3) was violated in that Helton was disciplined without proper cause, and requesting that the discipline be withdrawn and expunged from Helton's personnel file.⁸

On October 19, Walker wrote to Balog requesting certain information to allow the Union to properly investigate Helton's discipline and grievance. Specifically, Walker requested the following information regarding work rules 12 and 23:

Work Rule Number 12:

What was the specific infraction, regarding work rule number 12, allegedly committed by Mr. Helton?

Who was involved in the alleged infraction?

What was the approximate distance between the alleged victims from where Mr. Helton allegedly committed the work rule 12 infraction?

Did the alleged victims physically get any of the "body spray" from Mr. Helton's atomizer upon their person?

Did the alleged victims suffer any physical side effects?

Did they receive any medical attention as a result of the alleged infraction?

What environmental impact did the alleged infraction have in the worksite?

Who witnessed the alleged infraction?

In the past five years, how many other employees have been disciplined by the Company for the same or similar infractions alleged against Mr. Helton? Please provide specific details of each incident, including names and what types of discipline they received.

Were any grievances written as a result of the discipline?

Who issued the discipline to the individuals(s) committing the same or similar infractions?

Has any member of management ever violated work rule number 12 in the past five years? If so, please pro-

vide the names of the individuals involved in the incidents and what type of discipline they received for their infraction.

What written consultation or work rule information did Mr. Helton receive regarding the use of "body spray" in the workplace?

Who, within the work site, was endangered by the "body spray" exposure?

If someone was endangered, in what regard were they endangered?

Was there any emotional or mental trauma experienced by the alleged victims of the infraction? If so, how were they emotionally or mentally traumatized?

Did the alleged victims receive medical assistance for the emotional or mental trauma? If so, what type of assistance did they receive and from what agency or treatment facility?

Was there any lost time involved as a result of any treatment?

Work Rule Number 33

Please provide specific details regarding the alleged insubordination by Mr. Helton.

Who was involved in the alleged insubordination infraction by Mr. Helton?

Who was a witness to the alleged violation of work rule number 33?

Were specific orders given to Mr. Helton regarding the use of "body spray"? If so, what were they?

Please provide the written documentation detailing the directive given to Mr. Helton that he allegedly violated in an act of insubordination.

Was the individual giving Mr. Helton a directive regarding the "body spray," present at the time of the alleged "insubordinate" act?

Who provided written counseling or directive to Mr. Helton regarding the use of "body spray" in the workplace?

Are there designated locations where "body spray" may or may not be used? If so, please provide that information and when it was established.

In the past five years, how many insubordination acts and/or disciplines, have been issued to employees regarding this same incident? If so, are they types of insubordinate acts and/or discipline the same or similar to the alleged infraction Mr. Helton is involved in? If so, please provide information how each incident is the same or similar to Mr. Helton's situation.

Have there been other incidents within the past five years where an employee committed a same or similar type of insubordinate act and either did or did not receive a disciplinary action? If so, who were the individuals and what were the specifics regarding the incidents?

Because of the seriousness of the discipline, please provide the above requested information, no later than Wednesday, October 26, 2005, so that we may review it before the grievance meeting regarding this issue. This information is needed so that we may make an informed and educated determination regarding

⁷ See Stipulated Exh. 8, a copy of the letter. See also Stipulated Exh. 20, the Respondent's work rules in place at the time of the incident. Rule 12 prohibits threatening, intimidating, or coercing another employee or company official by word or act. Rule 33 prohibits insubordination of supervisors.

⁸ See Stipulated Exh. 9. The Union's grievance also asked that Helton be made whole and that any harassment of him cease.

Helton's discipline.

On October 20, 2005, Balog wrote to Walker, stating (in pertinent part):

Dear Mr. Walker:

I am in receipt of your letter of 10/19. Although not stated, I assume the grievance you are referring to is #54499 which was submitted by Larry Cognata on 10/18/2005. This matter is still in Step 1 of the grievance process. I am therefore confused as to the content of your letter since it was received even prior to the supervisors answer to the grievance submitted by Mr. Cognata. The supervisor's response is dated 10/19 . . . The bargaining agreement calls for a response from the Chairperson of the Bargaining Committee within 2 working days to be submitted to the Manager of Prototype Operations [Mark Kortz].⁹

Walker responded to this letter on October 20, 2005 (by fax), explaining to Balog that his October 19 letter merely was an attempt to request information the Union needed to process Helton's grievance.¹⁰

On October 27, 2005, Balog wrote to Walker explaining her understanding of the contract grievance procedure and the Company's view that it need not provide the information regarding Helton's discipline. She stated (in pertinent part):

Dear Mr. Walker

I received your letter of October 20th. Article VIII, section 5 Grievance Procedure Step 1, paragraph b, of the collective bargaining agreement states "the written answer in step 1 shall be final unless the answer is appealed on the form in writing, dated and signed by the chairperson of the bargaining committee and presented to the manager of the shop within 2 working days of the return of the grievance by the supervisor." The answer should have been received no later than the Tuesday 24th. The grievance regarding Mr. Helton has now been settled since we received no response to our Step 1 answer. Your letter of October 20th states that the information the union needed was to process Mr. Helton's grievance and required by no later than October 26. Since the grievance did not proceed to the next step as per the contract, I no longer see the need to provide that information. Please contact me if you have any questions regarding this matter.¹¹

On November 4, 2005, Walker wrote to Balog in reference to Helton's grievance:

RE: Grievance #054499 Appeal

Dear Ms. Balog:

On behalf of Local President Larry Flannery, I am appealing the above-cited grievance to the next Step of the Grievance Procedure, in accordance with Article 8, Section 5 of the Collective Bargaining Agreement:

Thank you for tracking down the grievance response from your foreman and forwarding it to me today. Although the foreman dated his response 10/18/05, it was not forwarded to the Union until today—11/4/05. The Union does protest this delay.

Please forward requested information on this grievance to my office. In addition, please contact Larry Flannery to proceed with this appeal and schedule a meeting date and time.¹²

On November 7, 2005, Walker again wrote to Balog:

RE: Grievance #05499

Dear Ms. Balog:

Thank you for bringing to my attention the typographical mistake in my November 3, 2005 letter to you regarding grievance #054499. The first sentence should have read, "It is my understanding from local union representatives that the Company has *not* provided a response to the above cited grievance." I am including a corrected copy of my letter to you with this fax.

The Union maintains the Company did not forward its grievance answer until your letter to me on November 4, 2005. If, in fact, the Company grievance response was given to the appropriate Union representative, please supply the following: 1) name of the Company representative(s) who gave the Company's response to the Union; 2) name of the Union representative the Company's response was given to; 3) the date and time the grievance was given to said Union representative; and 4) the location the Company's response was given to said Union representative. This information would be helpful in validation of the Company's claim of Article 8, Section 5 allegation.

*In addition to the above requested information, the Union still needs the information requested in my October 19th letter to you. Thank you for your cooperation in this matter.*¹³

On November 21, Mark Kortz responded by letter to Flannery regarding Helton's grievance stating:

Dear Mr. Flannery,

Per the letter sent by James Walker on your behalf on 11/4/2005 to Ms. Balog, I am requesting to meet with you on Tuesday, 11/22/2005 or Wednesday, 11/23/2005 at 4:00 p.m. on either day as a step two meeting to discuss grievance #05499. Ms. Balog is out this week but I understand Mr. Walker has a pending information request on this grievance. If we do not resolve it at our step, the company will respond to the information request after the Thanksgiving holidays.

Please contact me at [telephone number and extension] to advise which date fits into your schedule.¹⁴

¹² See GC Exh. 52.

¹³ See GC Exh. 19. I note that Walker's November 3, 2005 letter was not adduced by the parties.

¹⁴ See GC Exh. 20. I have omitted the telephone numbers Kortz included in his letter.

⁹ See GC Exh. 12.

¹⁰ See GC Exh. 13.

¹¹ See GC Exh. 14.

On November 28, 2005, Walker responded to Kortz' letters. He stated:

Dear Mr. Kortz:

For sometime now, the Union has requested information regarding Mr. Joe Helton's discipline and in his grievance (#054499). The Company has failed to respond.

On November 21, 2005, you suggested scheduling a meeting for either Tuesday, November 22nd or Wednesday, November 23rd. On November 22nd, the Union responded with a request to meet on November 23rd at the Union hall. When the Company failed to respond in a timely fashion, the Union sent you a fax explaining the reason for not waiting around for a meeting which the Company did not confirm. Finally, late Wednesday afternoon, you sent a fax being confused as to why the meeting was being cancelled. The "why" was that you didn't confirm the meeting for the 23rd at 4:00 p.m. at the Union hall.

This fax will serve as a request to meet on the above-cited grievance. I am offering the following dates to meet at the Union hall:

Wednesday, November 30th at 4:00 p.m.
Tuesday, December 6th at 10 a.m.

Please fax me, as soon as possible, what date the Company wishes to meet.¹⁵

B. The Strike Ends; the Parties Bargaining Relationship in 2006

On January 27, 2006, by letter, Walker wrote to the Respondent's human resource representative, Terry Youngerman, and informed him that the striking unit members desired to return to work pursuant to the Company's last, best, and final offer of November 4, 2004.¹⁶

Youngerman responded by letter¹⁷ dated also January 27, acknowledging receipt of Walker's letter but asking by way of clarification whether the Union was making an unconditional offer to return to work, and whether the Union had satisfied the Company's last, best, and final offer and had agreed to a new contract. Youngerman indicated that after receiving Walker's response, the Company would formally respond to the January 27 letter.

Walker responded to Youngerman by letter¹⁸ of January 30, 2006, stating:

Dear Mr. Youngerman:

To response [sic] to your January 27th letter to the Union:

Yes, the Union made an unconditional offer to return to work Friday, January 27, 2006.

No, the Union has not ratified the Company's posted terms for a new contract.

¹⁵ See GC Exh. 21. Walker's letter of November 22 was not adduced at the hearing. Also, the fax relating to this letter was not adduced; nor was Kortz' "Wednesday" fax.

¹⁶ See Stipulated Exh. 3.

¹⁷ See Stipulated Exh. 4.

¹⁸ See Stipulated Exh. 5.

In the near future, I will be contacting you for future negotiations.

On January 27, 2006, Walker also wrote to Youngerman and requested of the Respondent the following information within 20 days for purposes of representing unit members in collective bargaining:

1) A list of employees who have been hired by the Company since April 2005. For each employee, please state the following:

- a) their address
- b) their date of hire
- c) their previous place of employment, if any
- d) the day they passed the mechanical aptitude test and/or their score
- e) the position they now hold and their wage rate
- f) their age

2) A list of all subcontractors for bargaining unit work that the Company has entered into since April 2005. For each contract, please state the following:

- a) the product provided by the subcontractor
- b) the price paid by the Company for the product
- c) the duration of the subcontract
- d) provide a copy of each contract currently in effect

3) A list of all vacancies in the bargaining unit which have occurred since April 2005, the date of the vacancy, and the individual who filled the vacancy.¹⁹

On February 6, 2006, Youngerman responded by letter to Walker's January 27 information request, stating in pertinent part:

1. We do not understand the relevance of this information request for employees who were hired after the strike began with respect to their names, addresses, former place of employment and age. We also have concerns based on prior conduct by picketers toward replacements. Thus, as to that information, we will hold the request in abeyance pending further explanation. However since the strike began in April, 2005, we have hired 16 employees. Their date of hire, date passed mechanical aptitude test/score, position they now work and their wage rates is [sic] listed below.²⁰

2. Since the commencement of the strike in April, 2005, we have sourced a limited amount of bargaining unit work outside the facility to be performed by third party subcontractors. We have furnished you data until 08/26/2005 per the NLRB settlement in September, 2005. The data below is from 8/26/2005 to 02.06.2006. Also, as you know, we have used Strom Engineering for performing work inside the facility that would have been performed had employees not been on strike. However, now

¹⁹ See Stipulated Exh. 11.

²⁰ See Stipulated Exh. 12; Youngerman's letter did not identify the 16 replacements by name but provided the other information requested.

that the strike is over, we will cease using Strom in that capacity.²¹

3. The only vacancies that occurred since the strike began in April, 2005, have been those created by the strikers. Work associated with those vacancies was performed during the strike by salaried employees, contract employees and replacement employees hired. (See response to inquiry number 1.)

Walker, in turn, responded to Youngerman on February 13, 2006,²² stating:

First, we must insist that you provide the names, addresses, ages and former places of employment of the employees who you allege to be permanent replacement workers. This information is relevant for the following reasons:

a) We are still the exclusive bargaining representative of the bargaining unit employees at the plant, including the alleged permanent replacements. We need their names and addresses to communicate with them in order to act on their behalf. We also need their names to determine whether the other assertions you make about their hiring and wages are correct.

In response to your "concerns," I would note: (1) that you have not alleged any picket line misconduct occurring since the beginning of November, (2) that we have former strikers now in the place who will learn the names of the replacements in the course of their work, and (3) that given the limited number of former strikers in the plant, mailing addresses are the only practical way for the Union to communicate with these bargaining unit members in a private fashion that cannot be monitored by the company.

b) The ages of the alleged permanent replacements is relevant to any bargaining proposals the Union may make with respect to health and pension benefits. Of course, these are key issues at the present time in negotiations.

c) The hiring process used by the company relies on the work experience and skills of job applicants in addition to test scores and interviews. We would like to use the information regarding their prior employment to determine whether the company has applied this process consistently with its past practices.

In this letter, Walker requested additional information about Strom Engineering whose employees performed unit work during the strike. He requested the following information:

a) The date they were first hired for such services.

b) The last date upon which they performed such services in the plant.

c) The number of employees provided and their job assignments in each week of the strike since August 4, 2005.

In addition, we request copies of any written contracts between Tenneco and Strom Engineering and any purchase orders, requisitions, invoices or other documents

which set forth the amounts paid to Strom and the number of employees provided by Strom since August 4, 2005.

Walker also included a request within 7 days for information stemming from the Company's responses contained in its February 6 and January 3 letters, stating:

Third, your letter of February 6th indicates that several employees became replacements well after they were hired. Your letter of January 31st also indicates that you are now assigning positions by machine or function instead of by seniority. We hereby request any notices of vacancy that were posted in the shop between August 1, 2005 and the present, as well as any applications received for those vacancies.

Fourth, your letter of January 31, 2006 indicates that you can meet your "current operating needs" with fewer employees. If you have rearranged your work so that fewer employees can now accomplish the same amount of work, please list the steps you have implemented in this regard, along with the date of implementation of each such step. If your current operating needs have declined due to lack of orders, please list the business that has been lost, the date that it was lost, the impact of the loss on the need for employees and the steps that the company is taking to regain the business.

On February 20, Youngerman responded at length by letter²³ to Walker's February 13 request and dealt with each request by categories as follows:

Additional Permanent Replacement Information

You say you need names, addresses and ages in order to act on behalf of the permanent replacements to make contract proposals, and to confirm our "assertions" that their hiring dates and wages are correct.

It is our understanding from our counsel, that the NLRB has long held that an employer has no obligation to bargain with the Union over the terms and conditions of employment for replacement workers. *Service Electric Co.*, 281 NLRB 633 (1986). (An employer can unilaterally establish the terms and conditions of employment for strike replacement workers without bargaining with the Union); *Detroit Newspaper Agency*, 327 NLRB 871 (1999) (Confirming the Board's well-established rule that an employer need not bargain with a union with regard to the terms and conditions of employment for strike replacements). Thus, the information doesn't appear relevant for the purposes of bargaining on behalf of replacements, which is the reason you gave for wanting it.

The NLRB's reasoning is that requiring an employer to bargain over the wages and benefits for strike replacements would effectively invalidate its right to hire replacements. Second, it is not logical to expect that the union will negotiate in the best interests of strike replacements where the union also represents strikers. Instead, there is a reasonable concern that the union would not be a vigorous bargainer for the replacement workers because of

²¹ Youngerman included in his February 6 letter the names of two third-party subcontractors, the products they supplied, the quantity thereof, and the price of each product.

²² See Stipulated Exh. 13.

²³ See Stipulated Exh. 14.

the direct conflict of interest between the strikers and their replacements. This was borne out at our recent bargaining sessions, where you proposed that the Company return the strikers and lay off the replacements, and your proposal that replacements have their wages frozen until 2008.

Obviously, if and when a new labor contract is signed, the wages and benefits of replacement workers would become those provided in the signed labor contract applied to all employees.

Strom Engineering Information

We do not understand the relevancy of information with respect to Strom Engineering, and you have not provided any reason for the request. As you know, during a strike, an employer is free to continue operations through a variety of means. That includes using temporary contractors. It is our understanding that there is no duty to bargain with the Union about what contractors we temporarily hire, how we use them, or what we pay them during the strike. Now that the strike is over, certainly any information with respect to our use of Strom to continue operations during the strike is totally irrelevant.

Posted Vacancies

With respect to your request for vacancies, we previously responded to that in our earlier letter to you, dated February 20, 2006. Per the terms and conditions, a Job Bid was placed up for two days, the only qualified candidate that bid on the job was accepted, the remaining positions have been filled from the outside.

Operating With Fewer Employees

You asked for an explanation as to why we can meet our current operating needs with fewer employees. The major programs that were being fabricated at the time of the strike have went [sic] through their respective development cycles, and will be heading to production in our manufacturing facilities this spring and summer. Thus, the workload the Model Shop saw prior to the strike and during the strike has diminished because of simple progression through the development cycle.

On March 6, 2006, Walker responded by letter to the Company's February 20 letter, this time to the Respondent's director of human resources, David Hartman,²⁴ stating in (pertinent part):

We continue to insist that you provide information to the Union regarding the identity and terms and conditions of employment of the replacement workers hired by Tenneco during the course of the Union's ULP strike.

Your assertion that the Employer has no obligation to bargain about the terms and conditions of employment of the replacement workers is wrong. The cases you rely on apply to situations in which the Union was on strike and sought information about the terms and conditions of re-

placement workers prior to an unconditional offer to return to work. There are no cases which state that an Employer has no obligation to bargain regarding the terms and conditions of employment for replacement workers after strikers have returned to work in the same bargaining unit. Such a rule would be preposterous; it would divide the bargaining unit in half and make meaningful bargaining impossible. In short, the International Union and Local 660 remain the representative of *all* of the employees performing model maker and place service work at the Grass Lake facility.

Your comments regarding the "conflict of interest" between the replacements and the strikers are not well taken. First, the Company created this "conflict of interest" when it decided to hire permanent replacements. Second, the Union's proposals regarding the return of the strikers and the layoff of the replacements reflect the fact that the strikers have much more seniority than the replacement workers, both in the model maker classification and for the particular assignments which now exist at the plant. Third, it was the Company which proposed and implemented, in January 2005, a "two-tier" system for newly hired workers, both with respect to the initial wage and for progression into the model maker wage and the health care choices available to newly hired employees.

The information sought by the Union with regard to the replacement workers, is relevant both to the issues which are currently the subject of bargaining and to the Union's obligation to represent its members. As we have indicated previously, it is absolutely essential that the names of the replacement workers be provided to the Union so that the Union can ascertain whether the Company's statements about the terms and conditions of employment of those individuals are true.

Moreover, the Company has now taken the position that recall of strikers should be governed by the endurance of vacancies in particular assignments instead of by seniority in the model maker classification. Accordingly, we request the following information regarding each replacement worker currently employed, in addition to the information we have already requested:

- a) the day they began employment with Tenneco;
- b) the day they passed the muffler test;
- c) the day they passed the pipe test;
- d) any documents that were given to the employees at the time of hire;
- e) their employment prior to Tenneco.

The information and documents are relevant to determine whether the Company is acting in accordance with its implemented terms and past practices regarding the assignment and recall of model makers and for bargain [sic] intelligently about the issue of primary assignments in our ongoing collective-bargaining negotiations. Moreover, this information is needed to determine whether the Employer is adhering to any commitments it has made to its replacement workers. Finally, this information will assist

²⁴ See Stipulated Exh. 15. Hartman is an admitted statutory agent and/or supervisor.

senior members of the bargaining unit if they are called upon to train replacement workers.

Your concerns regarding disclosure of personal information are inadequate to eliminate your duty to respond to our information requests. Under precedent from the National Labor Relations Board, the duty to disclose information regarding replacement workers is limited only when there is a "clear and present danger" to those workers. No such danger exists here. Most of the conduct that was the subject of the NLRB charge did not involve bargaining unit members, and all of it ceased once the charge was filed. Indeed, the Union has agreed to cease any further such conduct.

Finally, you state that information regarding hiring is irrelevant because the Company has no duty to bargain regarding hiring. We need the information to determine whether the Company has honored its posted terms and the commitments it has made to the replacements after hiring. As noted above, this information would also be relevant to negotiations regarding Primary Assignments and the recall of strikers.

With respect to the use of Strom, you have conceded that the recall of replaced workers is a mandatory subject of bargaining. You have also stated that the workload of the Model Shop has diminished because of the progression through the development cycle. The information we have requested from Strom bears on the accuracy of this latter statement and also bears on the issue of the number of vacancies the Company has for striking workers seeking reinstatement. Our request for the information was aimed at documents which would set forth the number of Strom employees during the strike.

In your February 20, 2006 letter, you mention that the Employer had one bargaining unit vacancy. Please provide us with a copy of the bid notice that was posted for the vacancy and the name of the successful bidder. In addition, it was also stated in this February 20, 2006 letter that the workload of the Model Shop has decreased "because of simple progression through the product development cycle." So that we can better understand this statement, please provide us with the following:

- a) a list of all major development programs in existence at the plant as of April 2005 and the number of model makers assigned to each; and
- b) a list of all major development programs in existence as of February 6, 2006, a description of the status of the program, and the number of model makers attributable to each program.

Please also provide the Union with a list of all major development programs that the Company intends to bring into the Grass Lake facility within the next six (6) months.

In addition to the foregoing, the Union requests that the Company identify the individuals who hold the position of Plant Service Worker. We also request that you describe the current assignment of those Plant Service Workers and state whether the Company has any unfilled Plant Service Worker vacancies or has any plans to create

additional Plant Service Worker positions in the next six months.

In your letter of February 6, 2006, you indicated that the Company is subcontracting with Metal Form and V-Converter for various products. Please provide the actual subcontracts with those companies or the purchase orders and invoices with the quantity and price information set forth in your letter. In addition, please identify any other subcontractors that are currently being used to perform work traditionally done by model makers and provide the subcontracts or purchase orders for the work they are doing.²⁵

On March 13, 2006, Mark Kortz by letter, at the behest of Hartman, responded to Walker's March 6 letter and provided the following:²⁶

As to permanent replacement workers, last month, we provided you the following information: 1) number, 2) date of hire/date became permanent replacement, 3) date passed mechanical aptitude test and score, 4) position; 5) wage rate, and 6) age. The replacement workers are:

[15 named persons omitted]

You claim the remaining information (addresses and prior employment) for replacement workers is relevant to current bargaining issues. In your February 13, 2006 letter, you said that information was needed to make contract proposals on behalf of replacement workers and to confirm Company assertions that their hiring dais and wages are correct. Since you now have names, numbers, hire dates, positions, wage rates, ages, etc., we do not understand why you need home addresses and prior places of employment in order to make contract proposals.

The other reason seems to be so you can determine whether the Company has honored commitments it has made to the permanent replacements. I'm not sure what that means. In any event, you have Union representatives working here in the facility who are able to approach any of the replacement workers during breaks, meal periods, and before or after work, to ask them any questions you have or to provide them any information. Thus, you have already means to communicate with them.

However, irrespective of that and, more importantly, our concerns about providing home addresses reasonably remain. Because the Union has just recently settled the charges over its serious physical threats, property damage and intimidation against employees who crossed the picket line, those events are still fresh in everyone's mind. Furthermore, we continue to have reports that picketers are shouting harassing comments at replacements as they enter

²⁵ Walker requested that all information be provided within 7 days.

²⁶ See Stipulated Exh. 16. Also by letter dated March 13, 2006, Kortz advised the unit employees, individually, that the Union had requested personal information and invited them to express any question or concerns they might have about the Company's providing their home addresses and prior employment history. The employees were advised that the Company at that time did not plan to provide this information. (See GC Exh. 50.)

and exit the facility. You also recently made a contract proposal that all replacement workers be laid off and all former strikers return. Additionally, just last week, a returning striker, Steve Prysiazny, stated in front of a supervisor, "So these are all the people we are supposed to get rid of," as he waved his hand towards a group of replacement workers.

Therefore, at this particular time, we re-offer the alternative presented in our February 20, 2006 letter of identifying a neutral third party, such as a federal mediator, to whom we could provide the home addresses and you, in turn, could provide him with any information you wish to communicate to replacement workers at home, as opposed to at work through your representatives.

Responses to Additional Requests

1. Replacements. You asked for the day each permanent replacement workers [sic] began at Tenneco, when they passed the muffler test, the pipe test, and documents given to them at the time. We previously provided you their dates of hire and the dates they passed the pre-employment test, so you already have that information. (Please refer to our letter to you of February 6, 2006.) Replacement workers are at various stages in the number of hours of muffler and pipe fabrication. A. Porter has taken the muffler test. Others will be taking these tests as they complete additional hours in either muffler or pipe fabrication. As to documents given to them, a copy of the document each was provided and signed is enclosed. We previously reported to you the dates each individual became a permanent replacement.

You also asked about their employment history prior to being hired by Tenneco. We still do not understand the relevance of that information. The only reason you seem to have is that it would assist senior members of the bargaining unit if they're asked to train permanent replacement workers. While that may or may not be true, it has nothing to do with bargaining. Also, the Union has never, at any time in the past, requested information about any new hire's prior work experience. If a more senior employee is asked to train a replacement worker, and he wants to know about the person's prior employment, he can just ask and, if the person wants to respond, he can.

2. Striker Recall. You claim that the Company has taken the position that recall of strikers should be governed by the existence of vacancies in particular assignments instead of by seniority. That is incorrect. The parties have already specifically agreed as to how that will occur. In our January 31, 2006 letter, we stated, "[W]e will offer reinstatement to those individuals on the reinstatement list who are qualified to perform the work based on seniority." (That applies with the exception of Mr. Helton, who, per your request, is taking the place of a more senior striker.) In your February 1, 2006 letter, you said, "The Union accepts the proposed terms."

3. Strom. You indicated information regarding Strom was to identify the number of Strom employees during the strike. While we think that number is irrelevant because

we were entitled to use as many or as few as we felt necessary at any given time, the number of Strom employees we used during the course of the 9-month strike varied from a high of 50 to a low of 0.

4. One Vacancy. You asked about the one vacancy referenced in our February 20th letter. A copy of the bid paperwork is attached.

5. Development Programs—April 2005 and February 2006. You asked for list of major development programs in existence at the plant as of April, 2005 and February, 2006 and the number of Model Makers assigned to each. The information as to Development Programs is listed below.

[Programs Omitted]²⁷

As programs get closer to "pre-production builds," production equipment gets up and running, and we use parts from run-offs, where possible, because: 1) it is more economical; and 2) the customer wants us to deliver production-intent prototypes where at all possible.

We do not assign a Model Maker any one's [unit employee's] specific program. They may be called upon to work on multiple programs at any given time, as needed. For example, a bend operator works on all programs in the Shop, as does a hoist person, shipping person, tool room person, quality person, etc. Model Makers in pipe and muffler shops work on orders given to them. In several cases, we will give repeat or similar parts to the same persons(s) for efficiency reasons.

6. Future Development Programs. You requested a list of all future major development programs that the Company intends to bring to the Grass Lake facility within the next six months. As you know from the NLRB's ruling in the charge you filed last April, an employer is not obligated to respond to information requests about future or hypothetical events.

7. Plant Service Worker. You requested individuals who hold the position of Plant Service worker, the current assignment of those individuals, and whether there are any unfilled Plant Service Worker vacancies.

Plant Service Worker²⁸ Primary Assignment

[Name omitted]	Transferring parts to inventory
[Name omitted]	30-day temporary transfer to floor
[Name omitted]	Shipping/Receiving
[Name omitted]	Shipping/Receiving

There are no unfilled plant service positions.

8. Future Positions. You asked about future plans to create additional Plant Service positions in the next six

²⁷ The Respondent listed by automobile manufacturer 38 major development programs in existence as of April 2005 and February 2006, along with the status, e.g., launched or preproduction of each. I have omitted them for the sake of brevity and out of concern for the Company's possible proprietary interests in this information.

²⁸ The Respondent listed the names of four persons employed as plant service workers. I have omitted these from this decision.

months. As noted, an employer is not obligated to respond to information requests about future events and in any event we have no plans at present.

9. *Metal form and V Converter.* You asked for copies of contracts, invoices, etc., with respect to metal form and v converter work subcontracted during the strike. Because the Company was permitted to continue operations during the strike by a variety of means, including subcontracting, and pay whatever it had to pay to get the work done, we don't see the relevance of providing you with contracts, invoices, etc.

10. *Other Subcontracts.* Finally, you asked about any other subcontractors currently being used to perform work traditionally done by bargaining unit employees. There are none.

On March 22, 2006, Walker responded to Kortz' March 13 letter by letter addressed, however, to Hartman, stating as follows:

1. We request that you attach the names of the alleged permanent replacements you listed in your letter of March 13th to the information set forth in your letter of February 6th. The documents you provided with your letter of March 13th also contain the names of an employee named "D. Burke." This name is not listed on page 1 of the letter. Please identify this individual and state his current status and/or his employment dates with the Company.

2. Prior to the strike, employees received letters which were "formal offers" of employment. These letters outline the wage progression scale for new hires and the probationary period of new employees. An example is attached. If the Company issued similar letters to the individuals listed in your March 13th letter, please provide them. If the Company did not, please explain why they did not.

3. We continue to seek information as to the prior employment of the individuals hired during the strike. As we indicated before, this information will assist our members when they are called upon to train the replacements, particularly if there is an accusation that the training is somehow insufficient. This information would also be relevant to the issue of Primary Assignments which, as you know, is an issue on the negotiating table between the parties.

4. We repeat our request for records related to the use of Strom and its employees during the strike. It should not surprise you that one of our goals in bargaining is to ensure the return of all of the strikers to work. While you may not agree with our goal, you have conceded that the reinstatement of strikers is a mandatory subject of bargaining. The information about Strom is necessary so that the Union can judge how to press its position on this issue. It would allow the Union to evaluate your claim that fewer workers are needed because there is less work at the plant.

5. Our request for future product plans is relevant for the same reasons. This information has a direct bearing in any proposals we might make to resolve this labor dispute. We do not believe that the Regional Director has ruled that all requests for a Company's future plans are not proper under Section 8(a)(5).

Please provide the foregoing to the Union within seven (7) days. If you think that discussion of these matters will facilitate your response to this request, please don't hesitate to contact me directly.

On March 29, 2006, Kortz again by letter²⁹ responded to Walker's March 22 letter on behalf of Hartman and stated as follows in pertinent part:

The names of the permanent replacements matched up with the positions we previously provided to you as follows:³⁰

....

1. Mr. Burke is no longer with the Company. He worked from 1/24/2005 to 2/28/2006.

2. The individuals listed in our March 13th letter were provided one of the copies of the "permanent replacement" letters we submitted to you on March 13th. Which employees received which letter was identified at the top of each of those letters. They received those letters because they were offered positions as permanent replacements.

3. We continue not to understand the relevance of prior employment history for replacement workers at this time. The Union has never asked for prior employment information on any other employee hired and, as noted in our previous letter, if an issue comes up when one of your members is assisting a permanent replacement, they can have a discussion with the replacement at that point. No replacement worker has accused anyone of insufficient training, and thus, your reason for wanting the information is speculative or hypothetical. Finally, we do not understand how the information on prior work history is relevant to primary assignments or how primary assignments is an issue at the bargaining table.

4. We have already provided you information with a range of Strom temporary employees used during the strike. We first used Strom employees to perform bargaining unit work on April 26, 2005, and last used them on February 4, 2006. As we explained earlier, we used anywhere from 0 to 50 at any given time. They worked with bargaining unit employees who did not strike or crossed over and were assigned as needed to various areas, including welding, hoist, model maker, maintenance, and shipping and receiving. We still do not understand the relevance of written contracts or invoices for Strom during the strike because we were legally entitled to continue operations through a variety of means, including the use of temporary contracts such as Strom. What we paid them is irrelevant and we were not obligated to bargain with the Union about any aspect of using the temporary workers. The only reason you have given is that one of your goals is to ensure the return of strikers to work and this would allow you to evaluate the Company's position that fewer workers are needed because there is less work at the plant. We

²⁹ See Stipulated Exh. 18.

³⁰ Kortz listed the names of 15 permanent replacement workers along with their positions, 12 of which were designated experimental trainees and 3 were plant service workers.

have already bargained, and reached agreement, as to the process for reinstatement of strikers. We have previously provided you with a list of projects in the facility, before and after the strike, reflecting less work. If and when we determine that additional manpower is needed, we will recall strikers on the preferential recall list as previously agreed by the parties.

5. Future Product Plans. In our previous letter, we gave you a detailed list of projects that have been placed at Grass Lake at the time of the strike and since. Anything that we were working on, or have been told we will be working on in the future, is contained on that list. We have not been informed about any other specific major projects that have been sourced to the Model Shop.

We are, however, providing the ages of the permanent replacements in case it would have relevance to benefit proposals you may consider for your members.³¹

Additionally, we continue to have legitimate concerns about giving out personal information about replacement workers at this time. Until just recently, replacement workers, on a daily basis, had to cross a picket line and be subjected to name calling, profanity, verbal threats of physical violence, vehicle damage, videotaping and photographing of their vehicles and license plate numbers to the point that the NLRB recently planned to issue a Complaint against the Union, which we understand is being settled. The fact that you recently have ended the strike does not waylay these concerns. In fact, it heightens them, because many of your members did not return to work, but are on a preference reinstatement list. Additionally, you have just made proposals against the interests of the replacement workers.

Additional Proposed Alternative

Of course, you have several existing options for communicating with the replacement workers, including: 1) the union could schedule meetings as you would normally do to discuss bargaining issues and invite the replacements to attend; 2) your representatives now working in the facility have the opportunity daily to talk with replacement workers; and 3) the Company supplies the Union with its own bulletin board to communicate to employees, which can also be viewed by permanent replacements.

However, we offer another alternative on an interim basis until the concerns disappear. To the extent there is any reason for you to communicate with the permanent replacements, in addition to the available means you already have, we are willing to identify a neutral third-party (such as the federal mediator or someone else) to whom we would provide the names, addresses and mailing labels for the replacement workers. The Union, in turn, could then provide to the neutral third party any written information it wishes to send to replacement workers with postage stamps. The neutral third party could send your communications to them. This alternative meets both our legiti-

mate concerns and your desire to communicate information to the permanent replacements.

Hiring Process Information

Your request for information involving the hiring process and work experience of replacements prior to be[ing] hired by us does not appear to be relevant. Our counsel informs us, that the NLRB has long held that an employer has no duty to bargain with the Union about its hiring process or applicants. *Star Tribune, Div.*, 295 NLRB 543 (1989) ([f]or purposes of the duty to bargain, applicants are not “employees” under the NLRA).

C. The Respondent’s Poststrike Relationship with the Unit Members; the Withdrawal of Recognition

On January 20, 2006, the Respondent, through Kortz, issued a written reprimand to unit employee Joseph Helton for wearing on different occasions a T-shirt that the Company believed created friction between and among his fellow workers.³² The written reprimand in pertinent part stated:

We have advised employees, including you, about engaging in action or conduct that creates friction between fellow employees at work. We realize there are differences of opinion about the ongoing labor dispute, we have asked for everyone’s cooperation to stick to their work and not consciously create confrontational situations. Wearing a shirt about “scabs” to work knowing full well there are multiple employees who have crossed the picket line obviously incites emotions and problems at work. That is why we asked you to cover up the reference to the scab. Unfortunately, it appears you did not want to leave well enough alone and it was reported that you began telling others that another employee was an embezzler and then changed the slogan on his shirt to read, “thou shall not steal.” Again, an effort to goad fellow employees inappropriately and unnecessarily. Lastly, you then changed the shirt to read “thou shall not be a low life.” Again, an effort to goad fellow employees inappropriately and unnecessarily.

We have been doing our best to keep emotions and friction at a minimum at work during the labor dispute. I am committed to and believe I have handled any situation calmly and fairly no matter who has been involved. We have talked to you and other employees about this in the past, but for reasons that are unclear, despite these efforts you seem determined to continue to consciously engage in or instigate this goading behavior. We expect your cooperation in sticking to work assignments and stopping this type of behavior. This is no more than I am asking of any other employee. I have been patient and I trust there will not be any further incidents or there may be additional counseling or discipline.

On February 6, 2006, after some of the strikers had returned to work, the Respondent, through Kortz, issued the following announcement to all unit employees at Grass Lake.³³

³¹ Youngerman’s letter listed the ages of the 16 replacement workers.

³² See Stipulated Exh. 19.

³³ See Stipulated Exh. 21.

As you know, the Union has ended the strike. We stopped using contractors and salaried employees for the unfilled jobs we had at the time the strike ended. We now have employees working 1) who did not strike, 2) who did strike and then returned to work, 3) who are permanent replacements for strikers and 4) who are reinstated strikers.

Each of you made a very personal decision regarding your status. The Company respects each of your individual decisions and, in turn, we ask each of you to respect one another's individual decisions so we can all move forward.

These have been very tense times. Emotions and feelings have run high. We ask you to put those behind you. Hopefully, most of you can. But whether you are someone who didn't strike, a replacement worker or a returning striker, we want to take a moment to remind everyone of our expectation regarding appropriate behavior at work.

We are here to get a job done for our customers, not to engage in taunting, verbal or physical threats, or in other conduct that is confrontational or mean to evoke a response from a co-worker. We trust all will act like adults. We hope there won't be any issues, but if any of you experience inappropriate conduct, do *not* attempt to respond or resolve the matter on your own. Bring it to the attention of your supervisor, Human Resources or me.

Some have asked the status of the labor contract and union security. Although the strike is over, the parties have *not* reached a new labor contract. Thus, we will continue to work without a contract and under the terms of the offer we implemented as we have since January, 2005. Thus, as before the strike started, union security and due check-off provisions are not in effect because there is no signed contract.

Also on February 6, Kortz convened a "Tool Box" Meeting with the unit employees in which he, inter alia, stated that the posting of signs, letters, or printed materials are subject to supervisors' approval.³⁴

On February 10, 2006, 25 unit members employed at Grass Lake filed a decertification petition with the Board seeking to remove the Union as their exclusive collective-bargaining representative.³⁵

On February 16, 2006, the Regional Director for Region 7 informed the Respondent, the Union, and the petitioners that because the Union had filed the unfair labor practices charges against the Company on February 1 and 15, 2006, the representation case would be held in abeyance until the charges were resolved.³⁶

On November 27, 2006, the Respondent terminated a unit employee, Steven Prysiazny, for repeated violations of com-

pany rules regarding proper employee conduct.³⁷ On November 27, 2006, the Union submitted a grievance to the Respondent protesting Prysiazny's discharge and demanded that he be reinstated and made whole and, on November 28, requested that the grievance be advanced to the third step.³⁸

Between November 30 and December 1, 2006, 24 members of the 31 member unit of employees at Grass Lake signed and submitted to the Respondent a petition for decertification of the Union. Based on the petition, the Respondent by letter dated December 4, 2006, informed the Union that the Company would no longer recognize it as the bargaining representative for the Grass Lake unit.³⁹

On March 5, 2007, one of the Respondent's supervisors used a company tractor to move mounds of snow from the Grass Lake facility parking lots. The operation of the company tractor had been traditionally performed by plant service workers, who were members of the unit.

VI. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint as amended alleges numerous violations of the Act by the Respondent. For ease of understanding as suggested by the Respondent, I will discuss the charges chronologically as opposed to the order in which the charges are set out in the complaint. Accordingly, I will treat with the charges in terms of those occurring before the withdrawal of recognition of the Union and during the strike; the withdrawal of recognition itself; and charges occurring after withdrawal.

A. The Prewithdrawal Charges

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union on September 2, 2005, information regarding the Respondent's proposed installation of video cameras at Green Lake; on October 19, 2005, failing and refusing to provide information regarding employee Helton's discipline on October 13; on January 27, 2006, failing and refusing to provide the home addresses of the permanent replacement employees; and on February 13, 2006, failing and refusing to provide information regarding the amount of work performed by contractors during the strike.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to Helton on January 20, 2006, for wearing a T-shirt at work that at different times essentially stated employees should not be strike replacement workers.

The Respondent is also alleged to have violated Section 8(a)(1) of the Act on February 6, 2006, by promulgating a rule requiring that all postings by unit employees of signs, letters, or printed materials at Grass Lake be approved by the Respondent, and unlawfully restricting employee discussion by instructing unit employees not to say anything to each other that might be deemed offensive by or evoke a response from another employee.

³⁷ See Stipulated Exh. 27, Kortz' discharge memo to Prysiazny dated November 27, 2006.

³⁸ See Stipulated Exh. 28.

³⁹ See Stipulated Exh. 25, the petition, and Stipulated Exh. 26, the Respondent's December 4, 2006 letter to Walker.

³⁴ See GC Exh. 50, a copy of Kortz' notes of the meeting.

³⁵ See Stipulated Exh. 22, a copy of the decertification petition (Case 7-RD-3513) signed by unit employee Lonnie Tremain. As previously noted, Tremain also sought on behalf of a majority of unit employees to intervene in this matter.

³⁶ See Stipulated Exh. 23. See also Stipulated Exh. 24, the Regional Director's letter of September 7, 2006, which postponed indefinitely the decertification case until the charges herein were resolved.

B. *The Withdrawal of Recognition on December 4, 2006*

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition of the Union.

C. *The Postwithdrawal Charges*

The Respondent is also alleged to have violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union on December 6, 2006, at the third step of the grievance procedure regarding the discharge of employee Steven Prysiazny on November 27, 2006; and on March 7, 2007, assigning work traditionally performed by unit employees—snow removal—to its supervisors.

VII. APPLICABLE LEGAL PRINCIPLES

A. *The Law Applicable to Violations of Section 8(a)(5)*

It is an unfair labor practice for an employer to refuse to bargain in good faith with its employees' chosen representative.

The Act provides in pertinent part that:

It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees For purposes of this section (d), to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession.⁴⁰

An employer's duty to bargain with the union representing its employees encompasses the obligation to bargain over the following mandatory subjects—wages, hours, and other terms and conditions of employment. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981). An employer violates Section 8(a)(5) of the Act when it makes a material and substantial change in wages, hours, or any other terms of employment that is a mandatory subject of bargaining at a time when the employees are represented by a union. *Fresno Bee*, 339 NLRB 1214, 1214 (2003). Safety conditions in the workplace are a mandatory subject of bargaining. *NLRB v. Gulf Power Co.*, 156 NLRB 622 (1966), *enfd.* 384 F.2d 822 (5th Cir. 1967).⁴¹ Additionally, the discipline of unit members is a mandatory subject of bargaining. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

The General Counsel establishes a *prima facie* violation of Section 8(a)(5) when she shows that the employer made a material and substantial change in a term of employment without negotiating with the union. *Chemical Workers Local I v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1981); *Taino Paper Co.*, 290 NLRB 975, 977 (1988). The burden is then on the

employer to show that the unilateral change was in some way privileged. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 628 (1990).

A “term and condition of employment,” even though not expressly provided for in the collective-bargaining agreement, cannot be unilaterally altered or abolished by the employer without affording the union notice and an opportunity to bargain. Thus, a unilateral change constitutes an unlawful refusal to bargain unless the union has waived or can be said to have waived its right to bargain over this matter. The Board has held that the right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived, the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by an examination of all the surrounding circumstances, including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement. *TCI of New York*, 301 NLRB 822, 825 (1991).

However, the Board cautions that waivers of statutory rights are not to be “lightly inferred.” *Georgia Power Co.*, 325 NLRB 420 (1998). As the Board notes, national labor policy disfavors waivers of statutory rights by a union, and thus a union's intention to waive a right must be clear before a waiver can succeed. *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). Significantly, a union will not be found to have waived any right to bargain where the employer has presented it with a *fait accompli*. *Asher Candy*, 348 NLRB 993 (2006).

However, if the union is given timely notice of the employer's decision, then the union generally must request bargaining over the effects of the decision. *Jim Waters Resources*, 289 NLRB 1441 (1988).

Economic exigency may excuse an employer's unilateral action. Notably, the Board stated in *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982):

The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and conditions of employment. Once the General Counsel has made a *prima facie* showing of an 8(a)(5) violation . . . a respondent must demonstrate why the refusal to bargain was privileged.

Thus, an employer must demonstrate compelling economic considerations or sound business considerations to justify unilateral implementation of a policy. In short, the employer must adduce credible evidence that there was a present pressing legitimate business concern or significant event to justify the move and not simply that it chose for its own reasons not to bargain over the decision.

Regarding information requests, in the bargaining context, the union under Section 8(a)(5) is entitled to request and receive information that is relevant and necessary for it to carry out its responsibilities in representing bargaining unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This includes information relevant to contract negotiations. *Day Automotive Group*, 348 NLRB 1257 (2006).

“Where the requested information concerns employees . . .

⁴⁰ Title 29 U.S.C. §158 Sec. 8(a)(5), and (d).

⁴¹ See also *NLRB v. Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983).

within the bargaining unit, this information is presumptively relevant and the employer has the burden of proving lack of relevance. . . . Where the request is for information concerning employees outside the bargaining unit, the union must show that the information is relevant.” *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965).

The Board uses a broad discovery-type standard in determining what is relevant in such contexts. *National Grid USA Service Co.*, 348 NLRB 1235 (2006). Notably, the requested information sought need not be dispositive of any issue between the parties, it need only have some bearing on it.

Once the initial showing of relevance has been made, “the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information.” *San Diego Newspaper Guild*, supra at 863, 867. Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a “legitimate and substantial” concern for employee confidentiality interests which might be compromised by disclosure. *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320. In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union’s need for the information. *Detroit Edison*, id. at 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); *Pfizer, Inc.*, 268 NLRB 916 (1984). However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union’s right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1346–1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980).

As the Board noted in *North Star Steel Co.*, 347 NLRB 1364 (2006), it is well established that information relating to wages, hours, and working conditions of employees in the bargaining unit is presumptively relevant, and an employer’s refusal to provide such information may pose a violation of the Act unless there is a showing of privilege.

An employer’s refusal to provide without undue delay requested information relevant to the union’s efforts at negotiating a contract is an indicium of not bargaining in good faith. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993).

An employer is required to furnish grievance related information to the union so that the union can determine whether to pursue the grievance to arbitration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This information is deemed relevant and necessary because the Union must be able to assess not only the merits of the grievance, but also the adequacy of any remedial action the employer has taken, and to determine whether to pursue arbitration. *Raley’s Supermarkets & Drug*

Centers, 349 NLRB 26 (2007).⁴²

The Board has held that an employer is obliged to provide names, addresses, telephone numbers, and other employment information of all unit members (including replacements) unless the provision presents a clear and present danger. *Advertisers Composition Co. Typographers, Inc.*, 253 NLRB 1019, 1023 (1981); *Clinton Food 4 Less*, 288 NLRB 597 (1988). Thus, an employer may withhold information if there is a clear and present danger that the requested information would be misused by the Union. *Page Litho, Inc.*, 311 NLRB 881 (1993).⁴³

Finally, ordinarily, the employer is required to provide the union subcontracting information and a failure to do so has been deemed to violate the Act. *W-L Molding*, 272 NLRB 1239 (1984). Also, the employer is obliged by the Act to provide the union with information concerning suspected discriminatory hiring practices for bargaining unit positions. *Mid-Continent Concrete*, 336 NLRB 258 (2001).

Turning to the withdrawal issue, first, the Board has long recognized that an employer may not withdraw recognition based on employee disaffection if there is a causal nexus between the disaffection and unremedied unfair labor practices. *AT Systems, West, Inc.*, 341 NLRB 57, 59 (2004). Essentially, the employer may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices. *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

Consequently, the Board considers several factors to determine whether there is a causal relationship between unremedied unfair labor practices and the subsequent employee expression of disaffection with the incumbent union. The factors include:

- (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. [*Master Slack Corp.*, 271 NLRB 78 (1984).]⁴⁴

In *Parkwood Developmental Center*,⁴⁵ the Board set out an analytical framework for determining an employer acted unlawfully in withdrawing recognition:

In evaluating whether the Respondent acted unlawful in withdrawing recognition from the Union on March 8,

⁴² It is noteworthy that the Board in *Raley’s Supermarkets*, supra at 27, deemed the employer’s response to the union’s request for information concerning the grievances at issue *sufficient* [emphasis added]. Thus, it may be that the employer’s response need not answer all of the requests literally, but may answer them in a manner deemed sufficient.

⁴³ When the union provides (adequate) assurances on the employer’s request that the information will not be used for harassment purposes, the employer may not withhold information—payroll information in particular. *Webster Outdoor Advertising Co.*, 170 NLRB 1395, 1396 (1968), enfd. sub nom. *Painters Local 1175 v. NLRB*, 419 F.2d 726, 737 (D.C. Cir. 1969).

⁴⁴ See also *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301 (1999).

⁴⁵ 347 NLRB 974, 975 (2006).

2003, we apply the standard established in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), under which the Respondent must show that the Union had actually lost its majority status when the Respondent withdrew recognition. See *Port Printing Ad & Specialties*, 344 NLRB 354 (2005), enfd. sub nom. mem. *NLRB v. Seaport Printing Ad & Specialties, Inc.*, No. 05-60347, 2006 WL 2092499 (5th Cir. 2006).

... Under *Levitz*, an “employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” 333 NLRB at 725. As the *Levitz* Board explained:

[A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. [Id., emphasis added.]

However, it is clear that an employer may indeed rely on a petition signed by a majority of its employees where such petition demonstrates a loss of majority support for the Union. *Renal Care of Buffalo, Inc.*, 347 NLRB 1284 (2006).

The General Counsel bears the burden of establishing that the employee disaffection is, in fact, attributable to the unfair labor practices. However, to carry this burden, the General Counsel does not have to call employees to in effect testify, “Yes, I changed my mind about the union because of.” Instead, the Board, applying an objective standard determining what effect the specific unfair labor practices reasonably would have on employees. *Vanguard Fire & Security Systems*, 345 1016, 1044 (2005).

B. The Applicable Law Regarding the 8(a)(1) and (3) Allegations

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act.⁴⁶ The test under Section 8(a)(1) does not turn on the employer’s motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1999). Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct

would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985). *Medcare Associates*, 330 NLRB 935 (2000). *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998).

Regarding the issue of employee discussions about and solicitations on behalf of unions, the Board recently held and reaffirmed that:

It is well established that employees are entitled to discuss unions and solicit for unions on nonworking time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), and *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enfd. 142 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). It is also well settled that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees’ work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work *Jensen Enterprises*, 339 NLRB 877, 878 (2003).⁴⁷

While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Board recently reiterated the proper analytic framework for violations of Section 8(a)(3) and (1) of the Act:

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support, the interference that protected conduct was a “motivating factor” in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board’s *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1966), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating

⁴⁶ Sec. 29 U.S.C. §158(a)(1).

⁴⁷ See *Sam’s Club*, 349 NLRB 1007 (2007), where the Board stated, inter alia, that conversely, it is clear that an employer may lawfully prohibit solicitation during working time, citing *See Our Way*, 268 NLRB 394 (1983).

factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.⁴⁸

Once the General Counsel establishes initially that the employee's protected activity was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, supra.

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments of union supporter from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Service Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Bonta Catalog Group*, 342 NLRB 1311 (2004); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medic One, Inc.*, 331 NLRB 464 (2000).

The employer's burden under *Wright Line* requires it "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enf. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982). In short, a finding

⁴⁸ Taken from *Martinelli Interior Construction Co.*, 351 NLRB 1184 (2007).

of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).

VIII. THE GENERAL COUNSEL'S CASE

The General Counsel called the following witnesses to establish the charges in question; namely, James Walker, Larry Cognata, Herbert Ambs, Joseph Helton, Larry Flannery, Steven Grace, Leonard Ossenmacher, and Troy Scot Linden.

A. James Walker⁴⁹

Walker testified that he was the chief negotiator for the Union during the 2004 contract negotiations and, prior to the expiration of the last contract, was involved in the grievance process associated with the expired contract. Walker related that the Respondent's last, best, and final offer did not encompass the entirety of the contract that was to replace the expired one; the last offer in his view worked in conjunction with the expired contract, and that any terms not covered by the last offer were included in the expired collective-bargaining agreement. Thus, according to Walker, the impasse was based on certain unresolved terms, but not on all terms. Walker then proceeded to discuss the Union's information requests.

Regarding the Union's request for information about the Company's plan to install surveillance cameras, Walker stated that the Respondent did not respond to his September 2, 2005 letter. He conceded that the issue was never discussed again by the parties.

Walker testified that the Union's second request for information about Helton's discipline was responded to in some degree by the Company in a series of letters (previously mentioned) in which the Respondent claimed that the Union had not followed the grievance procedure or that the information sought was not relevant. Walker conceded that ultimately a meeting with the Company's representatives to discuss Helton's discipline did not occur on December 6, 2005. Walker also admitted that some verbal information regarding Helton's discipline was provided at the meeting per the Union's request of October 19, 2005. However, according to Walker, the information provided was in his view expressed in generalities and not specifics.

Walker, relying on his notes, testified that the Respondent specifically did not identify or disclose who registered the complaint against Helton; did not disclose the identities of the

⁴⁹ Walker stated that he has been employed since 1999 by the UAW Region 1C and is a representative of the International charged with servicing the Union as its chief contract negotiator since 2000. Walker stated that he also services the Grass Lake facility with respect to the grievance process.

witnesses; did not respond to the environmental effect of the infraction on the worksite; did not disclose whether other employees had been disciplined for same or similar infractions within the last 5 years; would not answer the question whether members of management ever violated rule 12; did not provide an answer to the Union's query as to who was endangered on the jobsite by the body spray or what was the emotional or mental trauma experienced by the victims; did not inform whether any time was lost as a result of medical treatment; and did not specifically detail Helton's insubordinate acts.

Walker stated that the Respondent did provide some information; for instance, the specific work rule violation—rule 12; the approximate distance between Helton and the victims—8 to 10 feet—and where the infraction occurred; whether victims got body spray on their persons; whether the victims suffered physical effects of spraying—they were sent to doctors, but the Company did not indicate whether they went after work. He was also informed that the Company was not otherwise aware of any physical problems experienced by the victims.

Walker stated that the Company also reported that there were no grievances for violations of the pertinent work rules within the last 5 years. According to Walker, the Company said in the December meeting regarding the nature of the rule violations in question, that Helton was told that he should not harass people. Regarding Helton's insubordination, Walker said the Company told him at the meeting that Helton was told not to spray anyone and that this constituted his insubordination.

Walker said other than this information, the Company did not provide the requested information, nor did it give any reason for not providing it or that such information did not exist.

Regarding the Union's request for information about the replacement workers, Walker stated that this request was made because the Union was informed by the Company that it had hired replacement workers on about January 25 or 26, 2006, which in turn prompted the Union on January 27 to make its unconditional offer to return to work. Walker testified that the information was necessary because the Union would be representing the permanent replacement workers once the Union resumed its position as the exclusive bargaining representative.

Walker acknowledged that the Union eventually received from the Company some responses to the requests for replacement worker information, including their names and other personal information. However, the Company would not and did not ever supply their addresses which, according to Walker, was very important. Walker acknowledged that the Respondent did provide reasons for not supplying the information which included conduct of some union members during the strike. Walker also conceded that there were problematic incidents, e.g., abusive language on both sides and some threats of physical violence, and that a charge was filed against him for striking the tire of a car leaving the plant. However, Walker said these events happened in October or November 2005, and no further incidents took place prior to the information request; and the Union settled all charges in which it was implicated by posting a notice at the union hall. Walker noted further that he made the request for replacement worker information after the strike had ended and the Union's unconditional offer to return to work.

However, he acknowledged that in spite of the Union's claim that the addresses of the replacements were important to its union obligations, the Company persisted in its refusal to provide this information, citing essentially the misconduct of the strikers on the line as the main reason.

Regarding the Union's request for subcontractor information, Walker stated that the Company's position is well stated in the correspondence between the parties. He conceded that the Company provided most information but not the contract and voucher information.

Turning to the Company's alleged change of rules at Grass Lake, Walker stated that in February 2006, the Company called a meeting and announced that all employees could not post information or talk about issues associated with the strike that would evoke a response in the workplace. Prior to February 2006, according to Walker, employees and the Union were allowed to post items on the union bulletin board without obtaining prior approval from management.

Walker said that the meeting was presided over by the plant supervisor, Mark Kortz, who made the announcement. Walker noted that the Union was not contacted prior to the announcement of the new rules and he was given no opportunity to bargain over what he viewed as changes in a vital workplace rule.

Walker also testified about the withdrawal of recognition matter. Walker stated that he was familiar with the decertification petition that had been filed earlier in 2006 by a number of employees; he was also aware this petition had been held in abeyance by the Board pending resolution of several unfair labor practice charges, specifically the Helton matter, the outstanding information requests, and the rule changes.

Walker insisted that these outstanding charges affected his ability to communicate with the unit employees. Walker stated that there were four⁵⁰ types of employees in the unit as of January 27, 2006—permanent replacements, employees who crossed the picket lines, those who never joined the strike, and the returning strikers. Walker felt that he needed to be able to communicate with these employees for a number of reasons, including the Union's negotiating position, the strike, their contact benefits, their rights as a represented unit of employees, among other matters affecting their terms and conditions of employment. Furthermore, Walker said that the Union wanted to assure to the unit members that irrespective of the individual employees' part in the strike or their feelings about it, the Union viewed each and all as family and desired to move beyond the strike and work towards securing a contract.

Walker believed the "new" rules did not allow him to communicate verbally with the unit's employees, or even to post information about the Union. Walker felt that the Company's new rules effectively stifled both the Union's and the employees' ability to discuss union related matters—the bargaining process, benefits to be obtained, the Union's message as it were—because to do so might evoke a proscribed response. Walker stated that the Union was practically handicapped by the Company in terms of speaking with the permanent replace-

⁵⁰ Helton perhaps represented a fifth category—a terminated, but reinstated unit member who was allowed to cross the picket line during the strike after having been returned to work by a settlement of charges.

ment workers, a majority part of the unit after the strike at the Grass Lake facility. Accordingly, Walker said that the Union made the request for their home addresses, as well as their names, so that it could speak to them directly about the Union, and in particular to the Union's position on the strike.⁵¹

B. Larry Cognata

Larry Cognata testified that he has worked at the Grass Lake facility for about 17 years in the maintenance department. Cognata said that he was and is a union member and since June 2005, has served as a steward at the plant. Cognata stated that he went out on strike in April 2005 but returned to work on February 6, 2006.

Cognata testified that he attended the February 6 lunch bucket meeting that was convened and presided over by Kortz who in addition to speaking to the assembled employees distributed an information sheet to the employees.⁵² Cognata noted that a number of supervisors also were in attendance.⁵³

Cognata stated that prior to Kortz' announcement, no such rule existed. Cognata noted that the Union by contract was provided with a bulletin board for its exclusive use and on which unit members could post anything (as he put it). However, Cognata also conceded that before February 6, prior approval from management was required to post on the other (nonunion) bulletin boards on which employees posted various nonwork-related items.⁵⁴

Cognata intimated that prior to the February 6 meeting, he frequently posted on the union bulletin board and, in fact, recently had posted notices of (the April and May)⁵⁵ union meetings. Cognata also recalled that prior to February 6, each employee was assigned an individual mailbox at the plant but when he returned to work, the Company had removed them. Asked on cross-examination about his or other union representatives' utilization of these boxes to distribute information prior to February 6, Cognata was initially unsure and then upon reflection stated that he had used them to distribute work-related information occasionally to employees.⁵⁶

⁵¹ Walker said that the Union took the position that its strike was an unfair labor practice strike. The Board, however, disagreed and determined that the walkout was economic in nature. Walker intimated that the Union wanted to address this matter among others, with the unit members in some detail. This is what I assume he meant about the need to communicate with replacement workers about the Union's side of the strike, and the decision to embark on that course.

⁵² Cognata identified Stipulated Exh. 21, a copy of Kortz' information sheet that Kortz gave to the employees on February 6, 2006.

⁵³ Cognata stated that Supervisors Dan Eggleston, David Thorp, Barry Jackson, Ray Gilbert, Jim Abbot, and Valerie Balog of human resources were all convened in the muffler shop. He noted that fellow employee Mark Dean, who was later promoted to a supervisor position, was also there.

⁵⁴ However, Cognata stated somewhat contradictorily that with respect to the bulletin board in the lunchroom, employees did not need management approval for postings such as sales of Girl Scout cookies. Cognata stated he has seen various "for sale" signs on this board, but could not recall the specific types of items listed.

⁵⁵ Cognata did not state the year. I would assume he meant 2006.

⁵⁶ Cognata was very vague in testifying about the mailboxes. Ultimately, in my view, I concluded that he did not seem to know much

Cognata noted that the Company did not consult with or contact the Union before making the February 6 announcement.

Cognata stated that irrespective of the February 6 announcement, he has attempted to communicate with the employees and acknowledged that he has spoken with several employees about the Union if the subject came up and, in fact, he himself raised topic of the union in conversations, "possibly" even with the replacement workers. On this point, Cognata testified that he tried to describe the benefits associated with union membership to the replacement workers in particular; he recalled specifically speaking to (an unnamed) replacement worker with whom he had a good rapport about the Union. (Tr. 280.)

Cognata allowed that it was his belief, however, that based on Kortz' information sheet that conversations of this type were frowned upon by management. He likened the situation to one connoting "union [talk] bad, nonunion [talk]" good from management's perspective. Accordingly, he tried not to get in trouble over this. However, Cognata stated that basically he spoke to everyone in the shop as a matter of course.

Turning to some of the other complaint allegations, Cognata testified that he knew Helton and as steward worked on his behalf regarding the T-shirt incident and discipline which occurred before he returned to work.⁵⁷

Cognata stated that the Tenneco employees have or are issued uniforms but are not required to wear them; basically, they are allowed to wear work clothes of their choosing without restrictions. According to Cognata, he has observed employees wearing T-shirts, even those containing curse words and sexually suggestive language, at the plant.⁵⁸ He could not recall what curse words were used, except that some T-shirts were for some "far out" bands and might have had some curse words in their messages.

Cognata testified that on March 5, 2007, he observed (admitted) Supervisor Eggleston around 3:30 p.m. operating the Company's front-loader tractor while removing snow from the company parking lot. Cognata related that the Company assigned supervisors unit work on "frequent" occasions and he grieved these actions. According to Cognata, this work is usually (by contract) performed by unit employees, model makers, and plant service or maintenance workers. Cognata stated that he himself, as a model maker and maintenance worker, on many occasions had used the tractor, mainly to tamp down scrap metal; he had not received any special training in the use and operation of the machine. Cognata also stated that he also had observed other employees operate this tractor.⁵⁹

about the mailboxes and their utilization by the employees or the Union at Grass Lake.

⁵⁷ Cognata identified Stipulated Exh. 19, Kortz' written reprimand of January 20, 2006, as well as GC Exh. 5, the written reprimand of January 19.

⁵⁸ Cognata recalled (via his affidavit) that an engineer, Tim Baulk, wore a T-shirt with a "far out" band name on it and was not aware that the Company ever asked him to take it off or turn it inside out.

⁵⁹ Cognata identified employees Stan Samloc, Herb Ambs, and Barry Jackson as having used the tractor on occasion.

C. Herbert Ambs

Herbert Ambs testified that he has been employed by Tenneco at Grass Lake as a model maker since about 1981, and for the past 2 years has served as vice president of the Union.⁶⁰

Ambs said he went out on strike around April 26, 2005, and returned to work on February 6, 2006, on which date he attended an employees' "toolbox" meeting. Ambs said about 30 employees were present along with several managers, including Mark Kortz who led the meeting.

According to Ambs, Kortz discussed a number of rules that were to be applied in the shop. One rule was that employees were not to say or wear anything that would evoke a response. Also, Kortz stated that postings on the bulletin boards were to be approved by the supervisors. Ambs stated that Kortz did not explain what he meant by the types of conversations that were approved, and he did not speak about consequences of violating the rules.

Ambs identified the notice to the employees that was issued by Kortz on February 6; and that it was posted on the bulletin board after the meeting.⁶¹ Ambs stated that there were three bulletin boards in the shop—a union board to the left of the timeclock in the lobby, a company board to the right of the timeclock, and one for employees in the employee breakroom.

Ambs testified that prior to February 6, the employees could post anything they so desired on the union board without management's prior approval. He noted that prior to February 6, employees posted without preapproval on the employee board items such as newspaper articles, family events notices, items for sale, union meetings, and food menus. Ambs stated he, however, never posted anything on the employee board. Ambs testified that since the February 6 announcement, he has posted nothing on the union board.

Ambs stated that when he returned to work after the strike, there were about 15 permanent replacement workers on board at Grass Lake, but he only knew one of them. Ambs stated that he did not talk to the workers about the Union because he was afraid that any such conversations would evoke a prohibited response; he feared for his job. Ambs conceded that he did convene union meetings after the strike but never (verbally) invited any of the replacement workers because he feared such would evoke a response; however, the meeting dates were posted on the Union's bulletin board at Grass Lake.⁶²

Ambs was familiar with the Company's Case front-loader

⁶⁰ Ambs stated that he has worked for Tenneco since 1974, having begun his employment at the Company's Jackson, Michigan facility. He was laid off from that facility in 1980, and rehired by the Company in 1981. Ambs said he also served as recording secretary for the Union for 6 months, a union steward for 15 years, and another stint as vice president for 3 years.

⁶¹ Ambs identified Stipulated Exh. 21, the announcement issued by Kortz.

⁶² On cross-examination, Ambs stated that he could not recall personally posting union material in his work area or at his locker; but he saw UAW logos in the work area, evidently posted by some unknown person; the logo is still posted as he testified. Ambs also noted that someone had posted a message describing the Company as the "leader of the underworld" at the facility; this message is still posted to his knowledge.

tractor and stated that it was used by model makers and maintenance workers to tamp down scrap metal, remove snow, and pull the hay wagon at company picnics. Ambs said that with no special training, he has personally operated the tractor about 50 times during his tenure, 5 times of which were for snow removal.

Ambs stated that he observed Supervisor Eggleston operating the tractor in early March (2007) removing snow. Ambs said that Eggleston had asked him for starter fluid for the machine, and in the course of their conversation he (Ambs) told Eggleston that in the past Larry Flannery, a diesel mechanic, had worked on the tractor. Eggleston responded that he also knew a little about diesels.

D. Larry Flannery

Flannery testified that he has worked at Grass Lake for over 30 years as a model maker in the muffler shop and has been represented by the Union during his employment. Flannery said that he was elected to president of the local in June 2005. Flannery also stated that he not only organized picketers for the April 27, 2005 strike by unit employees but actually participated in the picketing. Flannery said that he returned to work at Grass Lake on February 27, 2006, and therefore missed the February 6 employee meeting.

Flannery testified that he had heard that at this meeting the employees were instructed to watch what they said, so as to not evoke a response, and were not allowed to post material on the bulletin boards, lockers, or any place without prior approval of management.

Flannery stated that prior to the meeting employees posted "pretty much" whatever they wanted on the union bulletin board, especially information about union activities. Basically, according to Flannery, there were no posting rules as long as the material was not demeaning in a sexual way. (Tr. 186.)

Flannery noted that there were three bulletin boards at Grass Lake—a union board to the left of the timeclock, an employer board to the right of the timeclock, and a small employee board in the employees' breakroom.⁶³ Flannery said the breakroom board often included employee information, including menus from local caterers and auto discount program announcements, and was used by unit and other company employees. Flannery said he never posted anything on this board. However, he knew that prior to the February 2006 announcement, no employees, including the Union, had to obtain prior permission to use the employee board. Flannery noted that the Company did not contact the Union to discuss these policies before the February 6 announcement.⁶⁴

Flannery conceded that since February 2006, the Union has posted two or three notices of union meetings on its bulletin board and even a copy of the complaint in the instant litigation.

⁶³ Flannery stated that the employer and union bulletin boards were fairly large, about 4 feet by 8 feet.

⁶⁴ Flannery identified Stipulated Exh. 21, the written announcement issued by Kortz saying that he believed he was provided a copy when he returned to work on February 27. Flannery was not sure if his copy was dated, but recalled having a meeting with Kortz who went over the letter with him, line by line, in the presence of another unit employee—Przyaszny.

Flannery stated that while he sought Kortz' permission to post the complaint, he did not recall seeking or obtaining permission from him to post the meeting notices. Moreover, Kortz did not remove them. (Tr. 204.)

Turning to the discipline (dismissal) of unit employee Steven Prysiazny on November 27, 2006, Flannery stated that he filed a grievance on his behalf on November 28, 2006, after receiving a copy of the dismissal notice. Flannery noted that the Company's last, best, final offer did not abrogate article VIII of the expired collective-bargaining agreement governing the grievance procedure applicable to employee discharges.

Accordingly, pursuant to the contract, he filed a grievance on behalf of Prysiazny requesting under Section 7 of article VIII that the matter be advanced to the third step of the grievance process which entailed the involvement of a representative of the International (presumably Walker); the local's vice president (Ambs); the Union's recording secretary; and Kortz and Valerie Balog of human resources.⁶⁵

Flannery testified that Prysiazny's grievance did not proceed because of the Company's withdrawal of recognition of the Union on December 4, 2006. Flannery stated that he met with Kortz and Balog on December 5 at their request in Kortz' office, where Flannery said that Kortz informed him that the third-step grievance was not going forward because of the withdrawal, and that the meeting was merely given because he had promised Flannery an opportunity to speak on Prysiazny's behalf; the meeting was that opportunity. According to Flannery, Kortz said the termination decision was final. Flannery stated that Kortz did not honor his request to put in writing the Company's position regarding the decision not to go forward. Flannery stated that Prysiazny's termination never advanced to the third step.⁶⁶

Flannery said that he was familiar with the Company's Case front-loader bucket tractor and had, in fact, operated it around seven times over 30 years, the last time about 4 to 5 years ago. Flannery opined that employees did not have to be trained to operate the tractor, since he had not received any specific training in its use or operation.⁶⁷ According to Flannery, the tractor was used mainly by model makers, shop workers, and employees serving as plant service (maintenance) workers.

Flannery testified that on March 6, 2007, he observed Supervisor Eggleston operating the tractor while removing a pile of snow. He noted that the expired contract strictly prohibited supervisors from doing unit work with certain exceptions,⁶⁸ and the Company's last, best, and final offer in his view did not abrogate this provision.

Flannery stated while it was his opinion that anyone could

⁶⁵ Flannery identified Stipulated Exh. 28 as a copy of the November 28 grievance he filed on behalf of Prysiazny in which he asked that the matter be advanced to the third step of the contract grievance procedures. Notably, Flannery's request was timely under the contract.

⁶⁶ Prysiazny did not testify at the hearing.

⁶⁷ Flannery stated that Ambs, Cognata, and another employee, Barry Williams, had also operated the tractor.

⁶⁸ Flannery stated that the contract in art. XII, sec. 6 prohibited supervisors from doing unit employee work. I note the only exceptions stated in the contract relate to the training of employees, and in cases of necessity caused by difficulties encountered on the job.

operate the tractor to move snow, he himself had never used it for this purpose; he used it to pull out a truck stuck (in mud or snow) and to tamp down metal into the scrap hopper.

E. Steven Grace

Grace testified that he has worked for Tenneco at its Jackson facility, which produces aftermarket automotive products, for about 32 years; his job includes hoist changes and light maintenance. Grace stated that he is a member of the Union and served as trustee and financial secretary from 2002 through 2004. He noted that the Jackson workers are or were covered by the same collective-bargaining agreement as the Grass Lake facility workers.⁶⁹

Grace stated that he went out on strike (in 2005) and participated on the strike line. After the strike, he was recalled to work and reported on February 6. Grace said that he attended a meeting of about 40 employees and about 5 managers in the muffler shop on that date. Grace stated that Mark Kortz ran the meeting and addressed the assembled group.⁷⁰

According to Grace, Kortz basically said that since the employees at the plant consisted of different "people"—those who crossed the picket line, replacement workers, and those returning from the strike—management did not want the employees "to provoke any response from anyone" so we had to watch what we said. (Tr. 163–164.) According to Grace, Kortz also said that we (employees) could not post anything on the board without company approval and (we) were to watch our appearance, what we wore. (Tr. 164.)

Grace stated that he took the view that management just wanted to keep a handle on things. He volunteered that in his opinion, people have emotions which get in the way of their judgment sometimes. He noted that the strike had just ended and while he was one of the four to five strikers who had been recalled, the permanent replacements were viewed as having taken the jobs of the other strikers. Moreover, according to Grace, there had never been a strike at Tenneco in his 32 years, suggesting that this was a novel situation for all involved.⁷¹

Grace said that to him, Kortz in his address to the employees (he could not recall Kortz' exact words) did not want the employees to provoke each other by calling names—such as scabs—although Kortz did not use that term. Grace believed that Kortz just wanted everyone to get along, to watch what was said, to keep one's opinions about the strike to oneself, and to keep your comments (about the strike) to yourself. (Tr. 167.)

Grace noted that before the strike there was no policy that related to conversations among the workers at the company facilities; there were no restrictions on the types of conversations in which employees were permitted to engage. However, Grace

⁶⁹ Grace stated that he is the sole bargaining unit employee at Jackson.

⁷⁰ Grace also noted that Kortz distributed a "paper" at some point that touched on some of the matters about which he spoke to the group in the meeting. On redirect examination, Grace was shown Stipulated Exh. 21 and said this document appears to be identical to the one Kortz distributed, but he believed he had seen a copy dated January 27, 2006.

⁷¹ As I listened to Grace, I took this inference from his demeanor and tone of voice.

acknowledged that even before the strike, the employees could not use derogatory language; there were certain “ethical” (his word) things about which employees could not talk. Grace stated that he was of the impression that Kortz’ statements were directed to the strike and its aftermath, but that he was covering just about anything—he wanted everyone to play nice and get along. (Tr. 169.)

Turning to the issue of the bulletin board postings, Grace stated that there were three or four bulletin boards in the facility⁷²—one was a union board and two or three were considered company bulletin boards.

Regarding the union board, according to Grace, the Union exclusively controlled its use and posted items freely, so that “we [unit members] could communicate back and forth [with each other].” (Tr. 165.) Grace stated that the Union did not have to get permission to use the board before February 2006, and the items posted there were in his view “educational” matters related to the Union, including special events such as meetings. Grace recalled that the union board has been up for all of the 32 years he has worked for Tenneco.⁷³

Grace said that the use of the employer bulletin boards were governed by the Company’s work rules, specifically rule 30⁷⁴ with which he was familiar. According to Grace, rule 30 did not apply to the union bulletin board. Grace said that he did not post anything on the company boards and so could not state whether the items he observed posted on them, e.g., house and car sales notices, church rummage sales, vitamin and Girl Scout cookie sales—were approved by management beforehand. Grace noted that items deemed inappropriate by management were taken down. However, the union board was in Grace’s words “our board,” saying, “[W]e kind of governed that one.” (Tr. 178.)⁷⁵

F. Leonard Ossennmacher

Ossennmacher testified that he started working at Tenneco, Grass Lake, on July 24, 2004, as a model maker. Ossennmacher stated that he was involved with the strike but has never held union office, and had not been called back to work at the time of the hearing.

Ossennmacher recalled engaging in a conversation with Kortz, he believed, sometime between December 2004 and January 2005, around Christmas time, in the context of his having passed his qualifying pipe test and being presented by

⁷² While Grace said he worked at the Jackson facility for the most part, he also has worked at Grass Lake at least on Saturdays, since the end of the strike. I have assumed, based on his un rebutted 32 years’ employment at Tenneco, that he was familiar with Grass Lake facility and the location of the bulletin boards there.

⁷³ Grace identified Stipulated Exh. 1, the last contract, and once directed to p. 26, art. XII, sec. 7, dealing with bulletin boards, said he was familiar with this section which, inter alia, states the Company was required to furnish a bulletin board for the exclusive use of the Union and permitted the posting of notices of union social or business matters.

⁷⁴ The company work rules are contained in Stipulated Exh. 20. Rule 30 provides, “There shall be no posting of notices, letters, or printed material of any description on company property by any employees (unless otherwise provided by agreement).”

⁷⁵ Grace also noted that the Company did post notices, such as over-time schedules, on the union board.

Kortz with a certificate to that effect. According to Ossennmacher, Kortz pulled him aside and said that he (Ossennmacher) was a pretty intelligent guy, and he (Kortz) did not want to see him ruin any opportunities he might have with the Company because of his mouth—(based on) things people had said that he was saying.

According to Ossennmacher, Kortz then said that several (unidentified) people had come to his office and complained about negative things he (Ossennmacher) was saying about the Company. Ossennmacher said that by way of example, Kortz stated that it had been reported to him that Ossennmacher was pretty mad about the Company’s proposal to cut a percentage of employee pay and impose on the employees a lesser insurance plan. Ossennmacher said that Kortz stated that he did not want to go into the matter too deeply because of the hearsay nature of the report, but that such negative talk could ruin opportunities for him at the Company.

Ossennmacher stated that at the time he had reason to believe that there was some proposal being floated that entailed a 30-percent cut in pay for new employees such as him and that an inferior insurance plan would be applied to new hires. However, Ossennmacher said that he was not told this at the time he was hired, and did not think these proposals applied when he hired on. Ossennmacher said he believed there was an agreement in effect at the time, but that a new contract had not been negotiated.

Ossennmacher stated that while he was not disciplined by Kortz, and his conversation with Kortz did not affect what he said to the employees and supervisors about the contract, he decided to keep his thoughts and sentiments to himself. So he decided not to speak to anyone about these types of matters because he was afraid that anything he said might compromise his future progress at the Company.

Ossennmacher recalled that at the time, he had made comments regarding the wage cuts to a fellow employee, Denny Melon, telling him that if the Company was going to cut wages, he (Ossennmacher) would purposely fail the pipe test so the Company could fire him and he would then apply for unemployment benefits. He believes that this may have been the matter Kortz was referring to when he pulled him aside.

G. Joseph Edward Helton

Helton testified that he was employed by the Respondent at Grass Lake; that he began his employment around the latter part of February 2005 but was discharged by the Company on March 7, 2005. Helton stated he was reinstated in September 2005 and worked until October 5, 2007, when he voluntarily quit working for the Company.⁷⁶

Helton related his employment history with the Company. Helton testified that when he was first hired in February 2005, he had heard rumors of a strike brewing at Tenneco from other employees; this concerned him since he had just quit another job. Helton said that he then consulted with supervisors Dave Thorpe and Dan Eggleston to get their thoughts on the strike

⁷⁶ Helton’s discharge and reinstatement were dealt with and resolved through a settlement of unfair labor practice charges filed with the Board.

and verify the rumors. Helton stated that he feared that he would have to walk out with employees and would face pressure should he decide to cross the line, something he almost immediately ruled out.

Helton noted that before speaking with these supervisors he had conversed with Kortz who told him that there was then no contract—it had expired—between the Company and the Union, and that he did not have to join the Union. According to Helton, Kortz volunteered that there was no reason to join the Union when membership merely redounded to its taking 2 weeks' pay out of his check every month. (Tr. 216.) Helton said he made no response to Kortz in this conversation.

Helton said that after speaking with Kortz and the supervisors, he conversed with Kortz once more. This time, Helton said he complained to Kortz about not being told of the imminent strike when hired and that if there was one, he would have to walk out with the employees; also that, in point of fact, the union steward told him that he (Helton) was being enrolled as a union member. Helton said that he told Kortz that he wished he had been told about the strike because he would not have quit his former job. Furthermore, he (Helton) said he would have to honor the strike. According to Helton, Kortz replied, saying he did not know if there actually was going to be a strike.

Helton said he also spoke to other employees about his personal concerns and asked if they thought there was going to be a strike and what would happen in such a case.

In any case, after about 2 weeks (and a day) on the job, Helton said that he was terminated by Kortz who, in spite of his queries, would not give him any substantial reasons for the discharge.⁷⁷

In September 2005, a settlement having been reached with the Company over charges he filed with the Board, Helton said that he was reinstated to his former job. By then, the strike was going on, but Helton said that he did not join the line.⁷⁸

Helton stated that when he returned to work, the employees considered him a "mole," and one employee (Mark Dean) in particular made a sign saying "no moles" and "no rejects," meaning to him, respectively, that he was a union spy or plant and that he had been rejected by the Company and bought back. Another sign meant for him had an EAP (employee assistance plan) pamphlet on it suggesting derisively that workers like him are under stress, have problems, and could use some counseling.⁷⁹

Helton explained why he felt these signs were directed at him. First, Helton said that he felt he was being harassed and had complained to Cognata, who suggested that he get an EAP pamphlet and contact the appropriate counselor. Then he found out that an employee, Mark Dean, had put the derogatory signs up—on the back of Helton's work bench. Helton stated that he reported his concerns to Eggleston and Thorpe who merely said

the signs did not pertain to him. Helton said he also complained to Balog, but met with essentially the same response. Helton stated that eventually, the signs were removed after about a week's exposure. Helton said that he did not know if the person he identified as the perpetrator—Dean—was ever disciplined; Dean was later promoted to a supervisory position.

Helton said that on January 19, 2006, he was disciplined for wearing a T-shirt.⁸⁰ By way of background, Helton said that he had taken 2 weeks off in December for stress. When he returned to work, he wore a T-shirt given him by a union member that said, "Thou Shall Not Scab." Eggleston saw the shirt and ordered him to change out of the shirt because some of the employees did not like the shirt's message. According to Helton, Eggleston said that he could return home to change but would still be on the clock—just wear a different shirt.⁸¹

Helton said that he told Eggleston that the message on the shirt was not directed at any one in particular. The message was his (Helton's) statement that he would not be a scab. According to Helton, Eggleston said the shirt (the message) was still in issue (at the plant) and that he (Helton) had to do something about the shirt. In response, Helton covered the word scab with a piece of tape, which seemed to mollify Eggleston.

Helton said that about an hour later, he decided to write the word "Steal" on the tape covering "Scab," a reference to scabs stealing union jobs. According to Helton, this upset Eggleston who, according to Helton, told him to put another strip of tape over the word steal. Helton said that he complied.

Helton said a short time later, he affixed another strip of tape to the shirt, and wrote "low life" on it, making for a new message that read, "Thou Shall Not Be a Low Life." This brought Eggleston back to his area. According to Helton, Eggleston was again pretty upset and ordered him to put another piece of tape over the message but this time leave it blank, or he would take care of the problem. Helton said that he told Eggleston that inasmuch as they could not arrive at a compromise, perhaps he should leave for the day. According to Helton, Eggleston concurred and Helton left work but was paid for his time. Later, Helton said he was informed by Union Steward Cognata that he would be disciplined and a meeting was scheduled for the next day—January 20; Cognata stated he would represent him at the meeting.

On January 20, Helton met with Dan Eggleston and Cognata. According to Helton, Eggleston said that he (Helton) was trying to intimidate coworkers with the T-shirt messages and that he would be written up for the incident. Helton said that he told Eggleston that the shirt's message was directed at the workers who crossed the picket line and took our jobs. According to Helton, Eggleston did not accept this and said he would be written up.

⁸⁰ Helton identified GC Exh. 5 as a copy of the discipline he received on January 19.

⁸¹ Helton noted that some employees wear uniforms, some wear T-shirts and jeans. The T-shirts he has observed have something written on them, but he could not recall the specific messages or sayings. Helton testified that he could not testify whether any other employee had been asked to change his T-shirt. Helton also stated that no one had complained to him about his shirt before Eggleston asked him to remove it.

⁷⁷ At the time of his discharge, Kortz said he had had a few complaints about him, his going around stirring things up on the shop floor; but Kortz gave no further explanation.

⁷⁸ It is undisputed that the Union gave Helton permission to cross the picket line to resume his employment at Grass Lake.

⁷⁹ Helton said some of these names also appeared on the company website. According to Helton, Dean called him a mole and "two week Joe" on the company website.

Helton testified that a grievance was pursued by the Union but he had not actually seen a copy.

Helton stated that while he would not be offended if someone called him a scab—a person who crossed the picket line—because he was not a scab; but the “no moles” and “no rejects” messages did offend him.

Turning to the information request, Helton acknowledged that on October 13, 2005, he was issued a written reprimand⁸² by Supervisor Thorpe⁸³ for spraying body spray at his coworkers as he was leaving work. Helton stated while he did spray the cologne, he did not spray it at anyone in particular.

Helton stated that he believed a grievance was filed on his behalf over the spray incident, but he has never seen it.

H. Troy Scott Linden

Linden testified that he began his employment with the Respondent on March 28, 2005, as a model maker. Linden stated that he honored the strike, and has not been recalled; he is on the preferential call-back list.

Linden testified that on about March 8, 2005, he and three other job applicants met with Kortz and another management employee, Julie Lawless.⁸⁴ At this session, Linden stated that he raised the issue of strike at the Company which he had read about in the local newspaper. Linden said that he told Kortz, who led the meeting, that a strike was a big issue for him as he was moving a considerable distance—about 100 miles—to take the job at Tenneco. According to Linden, Kortz said that he did not think a strike would occur, that the outstanding issues with the Union would be settled. According to Linden, Kortz also said even if there were a strike, employees such as himself—hired at will—would still have their jobs once the strike ended even if we had honored the strike; if we chose not to honor the strike, we would still have our job because at the time there was no contract.⁸⁵ According to Linden, Kortz said that joining the Union was entirely their decision to make.

According to Linden, Kortz counseled the applicants to simply come to work, put in your time, and go home if any employees should happen to approach them about the Union.

In this conversation, Linden said that Kortz then referred to an employee who was prounion and stirring up trouble. Kortz said that the Company had to let him go after only a few weeks or a month. According to Linden, Kortz advised the applicants that kind of attitude just was not conducive to a good work atmosphere and would not be tolerated, and that was why that person no longer worked for the Company.

Linden stated that he interpreted Kortz’s counseling to mean

⁸² Helton identified Stipulated Exh. 8, a copy of the document.

⁸³ Thorpe, like Eggleston, did not testify at the hearing.

⁸⁴ According to Linden, Lawless only addressed payroll issues at the meeting. She did not testify at the hearing.

⁸⁵ Linden stated that he believed he would be an at-will employee because there was no collective-bargaining agreement in force at the time of his application. He further believed that where a union contract is in place, employees customarily must serve out a 30-day probationary period.

that applicants⁸⁶ should just stay out of the conflict, should not express opinions, but simply do your job and leave; applicants should not be procompany or prounion. According to Linden, Kortz advised the applicants that if someone (a fellow worker) said something, simply listen but do not say anything. According to Linden, this was Kortz’ advice to him and the other applicants.

IX. THE RESPONDENT’S CASE

The Respondent called Mark Kortz as its principal witness, along with several current employees.

A. Mark Kortz⁸⁷

Kortz testified that his official title is manager of prototype and facilities operations at the Grass Lake facility; he has held this position for about 10 of the 17 years he has been employed with Tenneco.⁸⁸ Kortz stated that in this position, his responsibilities include the hiring, disciplining, and termination of employees. He also is involved in the collective-bargaining process, contract negotiations, and the grievance process. Regarding the grievance process, he takes on a lead role at step 2 and assists at step 3.

Regarding the collective-bargaining process, Kortz stated that he serves as a member of the Company’s negotiating team and served in that role during negotiations for a new contract during and after the expiration of the last collective-bargaining agreement with the Union. He noted that negotiations with the Union continued beyond the expiration date of the contract, but that there came a time when the Company made and implemented its last, best, and final offer; but the unit employees continued to work after its implementation. However, when the Union decided to go out on strike in April 2005, the Company decided to continue operations.

During the strike, Kortz stated that only three unit employees did not go on strike; the remaining unit members walked out to honor the strike. Kortz said that the Company ultimately maintained its operations by using salaried employees; the three who did not strike; ten unit employees who crossed the picket line; outside contract employees from Strom Engineering; and outsourcing of some production. Kortz noted that while the strike ended in January 2006, he had some serious concerns about restarting operations in its aftermath.

Kortz explained that he consulted with the Company’s human resources officials about his concerns, and he and they shared a concern that there could be conflicts between the returning strikers and the permanent replacements. Kortz related that during the strike he had observed the emotional reaction of those who were involved in picketing and those who crossed the line; there were reports of physical and verbal incidents on the line. Vehicles were reportedly damaged, cars were egged, and there were reports of pickets going to other workers’

⁸⁶ Linden identified the other three applicants as Mike Nichols, Carl Blethren, and a man who chose not to work at Tenneco. Nichols and Blethren were hired along with him.

⁸⁷ Kortz is an admitted statutory agent and/or supervisor.

⁸⁸ Kortz stated that he started working with the Company as a unit member—a model maker—and was a member of Local 660, and in fact has served as vice president of the local.

homes.

Kortz stated when the strike ended, he believed with those issues serving as a backdrop, that he would be challenged as a manager at the plant and needed to adopt a process to mold disparate elements—16 replacements workers, 9 workers who crossed the line, the 3 who did not cross; and the 4–5 returning strikers—into a well-functioning group of employees whose primary goal was to get products out the door.

Kortz stated that he wrote the February 6, 2006 letter (Stipulated Exh. 21), which was distributed to all (about 33) of the employees to address these concerns. According to Kortz, he believed at the time he basically had two options—do nothing and hope for the best—or deal directly with the issues and not permit the situation to get out of hand, attempt to bring the employees together and avoid what could be an explosive situation.

Kortz stated his major goal was to unify the group by acknowledging that the employees each had a point of view or opinion about the strike and what had transpired during the walkout. However, his intention was to alert the work force to the reason they were employed, that is the production of a quality product, made timely and in accord with the customers' expectations—essentially everyone was there to work.

Kortz said that in order to promote the Company's mission, he believed he needed to encourage the employees to respect each other's opinions and not taunt or provoke a coworker with whom they may have a disagreement. Kortz volunteered that at the time the situation was a veritable powder keg (of emotion) that could explode at any time. So the message he wanted the employees to receive on February 6, was that the Company was going to do all it could to control the situation.

Kortz said that with reference to the posting issue, he did not mention this in the letter but did discuss the matter before the assembled workers on February 6 at the meeting. According to Kortz, he told the employees if they needed to post items in their work areas, they would need his approval or that of their supervisor. Kortz said that this was his response to past instances of employees' posting offensive (to other workers) materials. He viewed these types of postings as reflective of taunting, which was one of his major concerns along with verbal and physical threats or other confrontational behavior. Kortz stated that he wanted this behavior to stop, and so he told the employees not to post in their work areas without first obtaining permission.

Kortz testified that he did not mention anything about the bulletin boards, and specifically did not mention the union bulletin boards, or that the Union would not be allowed to post on any bulletin board.

On this point, Kortz noted that the expired contract provided expressly for a union board and that at no time during the contract negotiations, the Company made no proposals to changing this term. Kortz stated that it was his assumption that the Company's last, best, and final offer, once made and implemented, did not affect the bulletin board provision.⁸⁹

⁸⁹ Kortz reinforced his point by pointing to a part of a letter he sent to the Union on February 20, 2006, in which he wrote, "[T]he company supplies the Union with its own bulletin board to communicate with

Kortz also noted that around February 6, he had observed postings on the Union's bulletin board, e.g., meeting notices, some correspondence, and a printout of an article from the Internet about the UAW. Moreover, as best he could recall, Kortz said that neither (steward) Cognata nor (president) Flannery ever asked for permission to post on the union board,⁹⁰ and the Union never filed a grievance over his posting announcements or other comments made at the February 6 meeting, or even bothered to ask for clarification of his presentation. Kortz said that moreover, he could not recall asking anyone to remove a posting from his workstation after February 6 and no one asked permission to post anything.

Kortz also stated that his announcement actually did not invoke a rule change, but in a manner of speaking was a restating of an existing rule. Kortz noted that the Company's longstanding (over 20 years) work rules, particularly rule 30, prohibited any posting of notices, letters, or other printed material of any description on company property by any employees unless provided by agreement.⁹¹

Kortz testified that before convening the meeting on February 6, he believed that he did not need to contact the Union about the meeting because (in his view) nothing was to be changed by way or rule or practice at the plant—the meeting was simply to attempt to mold the work force into a working unit and to get them to focus on production. Besides, Kortz said that he had called meetings in the past without notifying the Union. Kortz insisted that he never told employees not to discuss the Union, the strike, or any other matter outside of work.

Kortz noted that it was his intention that all employees receive a copy of his February 6, 2006 letter and believed all eventually received a copy based on a log the Company kept of the attendees at the meeting.⁹²

Turning to the information request allegations, Kortz explained that with respect to the proposed installation of the video cameras around September 2005, at the test labs located adjacent to the main plant facility, there had been at the time—late August 2005—what the Company viewed as intentional damage to a valve on the natural gas line—a hole had been drilled in the valve posing a safety hazard. Kortz conceded that the Company did not respond in writing to the Union's request for information about the proposed installation, but did so (he believed) verbally through Balog.

In any case, Kortz said that the Company did not install the cameras and instead retained an independent security service to patrol onsite, increased security patrols, secured the labs

employees which can be viewed by permanent replacements." (See Stipulated Exh. 14, p. 2.)

⁹⁰ Kortz did recall that in August 2007 (after the Company's withdrawal of recognition of the Union), Flannery asked to post a copy of the complaint in this case on the union board.

⁹¹ Kortz identified Stipulated Exh. 20 and R. Exh. 15 as copies of the current company work rules and the excerpted copy of these rules when Tenneco operated as Walker Manufacturing. Tenneco was the parent company of Walker, having purchased that Company in 1997–1998. Kortz testified that work Rule 30 has been in place for over 20 years.

⁹² See R. Exh. 16, a copy of the log on which those who received a copy of the February 6 letter had a check placed by their names.

through a keyed access, and put locks on the external gas tanks. Kortz said that the Company urged the employees to pay more attention to the condition of the equipment before using the gas. According to Kortz, the tampering ceased with these measures, obviating the need for the cameras. Kortz said that he never heard anything more from the Union about the matter.

Regarding Helton's discipline of October 13, 2005, Kortz acknowledged that the Company had received information requests about the matter, and that he had participated in the grievance procedure (at step 2) associated with the discipline. Moreover, he discussed the requests (in Stipulated Exh. 10) with Walker at the step-2 meeting. Kortz acknowledged that the meeting did not occur as timely as he would have wanted because of a couple of "miscommunications" that forestalled the meeting. However, the meeting did take place at the UAW hall with Supervisors Eggleston and Thorpe accompanying him. According to Kortz, Walker asked a "barrage" of questions—like those in his October 17, 2005 letter⁹³—and he and his staff attempted to answer them as best they could; Walker appeared to take notes.

Kortz said the parties again met for a step-3 grievance meeting on about January 25 or 26, 2006, and Walker stated that he had not received a response to the Helton information request. Kortz said that he told Walker that he thought he had provided the information at the step-2 meeting. According to Kortz, he asked Walker what had not been provided and Walker produced a sheet of paper and proceeded to ask questions to which Balog provided responses. When Walker finished, Kortz said he asked Walker if he were satisfied. According to Kortz, Walker said that he now had all the information he needed; and Kortz said he made a note that day that Walker had received the requested information.⁹⁴ Kortz testified that after this meeting, the Union never contacted him about the Helton information request.

Kortz then turned to the information requests relating to the names and addresses of the replacement workers and those relating to requests for contractor information. Kortz identified the various correspondence relating to these matters and stated that the Union and the Company dealt with these matters solely through the letters;⁹⁵ there were no other conversations with the Union about these matters.

Turning to the issue of the withdrawal of recognition of the

⁹³ Kortz said that Walker appeared to be reading from something but was not sure what it was. Kortz recalled that he told Walker that the witnesses to the incident were Dennis and Doreen Zurch, the only other employees involved in the incident.

⁹⁴ Kortz identified R. Exh. 18 as a copy of the notes he took the day of the third-step meeting. Notably, Kortz' notes, while referring to the third-step body spray incident, indicates the meeting was held on February 15, 2006, at about 9 p.m., not January 25 or 26 as he testified. On cross-examination, Kortz agreed in essence that the meeting took place on February 15, that he may have been mistaken about the meetings having occurred in January.

⁹⁵ Kortz was present in the hearing room when certain replacement workers testified. This will be discussed later herein. Kortz recalled that replacement employees Jerry Simpson and Miles Blakely asked him not to disclose information about them—their home addresses—to the Union. Kortz said that he canvassed other workers about this issue at the time.

Union, Kortz testified that replacement employee Lonnie Tremain approached him on December 4, 2006, with a copy of a decertification petition that had been signed by a number of the Company's Grass Lake employees.⁹⁶

Regarding the complaint allegation dealing with the Company's refusal to bargain at the third step with the Union with respect to Prysiazny's grievance over his discharge, Kortz agreed that as of December 2006, the grievance was proceeding to the third step as the Union had requested. However, because of the withdrawal of recognition, the Company decided that it could not lawfully deal with the Union as the exclusive bargaining representative of its employees, and so elected not to bargain with the Union at the third step. Kortz stated that he told Flannery that because of the withdrawal, there was no need to proceed with the grievance.

Kortz readily conceded that Supervisor Eggleston operated the company Case tractor on or about March 7, 2007. He also conceded that historically the tractor was operated and utilized by unit employees, including many model makers and plant service and maintenance personnel to perform snow removal and other unit work. Kortz acknowledged also that there was no specialized training required (by the Company) to operate the tractor.

Kortz explained that prior to 2004, basically any employee who knew how to start the tractor and operate it, did so without any specific regulation and was not required to have completed any training courses in its operation.

However, during the summer of 2004, Kortz related that Tenneco at Grass Lake ultimately participated in the Michigan State Award Program sponsored by the State of Michigan Office of Safety and Health Administrative (MOSHA). According to Kortz, participation in this program entails a MOSHA audit, examination, and assessment of a company's safety processes and procedures. As a result of the audit, Kortz said that MOSHA, in a safety survey, recommended that the Company implement a training program for employees who might operate the tractor.⁹⁷ Kortz said that based on this recommendation, he implemented a training program for those who would have to operate the tractor. According to Kortz, Eggleston, working with a company environmental health and safety technician, developed an appropriate training program in 2005 which included a sign-in roster and naming three employees qualified to operate the machine—Trevor Jaspers, Greg Incensio, and Scott Zollin—each one a bargaining unit member.

On March 7, 2007, Kortz related that Zollin was not working at the plant but was on the preferential reinstatement list. Trevor Jaspers also was not available; and Greg Incensio was no longer a bargaining unit member. Accordingly, on that day, no qualified bargaining unit member was available to run the tractor; Eggleston then performed the removal of snow on the parking lots.

Kortz noted that he could not say that only the persons qualified and authorized to operate the tractor used it. Kortz was at

⁹⁶ Kortz identified Stipulated Exh. 25 as a copy of the petition Tremain showed him.

⁹⁷ Kortz identified R. Exh. 22 as a copy of Michigan OSHA safety survey dated July 27 and 28, 2004.

pains to say that after the MOSHA report, the Company only permitted qualified people to operate it; this was how the new system was designed to work.

Kortz also testified about his involvement with Troy Linden and the Helton T-shirt incident. Regarding the former, Kortz acknowledged that Linden did ask strike-related questions but he could not recall the exact queries or his responses. Kortz intimated that he had had many conversations with job applicants in 2004 and 2005. Kortz admitted that after the strike commenced, he had conversations with employees about the strike in the course of his hiring replacements. According to Kortz, these conversations were generally about recent developments in the labor dispute.

Regarding the T-shirt incident, Kortz said that he was not present at the plant on the day in question; that Eggleston, however, told him of the incident. Kortz stated that he agreed with Eggleston's action; that Helton's refusals, as he understood the incident, could constitute insubordination, a proper ground for discipline.

B. *The Amicus Employees*

1. Lonnie Tremain⁹⁸

Tremain testified that he currently works at Grass Lake where he has been employed as a model maker for about 17 years, during which period he was a member of Local 660 and actually served as the local's sergeant-at-arms for about 6 months. Tremain stated he is no longer a member of the Union.

Tremain stated he joined the strike in April 2005 but did not participate in the picketing. Tremain said that after about 6 weeks, he decided to cross the line and return to work, knowing then there would be "discontent" over this move.

Tremain related that he and a number of his coworkers filed a petition with the Board seeking decertification of the Union in February 2006. According to Tremain, this petition was filed without the knowledge of the Respondent. However, when the Board notified him that the decertification petition would be held in abeyance pending resolution of the pending unfair labor practice charges, he feared that the petition would be dismissed. Consequently, Tremain decided to pursue an alternative approach and consulted the National Right to Work organization and was referred to one of its attorneys, who suggested that the interested employees could prepare a withdrawal petition on their own and submit it to the Company.

Tremain said that consequently, based on this advice, he collected the signatures of about 63 percent of employees and on December 4, 2006, and submitted to the Company the request that it withdraw recognition of the Union.

Tremain noted that his signing and submitting of the petition was "absolutely" (his term) not motivated by anything the Company had done to influence his or others' action. Tremain stated that he basically believed that the Union had "poorly represented" the employees regarding its negotiating stance on wages and health insurance benefits.

⁹⁸ It should be noted that Tremain filed the intervention petition in this case and was allowed to participate in the hearing as amicus.

2. Travis Atherton⁹⁹

Atherton testified that he is currently employed at Grass Lake as a model maker; he started his employment on January 17, 2006, at which time the strike was ongoing.

Atherton related that around February or March 2006, he was informed by Kortz that the Union had requested his name and address.¹⁰⁰ Atherton testified that he instructed Kortz not to release this information because his current residence was his parents' home, and he merely received his mail there.

Atherton volunteered that if the Union wanted to speak with him, they could do so at work, and agreed that the Union should be able to communicate with the employees it represented.

Atherton said that he was aware of the union bulletin board and has observed postings of union meeting notices and, in fact, a copy of a court document. Atherton stated that he knew Union Representatives Cognata, Ambs, and Flannery and spoke with them "quite often," but not much about the Union. Atherton, however, said that the union representatives in such limited conversations explained to him the Union's reasons for going out on strike and talked about former employees who had gone out on strike with them.

Atherton testified that he signed the petition to withdraw recognition of the Union on November 30, 2006, and explained what motivated him to do so.

Atherton stated that he wanted everything to be done with, he wanted to make his own decision about his job, whether he kept his job or not; he did not want to the Union to have a "say" in this.¹⁰¹ Atherton stated he clearly understood that the petition sought to "disband" the Union, which he thought did not actually represent him as opposed to the strikers and the few members who returned to work after the strike. Atherton stated affirmatively that the Company did nothing to influence his decision to sign the withdrawal petition, that this was the personal decision of employees such as himself.

3. Eric Crots¹⁰²

Crots testified that he has been a model maker at Grass Lake since December 5, 2005; the plant was being struck at the time and he was aware of its ongoing nature when he accepted the job. Crots stated that he originally worked for Tenneco as a Strom Engineering contract worker, starting about November 2005.

Crots recalled during February or March 2006 that the Union

⁹⁹ Atherton was a signatory on the Motion to Intervene. He was hired as a permanent replacement worker.

¹⁰⁰ Atherton identified a March 13, 2006 letter he received from Kortz which advised employees, among other things, of the Company's concerns about releasing to the Union their home addresses and prior employment information.

¹⁰¹ Atherton explained that he signed the petition because he wanted all controversy to end; he wanted everyone's workday to run smooth. Atherton said that he also felt the Union was a threat to his job because if the strikers came back, he might lose his job. Atherton admitted that he did not know whether these matters would be resolved in a contract or that he could personally vote for a union representative with respect to that contract.

¹⁰² Crots was a signatory to the motion to intervene.

was rumored to be seeking his name and address.¹⁰³ According to Crots, he verified the rumor with Kortz and thereupon instructed him not to provide the Union with his name or address. Crots stated he had heard stories that the union representatives had gone out to the home of two coworkers, Mickey and Sue Neal, and picketed there. Crots also related his own negative experience with the Union on the picket line where his vehicle was struck with a sign as he drove to work one day during the strike. Crots stated he did not want the Union showing up at his house and doing what it did to the Neals. Consequently, Crots said that he did not want his name and address provided to it out of this concern.

Crots said that he was familiar with the UAW as a national labor organization and based on that understanding knew the Union represented him at Grass Lake. He also agreed that a representative union, in his view, was entitled to have contact information for the employees it represented. In that regard, Crots stated that he knew Cognata, Flannery, and Ambs, his coworkers at the Company, saw them almost everyday, and talked with them sometimes (“just little things here and there”) about the Union or the strike. Crots said they talked about benefits and “stuff” like that which were being cut (by the Company), the reasons for the cuts, and that the cuts would affect the replacement workers such as he. Crots could not recall whether the union representatives ever talked about union meetings, but was sure they never were threatening in any way or said they would not represent him.

Crots intimated that he tried not to talk about union matters with the three simply because he was not interested in the subject. Generally, according to Crots, his conversations with them covered topics other than the Union. Crots believed that Flannery, Cognata, and Ambs clearly had the right to talk with him about the Union or other labor disputes with the employees, but only if he wanted to listen to them. Crots also stated that there was a large union bulletin board in the shop and he observed (around January 2006) union-related materials posted on the board, but could not recall what they were about.

Regarding the withdrawal petition, Crots acknowledged that he signed it on December 1, 2006. Crots explained that this decision was personal; he simply did not want any part of the Union. The stories about the Neals and his personal experience coming through the pickets during the strike influenced his decision to sign. According to Crots, the Company did nothing to influence his decision.

4. Chris Oakley¹⁰⁴

Oakley testified that he started working at Grass Lake on August 22, 2005, as a “crib attendant” when the strike was ongoing, of which he was aware when he was hired.

Oakley said that he learned from another coworker about the Union’s request for his name and address and went to Kortz to request that the information not be provided to the Union. Oakley stated that he was married with two daughters and he did not want anyone showing up “on my doorstep” or making any

kind of phone calls that would alarm his wife and family. (Tr. 450.)

Oakley stated that he knew Cognata, Flannery, and Ambs and worked with them every day. Oakley recalled that he conversed with Cognata about the Union, and Cognata approached him on an occasion and spoke to him about what he could potentially lose if the Union did not represent him. Oakley said that his interaction with the three was friendly and they never made threats or violent gestures to him.

Oakley testified that he was of the view that the Company did not have the right to tell him not to talk about unions, or the strike, nor could it restrict postings on the union bulletin board. On this latter point, Oakley testified that the Company did permit the Union to post on the board on a regular basis, e.g., union meeting notices and some legal notices posted around August 2007.

Oakley acknowledged that he signed the withdrawal petition of which he became aware through Tremain. Oakley testified that he contacted Tremain and signed the petition voluntarily because he believed that the UAW essentially was doing more harm than good for the auto industry, that he did not like seeing (auto) jobs going overseas or to Mexico; and he did not want his job to be lost. Oakley stated that he signed the petition to serve notice on the Union that he was not interested in being a union member. Oakley, however, admitted that he did not know at the time that the Union represented him. Oakley stated that it was most important to him (the “biggest thing”) that he felt that strikers did not get the best representation (from the Union) and that the Union should have taken an approach that did not include a strike or some other action to get the strikers back to work. Oakley testified that the Company did nothing to influence his decision to sign the withdrawal petition.

5. Jerry Lee Pollard

Pollard testified that he began working at the Grass Lake plant as a model maker around October 2005 while the strike was ongoing; he was aware of the strike when he applied for the job as he had originally worked there as a Strom Engineering contract employee. Pollard volunteered that he learned of the availability of jobs at Tenneco through a friend. Pollard said that he knew Kortz personally (having worked on his race car and lived with him for a while) and submitted an application to the Company. Pollard testified that he is essentially philosophically opposed to unions and has never been a member of one because of issues he has had with unions during his life time. Pollard stated that when he hired on with the Company, he did not believe he was represented by any union.

After the strike concluded, Pollard stated that he learned from Kortz that the Union was seeking his name and address. Pollard said that he told Kortz that he was opposed to the disclosure because he (and other workers) had been hassled by the strikers as they went to and from work, and had been followed on different occasions. Also, the strikers had made hand gestures suggestive of a gun being pointed at him and then pulling the trigger as he went through the line.¹⁰⁵ Based on this experi-

¹⁰³ Crots initially said that he did not receive a letter from Kortz about the Union’s request, but once shown a copy of Kortz’ letter (GC Exh. 50) of March 13, 2006, recalled receiving a letter(s) similar to this.

¹⁰⁴ Oakley signed the petition to intervene in this matter.

¹⁰⁵ Pollard testified that Helton was one of those making the gestures. Pollard said that he reported the incident to company security who advised that nothing could be done.

ence, Pollard said he did not want the Union to have his personal information, that he had been harassed enough and told Kortz as much.

Pollard stated that he was aware of the union bulletin board in the shop, and had seen union postings on the board during the time of his employment; Pollard said he could not recall the contents of the postings, as he did not bother to read them. However, Pollard recalled that he had overheard employees on the assembly line discussing the posted notices in the context of conversations about the Union. So he would think the notices in some aspect dealt with union matters.

Pollard acknowledged that he signed the petition to withdraw recognition of the Union on November 30, 2006, because he felt that he did not need to be represented by a union. Pollard said that a union had treated his father shabbily in the past, so he essentially was no fan of the unions and had no interest in them. Pollard stated that he believed other laws governing the workplace would be sufficient to protect him better than a union. Pollard stated that the Company did nothing to motivate or influence him to sign the withdrawal petition.

6. Andrew Porter

Porter testified that when he hired on with the Respondent as a model maker in August 2005, the strike was ongoing; but he knew this before he accepted employment. He realized at the time he was being hired as a permanent replacement worker for the strikers.¹⁰⁶ Porter stated that after the strike concluded, sometime either in February or March 2006, he became aware through rumors in the shop of the Union's having requested that the Company provide his name and address. Porter stated that he spoke to either Kortz or a supervisor—he was not sure to whom he spoke—and told the person that he did not want his personal information given to the Union. Porter stated that he personally did not like unions, that they possessed in his view too many rights and should not be able to dictate to a company.

Regarding the Union's request for his personal information, Porter said that he did not want to receive union propaganda in the mail and, moreover, was afraid a union person would show up at his home to talk about the Union. Porter said he did not want to be contacted by the Union even to discuss terms and conditions of employment, and he did not want to join the Union.

Porter stated that he knew Cognata, Flannery, and Ambs and worked with them and was on friendly terms with them. Porter said he and they never really discussed the Union except in a jocular way.¹⁰⁷

Porter acknowledged that he signed the withdrawal petition on December 1, 2006, and did so because of his personal antipathy toward unions. While he at first did not think the Union

represented him, Porter said that he later came to the understanding that the Union was connected with Tenneco and represented the employees out on strike. Porter stated he signed the petition thinking that it would dissolve the Union at Grass Lake, that it would no longer only represent the striking employees. Porter testified that the Company did nothing to influence his decision. He signed because he wanted to be rid of the Union.

7. Martin Nelson

Nelson testified that he has been working at Grass Lake since February 1986 and has been a Local 660 member for about 20 years, during which he has held union positions of trustee and financial secretary.

Nelson stated that he was working when the Union called the strike in April 2005, and he walked out with the employees. Nelson said he decided to abandon the strike on January 27, 2006, when he returned to work. The Union, he noted, ended the strike on that very day.

Nelson stated he decided to sign the petition because he was simply “done” with the Union. He had personal and financial reasons for his decision, but he also was fed up with the strike that was going nowhere in his view. Nelson testified that the Company had nothing to do with his decision; the decision to sign the withdrawal petition and to join in on the motion to intervene were his and his alone.¹⁰⁸

8. Robert McNees

McNees testified that he has been employed with the Company for about 3 years and became a member of the Union shortly after being hired.

McNees stated that he was employed at the Grass Lake plant in April 2005, when the Union called he strike; he joined the strike at that time. However, after 5 months of picketing, McNees said that he decided to abandon the strike, which he described as a very hard and personal decision.

McNees acknowledged that he signed the petition to withdraw recognition of the Union on November 30, 2006, and explained his reasons for doing so.

According to McNees, he believed both before and during the strike that the Union was not doing a good job of representing him as an employee—the Union was not looking out for his and the other employees' needs. He believed furthermore that the Union was looking out for only a few individuals who would benefit from the Union's proposals. McNees stated that he went so far as to ask the union leadership what precisely was being bargained for vis-à-vis to what the Company was asking the Union to give in negotiations. According to McNees, the Union's response was not satisfactory to him and influenced his decision to withdraw.¹⁰⁹

¹⁰⁶ Porter stated that he was not told by company representatives at the time of hire that the Union did not represent him. By the same token, Porter also stated he was never told that the Union actually represented employees. According to Porter, the Union was not discussed at the time of his hire.

¹⁰⁷ Porter stated that he knew that Cognata, Flannery, and Ambs were returning strikers, but they at no time threatened or were abusive or violent toward him; they never said they were not willing to represent him.

¹⁰⁸ Martin was a signatory on the motion to intervene.

¹⁰⁹ McNees stated that he understood that the Company was advising members to give up retiree health insurance coverage and members were to pay more for their health insurance benefits. McNees said that he suggested to the Union that it should negotiate for higher pay, perhaps a 401 matching contribution—something to offset the Company's proposal. According to McNees, the union leadership rejected this saying that “we” want retiree health insurance, which to McNees would only benefit a handful of members.

McNees said that the behavior of some of the union members even 8 months before the strike also influenced his decision. McNees related that union members had asked him to slow down on the job, claiming he was working too fast which would affect overtime. McNees said that he asked them what their concern was, to which the members said that he was helping the Company. McNees related that he told them that he was working to help the Company (by working too fast), not the UAW. McNees also said (without elaboration) that actions on the picket line influenced his decision to withdraw. He did not want to be a part of the kinds of things the picketers were doing. McNees stated that he did not approve of these tactics and refused to work in that way.

McNees stated it was his belief, based on his experience that it would be less likely that he would retain “good”¹¹⁰ conditions of employment with a union that he had done better in the past without union support or representation.

McNees stated affirmatively that the Company did nothing to influence or motivate him to sign the withdrawal petition.

9. Mickey Neal¹¹¹

Neal testified that he has been employed at Grass Lake for about 13-1/2 years as a model maker and toolmaker. Neal stated that he was a Local 660 member for 11 years, but never held union office.

Neal related that he was employed at Grass Lake when the Union decided to call the strike; he joined the strike and walked out in sympathy with the cause. However, Neal said that he decided to abandon the strike after only 4 days.¹¹² Neal noted that his wife, Sue, who also worked at Grass Lake, also decided to return to work at the time. Neal intimated that he knew the Union would not approve of his (and his wife’s) decision but he, nonetheless, decided to return to work.

Neal related an experience he and his family had with the Union during the strike, around June 2005. Neal stated at the time he had crossed the picket line, and was at work when he received a call from his 12-year-old son from home telling him that there were picketers at the family residence.

Neal said that when he got home, Walker and four others were outside of his home carrying signs that read: “Do you know your mom and dad’s a scab; do you know your neighbor is a scab?” or words to that effect. Also, according to Neal, the local police were on the scene. Neal stated that he was very angry over this, especially since his son suffers from seizures if he becomes overly excited and was in fact having one when he

¹¹⁰ McNees stated that presently at Tenneco he made \$50,000 to \$60,000 annually and had health insurance. He confessed to knowing not a whole lot about pensions at the Company but believed he would receive \$25 per month with 25 years of service.

¹¹¹ Neal was a signatory to the motion to intervene.

¹¹² Neal stated that at the time he decided that the Union had not been truthful about the reasons for going on strike. He believed that the real reason the Union went out on strike related to health care benefits—an economic reason. However, the Union claimed it was striking because of unfair labor practices. In any case, Neal said he did not come to this conclusion until after the strike had been called. Furthermore, he did not think the health care benefit issue merited a strike; that the Union should have negotiated better. Neal stated he became dissatisfied with the Union at this point.

returned home.

Neal acknowledged that he signed the petition to withdraw recognition of the Union on November 30, 2006.¹¹³ Neal testified that he signed the petition basically because the union members had picketed¹¹⁴ at his residence and caused a disturbance in his home and because he believed the Union had not done a good job in representing the employees.

C. *The Union Members Called by the Respondent*

1. James Walker¹¹⁵

Walker testified that he considered those unit employees who crossed the picket line and abandoned the strike “scabs”—persons he believed were not faithful to the strike line and in fact were traitors in his mind, but not the lowest form of life. Walker acknowledged that he had communicated to the union members his view of scabs during the strike.

Walker acknowledged receiving a letter from Kortz on February 20, 2006, regarding Helton’s step-2 grievance over the T-shirt incident.¹¹⁶

Walker also acknowledged that once he learned from management (Youngerman) around January 26, 2006, that the Company had hired replacement workers, he wanted them laid off and the strikers returned to their former jobs. Walker said that he realized that there would be a conflict if the strikers returned and the replacements were still working. Walker admitted that the Union felt very strongly about the replacements’ hiring, that this move by management was inappropriate. Walker stated that it was in the context of the Company’s decision to hire replacements that he made the offer to return to work.

Walker also agreed that a few weeks later—around February 15, 2006,—he submitted certain proposals to the Company covering wages and benefits that would be applicable to the permanent replacements. Walker identified his handwritten and typed notes which contained some of the Union’s proposals. Walker admitted that some of the proposals favored the more senior employees, essentially the strikers, over the newer employees—the permanent replacements (those employees

¹¹³ Neal identified Stipulated Exh. 25 as a copy of the withdrawal petition and his signature thereon. Neal also identified the signature of his wife Sue, who signed the petition on December 1, 2006. Sue Neal did not testify at the hearing.

¹¹⁴ Called by the Respondent, Walker admitted that some members of another local picketed the Neals’ home, but that no Local 660 member participated. He also admitted that signs carried by the picketers including the word “scab” but said, “Mom and Dad, what is a scab worker?” Walker said the sign was not addressed to the Neals, “just addressed in general.” (Tr. 314–315.)

¹¹⁵ The Respondent called Walker and, upon motion, I allowed him to be examined as an adverse witness under rule 6(1)(c) of the Federal Rules of Civil Procedure.

¹¹⁶ See R. Exh. 13, a copy of the letter. In this letter, Kortz set out in some detail the Company’s version of this incident and its attempts to deal with Helton’s conduct which Kortz believed was indicative of a pattern of behavior that the Company found inappropriate and would subject him to additional discipline, including termination for if it continued.

hired after April 26, 2005).¹¹⁷

2. Larry Flannery

Flannery testified that when he returned to work on February 27, 2006, there were about 35 hourly employees working at Grass Lake and included fellow strikers, those who crossed the picket line, and the permanent replacement workers. Flannery stated that he considered those who crossed the line as scabs, which to him included union members and the permanent replacement workers; in short, anyone who crossed the line to take the union members' jobs.

Flannery admitted (with emphasis) that he resented these people and had a low opinion of them. Flannery stated that he could not stomach a person who crossed the picket line and recalled that he had vocalized these sentiments.¹¹⁸

Flannery also admitted that as the president of the local, he wanted the replacements workers fired and the strikers returned to their old jobs.

X. DISCUSSION AND CONCLUSIONS REGARDING THE COMPLAINT ALLEGATIONS

A. *The September 2, 2005 Surveillance Camera Information Request*

The General Counsel (and the Union)¹¹⁹ contends that the Respondent was legally—by dint of the collective-bargaining agreement as well as the Act—required to provide the Union with the requested information regarding the Company's proposed installation of the surveillance cameras in the test lab. She argues that the Company did not provide this presumptively relevant—in unit—information and did not at the time offer any explanation for the failure. Accordingly, the General Counsel submits that the Company has to a certainty violated Section 8(a)(5) and (1) of the Act.

The Respondent contends that the Company did not unlawfully provide the surveillance camera information because it decided not to install the cameras and thus the matter became moot. Furthermore, the Respondent asserts that the Union's failure to pursue the matter clearly is an acknowledgment that it also considered the matter moot and not worthy of further re-

¹¹⁷ Walker's notes are contained in R. Exh. 6 and consists of six pages. According to the notes, the union proposals included ones giving senior employees (the strikers) a superior health plan and freezing the wages of the replacements through May 12, 2008, and ultimately laying off the permanent replacements. Walker noted that these proposals were among 10–11 proposals made by the Union in the negotiations after the strike, and up until around November 2006.

¹¹⁸ Somewhat ironically on cross-examination, Flannery stated his personal relationships with some of the replacement workers were really good; some were even friends. However, he noted that having worked with the replacements workers for a time, he came to understand their personal situations—they were out of work and needed a job, just like the 20 or so members of his local who are now out of work. Accordingly, he has developed mixed feelings about them over time.

¹¹⁹ Henceforth, I will treat the contentions of the General Counsel and the Union as one unless there is a material divergence or difference in their respective positions.

sponse.¹²⁰

First, I note that the Respondent does not contend that the surveillance camera information was irrelevant, of a confidential or proprietary nature, or required an unduly burdensome response or that it could not be done timely. The Respondent's defense is that the matter became moot because the Company decided to secure the test lab using other methods and approaches, thus rendering unnecessary the requirement of a response.

In agreement with the General Counsel, I would find and conclude that by not providing a response to the Union's request for information on September 2, 2005, that the Respondent violated Section 8(a)(5) of the Act. I will note that in my view it is important for purposes of the policies undergirding the Act that a company should honor where appropriate a union's legitimate request for information in an appropriate fashion and not leave the matter in some indefinite or default position or, as here, deemed moot. This approach is not advisable.

In my view, clearly if the Respondent had timely responded in writing to the Union about its decision not to install the cameras but instead use other methods to secure the test lab—an approach evidently not objectionable to the Union—the charges would not have been filed in this case, which supports the policies of the Act. Accordingly, in my view, the Respondent's claim of mootness does not relieve it of the law's requirement to provide relevant information in a timely fashion.

I note in passing, however, the record is clear that the Union did not pursue or followup on its request. So, it would seem that the issue was no longer of moment to the Union and its obligation to police the (expired) agreement and otherwise represent the unit. In this respect and under the circumstances, the Respondent's violation of the Act is very close to de minimis, at least in my view, but a violation nonetheless.

B. *The October 19, 2005 Information Requests Regarding Helton's Discipline*

The General Counsel concedes that Kortz did verbally provide some of the rather extensive requests for information the Union deemed necessary to pursue Helton's grievance. However, she notes that whatever was provided was given in part on December 6, 2005, and later on February 15, 2006, again verbally. She submits that not only was the information incomplete, it was unacceptably delayed. The General Counsel argues that among the vital information not provided were the identities of the complainants; whether they got the spray on their person; the environmental effect (impact) of the spray on the workplace; whether other employees had been similarly disciplined within the last 5 years, the details associated therewith; whether any members of management ever violated

¹²⁰ The Respondent asserts that since it notified the Union promptly of a proposed camera installation at another location and responded promptly to the Union's information request about it and bargained over that matter, it has demonstrated a willingness to comply with the September 2 request. I heard evidence on this point at the trial. The Respondent seemed to be arguing that if it did not consider the September 2 request moot, it would have in likewise responded to that request. However, I do not consider the Respondent's position persuasive regarding the instant charge.

the same work rule; the emotional or mental trauma suffered by the complainants; whether anyone was endangered by the incident; and the specific details of Helton's alleged insubordination.

The Respondent contends that it did not refuse or fail to provide the information requested pursuant to Helton's grievance; that it indeed did provide the information at the grievance meetings; and, moreover, the Union confirmed that the information supplied was sufficient at the step-3 grievance meeting in February 2006.

The Respondent submits that Kortz credibly testified that he and Walker went over the information queries at the meetings and the Company provided responses as appropriate. The Respondent notes that as further proof that the Company had sufficiently complied with the requests, the Union did not recontact the Company over the matter.

The Respondent rightly contends that Board law does not require a written response to an information request of relevant information, which point would be applicable here. Notably, the Respondent does not contest the relevance of the request; its position rests essentially on its sufficient and satisfactory (to the Union) response to the information requests about Helton's counseling.

However, as I have stated in my prior finding, it would seem once more that a verbal response to extensive information requests is not a good practice. With respect to the Helton grievance, Kortz, whom I found to be a credible witness, claimed to have provided not only responses to the queries to the Union, but his responses were deemed sufficient to Walker in the grievance meetings. The problem is that Walker disputed this assertion at the hearing and therein lies the problem—verbal responses to written interrogatories are prone to misunderstanding and claims of noncompliance.

On October 19, 2005, the Union made 29 separate written queries about Helton's counseling. In all candor, I am not entirely clear as to what was provided and what was not, in spite of the record testimony. The witnesses, but specifically Kortz, did not state point by point what he provided to Walker in their meetings. Instead, he testified that he provided general responses to Walker who he claimed was satisfied therewith. Surely, the better practice during the grievance sessions and afterwards would have been for the parties to memorialize their understandings in a letter or other written document of what had transpired at meetings regarding the information requests.¹²¹ Perhaps, here again had this been done, the charges might not even have been made by the Union.

So, on balance, while I believe that Kortz possibly did respond to the information requests at least in part, I cannot find and conclude that his responses were sufficient as required by the Act and Board law. Because I cannot conclude that the Respondent provided timely, substantially, and sufficiently the responses to the Union queries about Helton's counseling, I therefore must conclude that his response on balance was not timely or complete. I would find a violation with respect to this charge.

¹²¹ Kortz's rather cryptic notes of his meeting with Walker regarding the information requests about Helton were not helpful.

C. The January 27, 2006 Request for the Addresses of the Permanent Replacement Workers

The General Counsel contends that the home addresses of the strike permanent replacement workers, as bargaining unit employees, is a matter presumptively relevant to the Union's duties as the exclusive bargaining representative and that the Respondent acted unlawfully in not providing this information as requested by the Union on January 27, 2006. She submits that in this case, the Respondent did not establish that there was a clear and present danger that the Union would misuse the information, or that any harassment of the employees would likely result from furnishing addresses of the replacement workers.

The General Counsel notes that the Union made the request after the strike ended so that it could represent and communicate with the entire unit, including the permanent replacement workers about whom they had little or no information and, she argues, no feasible way of contacting.

She further notes that the Respondent was not altogether cooperative with the Union in terms of providing any personal information about the replacements, dribbling out as it were their names and other information over a period of about 6 weeks after the request was made. She submits that all communications about this issue were dealt with in the correspondence between the parties with the Company essentially asserting the safety of the permanent replacements as the reason for its not providing the addresses.

The General Counsel, however, contends that the objections to disclosure by five replacement workers were for the first time only adduced at the hearing, but were not asserted by the Company in its correspondence as grounds for nondisclosure. She submits that certainly these five could not be representative of the sentiments of the remaining 12 or 20 replacement workers who did not testify.

The General Counsel further submits several factors militate against any finding that disclosure of the replacement's addresses would constitute a clear and present danger of abuse. She asserts that the strike was conducted and concluded peaceably by the time of the Union's request. Moreover, the strike was marked only by innocuous and nonviolent behavior, to include insults and name calling. She asserts these circumstances cannot constitute a clear and present danger to support a claim that the Company feared for the replacements' personal safety, the gravamen of the Respondent's claim for nondisclosure.

The General Counsel contends that the Respondent did not overcome the presumption of relevance of the requested address information and the Union's clear need for such information in order to perform its statutory obligations. Moreover, and most importantly, she asserts, the Respondent did not establish that the disclosure would present a clear and present danger to the replacement workers.

The Respondent counters, contending it had legitimate concerns that justified not providing the Union with the addresses of the permanent replacement workers. The Respondent notes that the strike lasted 10 months and during that time employees who crossed the picket line were subjected to abusive language, strikers making gun gestures with their hands, videotaping, and

photographing as they crossed the line, and physical striking of crossing employees' vehicles. The Respondent notes that it filed charges with the Board regarding the strikers' conduct and while the Union settled the matter in February 2006 and posted a notice stating it would not engage in this behavior in the future, the Company's concern for the replacements' security remained.

The Respondent submits that its concerns were made early on in its correspondence with the Union. Consequently, the Company proposed reasonable alternative means by which the Union could communicate with the replacement workers, but without the Company's providing their home addresses.

The Respondent further contends that Walker himself, in his negotiations with the Company, was personally hostile to the replacement workers, whom he considered scabs, and actually proposed that they be replaced by the returning strikers and receive less favorable treatment in terms of their wages and benefits. The Respondent asserts that it was Walker and members of a brother union who went out to the residence of two union members, the Neals, and picketed with signs containing abusive and pejorative language stemming from their having crossed the line. The Respondent contends that the replacement workers reasonably could have expected similar treatment should their home addresses be disclosed to the Union.

The Respondent further notes that as a matter of policy, the Company routinely seeks the permission of the employees before disclosing their personal information to third parties. In point of fact, the Respondent submits that once the permanent replacement workers learned that the Union was seeking their personal information—mainly their home addresses—they instructed the Company not to release this information. The Respondent notes that the several replacement workers subpoenaed to testify at the hearing confirmed this and also provided legitimate reasons for not wanting to have their home addresses disclosed to the Union.

The Respondent submits that the replacement workers, as they testified, believed that they had suffered enough abuse from the Union while going to work during the strike. They simply did not want to subject themselves to possible abuse at their homes.

The Respondent notes that the Union's claim that it needed the replacement workers' addresses because that was the only feasible way it had to communicate with them is disingenuous at best. The Respondent points to its correspondence in which the Company offered different means by which the Union could communicate with the replacement workers and its willingness to facilitate communication, short of providing their home addresses. The Respondent also notes that the union bulletin board continued to be a source of union notices and communication with the entire workforce. Also, the Respondent asserts that as the testimony at the hearing revealed, the replacement workers and representatives of the Union's leadership worked side by side at the plant and on occasion spoke of the Union, in which circumstances the Union could communicate personally with replacement workers.

Thus, the Respondent, for these and other reasons, asserts it was legitimately justified in not disclosing the replacement workers' home addresses.

Irrespective of whether one employs the totality of circumstances¹²² test or the Board's clear and present danger test,¹²³ I would find and conclude that the Respondent very persuasively established legitimate reasons for not disclosing the home addresses of the replacement workers.

First, while all of the replacement workers did not testify at the trial, those who did clearly opposed the release of their home addresses to the Union. There is no reason not to credit their reasons and it does not require any great leap of logic to infer under the circumstances of this case, including the two petitions filed by the remaining replacements to withdraw recognition, that the other replacement workers in likewise opposed the release of this information.

Second, although the strike had indeed ended by the time of the Union's request, it is clear from the testimony of the unionists and the replacement workers and those who crossed the line, that particularly hard feelings about each other had developed and hardened into a fairly strong antipathy during and in the aftermath of the strike. Moreover, at the time of the request, the strike and the behavior of the Union were clearly fresh in the minds of everyone, as evidenced by the Company's determination of a possible "powder keg" situation in the unit on February 6, 2006, and not incidentally the behavior of Helton on January 19.

Third, this case presents more than a hypothetical potential for abuse of the replacements' personal information—their addresses in particular. It is an unrebutted fact that the Union (Walker) traveled to the personal residence of two members, whose address they certainly had access to, and staged a protest of their stance on the strike. Neal testified that this was highly disturbing to his family and himself, and probably embarrassed him before his neighbors. Moreover, the police were called and the matter all in all was a mess.

Certainly, based on the testimony of other workers, including the replacements, they heard of the incident and concluded that they did not want to have something similar happen to them. The Company clearly weighed their concerns in deciding not to disclose the addresses. In this, I would concur. The concerns of the replacement workers, under these circumstances, must be respected.

Fourth, I also note that as I heard the testimony of the union witnesses, it was clear to me that each possessed a lingering resentment of the replacement workers, and while calling someone a "scab"—a venomous term for anyone who crosses the picket line—may be commonplace in the union movement, it, nonetheless, bespeaks an unfriendly and disrespectful attitude toward the person so called.

The replacement workers were reviled during the strike, and it seems clear that the lingering bad feelings toward them could subject them to future abuse if the addresses were provided,

¹²² See *Chicago Tribune v. NLRB*, 79 F.3d 606 (7th Cir. 1996), where the court concluded that, inter alia, the Board's presumption that names and addresses of replacement workers are relevant information to which the union is entitled is not irrebuttable, but turns upon the circumstances of a particular case. The court rejected the Board's clear and present danger test to determining whether the employer permissibly could withhold such information.

¹²³ See *Page Litho, Inc.*, 311 NLRB 881 (1993).

especially when the request was made fairly close to the end of an unsuccessful strike.

It is important to note that the Respondent's refusal to disclose the addresses of its employees—the replacements—to the Union stemmed not from its desire to be uncooperative. In my view, its decision was based on the Union's behavior toward and attitude about a significant portion of the work force the Company felt compelled to employ because of the Union's decision to strike. It is clear to me that, in part, the decision not to disclose reflected the Company's prophylactic reaction and legitimate business judgment not to subject its employees—clearly out of favor with the Union—to possible abuse along the lines suffered by the Neals at their personal residence. There was to me, under the circumstances, a clear and present danger that the replacements would suffer the same treatment.

Also, it is important to note that the Union had other viable means of communicating with the replacements short of having access to their homes. The union bulletin board was still available for communication purposes and the returning strikers could and did speak amicably and about union matters with some of the replacement workers while at work. Thus, the Union had ample opportunity to present to the replacements its side of the strike, the need for union representation, and the progress of the negotiations that were ongoing.

I would find and conclude that the Respondent did not violate the Act by refusing and failing to provide the replacements' home addresses, and would recommend dismissal of this charge.

D. The February 13, 2006 Request for Subcontractor Information

The General Counsel contends with respect to the Union's February 13 request specifically for the dates of work for the Strom Engineering replacement workers, the numbers of such workers used, their job assignment and the written contracts between the Company and Strom, the Respondent did provide the requested information, with the exception of the number of Strom workers used at Grass Lake. She submits, however, that the Respondent's response on March 13 that it was between 0 to 50 employees at Grass Lake during the strike was not a sufficient response.

The General Counsel contends that faced with the Respondent's response that the information about the subcontractors was irrelevant, the Union explained its need for requested information, that is, to determine the accuracy of the Company's statement about the number of vacancies at the end of the strike and to evaluate the Company's claim that fewer workers were needed at Grass Lake at the time the strike ended. The General Counsel asserts that the Union had a legitimate concern about these matters since only 6 striking workers were being called back to work; 24 were not; that this also posed an issue of possible discriminatory hiring.

The Respondent asserts that the complaint allegation is inaccurate in that the only information it did not provide on February 13 were the contracts with and invoices regarding payments to Strom during the strike; the Respondent contends that these were not related to the amount of work performed by contractors during the strike (as alleged in the complaint).

The Respondent notes that the union letter of February 12, requested the dates the replacements were hired; their last date of service in the plant, and the number of Strom employees and their assignment during the strike.

The Respondent asserts that pursuant to the Union's letter request, it provided the Union in writing with the number of Strom employees utilized—0 to 50; the date it first used them—since April 26, 2005; their last date used—February 4, 2006; and their assignments to various deployments in the plant, that is, to bargaining unit jobs in welding, hoist, model maker, maintenance, and shipping and receiving departments.

The Respondent contends that it did not provide the written contracts or invoices relating to Strom because the Company took the position that legally it did not have to bargain with the Union over contractor costs for services, since it was unquestionably entitled to continue operations through use of subcontractors.

The Respondent also contends that by providing the aforementioned information, this was sufficient to satisfy the Union's need to evaluate the Company's position that fewer workers were needed at the conclusion of the strike. Moreover, the parties at the time had agreed on a reinstatement process for the strikers and also provided the Union with a list of projects at Grass Lake before and after the strike that suggested less work. On balance, the Respondent asserts that the contract and invoice information was irrelevant first, and second, not necessary to the Union's role as exclusive bargaining representative.

The complaint in paragraph 17 essentially (as correctly noted by the Respondent) charges that the Union's letter of February 13, 2006, requested information regarding the amount of work performed by the Strom workers during the strike and that the Respondent violated the Act in not providing this information.

As I read the Union's letter, the requests literally do not seem to correspond directly to a general query about the "*amount of work performed*" by the Strom employees.

In its followup letter of March 6, 2006, the Union stated that its request for information about the Strom employees "was aimed at documents which would set forth the *number* of Strom employees during the strike." In the Union's March 22, 2006 letter, the Union stated that the information about Strom employees was necessary so that the Union could judge how to press its position (goal) in bargaining to ensure the return of all of the strikers to work, and that the reinstatement of strikers was a mandatory subject of bargaining. Additionally, the Union's letter stated that the Strom information would allow the Union to evaluate the Company's claim that fewer workers were needed because there was less work at the plant.

Perhaps, as the Respondent contends, the complaint allegation is not as artfully worded as it could be. However, the Respondent did not complain about the charge at the trial, nor did it move for its dismissal for failure or insufficiency to state a claim. I would find that in spite of its wording the charge gives sufficient notice to the Respondent to satisfy due process. Moreover, the Respondent had the opportunity at trial and indeed took advantage thereof to adduce evidence in defense of the charge.

Directing myself to the February 13, 2006 information request, I would find and conclude that the Respondent provided

a sufficient response to that letter (and those sent subsequently), except with respect to the requested contract and invoice information. The Respondent concedes that it did not provide this information essentially on grounds of relevance. As earlier noted, the Board employs a broad discovery standard regarding the relevance of information requested by the Union. In my view, under that standard, given the Union's stated reasons for the need of the information, the contracts and invoices for Strom could be useful to the Union's stated need to verify the number of Strom employees vouchered by the Company pursuant to the subcontractor contracts which, in turn, could arguably shed light on the amount of work they performed.

Notably, the Union, with 40-plus years of experience with the Respondent's operation, was in a position to use these contracts and vouchers in its negotiations with the Company for purposes of reinstating the strikers and determining whether the Respondent's offer to return a certain number of strikers was consistent with the amount of work available at least based on the Company's history in employing the subcontractors during the strike.

I would grant that this is a somewhat speculative approach to the relevancy issue. However, the standard the Board utilizes regarding relevance in my view cuts a fairly broad swath in terms of producible information. I would accordingly find and conclude that by not providing the contract and invoice information for the Strom employees employed during the strike, the Respondent violated Section 8(a)(5) of the Act.

However, I would note in passing that the Respondent's response to the February 13, 2006 letter was otherwise sufficiently responsive and that its view of the irrelevance of the contract and voucher information was principled. Hence, I would deem its failure to provide this information more in the nature of a technical violation of the Act, but a violation nonetheless.

E. The February 6, 2006 Rule Changes Allegations

1. The February 6 announcement by Kortz at the mandatory employee meeting

The complaint alleges essentially that the Respondent, through Kortz on February 6, unlawfully restricted employee discussion by instructing the gathered employees that they were not to say anything to each other that might be deemed offensive or evoke a response from another employee, in violation of Section 8(a)(1) of the Act.

The General Counsel essentially contends that Kortz' announcement that taunting, verbal, or physical threats meant to be confrontational or to evoke a response from coworkers were prohibited, and that such actions were to be reported to him, implicated protected activity. She asserts that since his edict was not defined or limited in time or place, it therefore was impermissibly overbroad in its reach. She submits that Kortz' announcement violated the employees' rights guaranteed them under the Act to discuss the Union as well as their terms and conditions of employment because Kortz did not indicate what type of topics might be considered confrontational or evoke a response.

In short, she submits that by the Respondent's announcement of this rule, the employees were effectively muzzled and were

unreasonably restricted in terms of being able to discuss job-related matters to them guaranteed them under the Act.

The Respondent argues that on February 6, the first day the strikers returned to work, Kortz called all employees together to discuss moving forward with the business of the Company and the jobs they were hired to perform post-strike. Towards that end, Kortz distributed the one-page letter to all employees and posted a copy on the bulletin boards.

The Respondent contends that this announcement took place in the context of a contentious 10-month strike, just concluded, that was unsuccessful from the Union's point of view; the hiring of permanent replacement workers whom the Union had demanded be terminated and the strikers returned to work. However, the Company had refused this demand and the Union, through Walker, indicated retention of the replacement workers would produce a "conflict."

On February 6, faced with a work force consisting of disparate and possibly antagonistic elements and being responsible for managing the facility and keeping its operations afloat, the Respondent submits that Kortz decided to address the employees and deal with a potential "powder keg" in the most responsible way he could devise.

Thus, the Respondent contends, contrary to the General Counsel's claim, Kortz was not trying to muzzle or stifle the employees in the exercise of their statutory rights. Rather, confronting his first strike situation, Kortz was simply but responsibly trying to avoid situations that could cause physical or verbal confrontations that would cause disruption in the plant.

The Respondent asserts that on bottom, the complaint allegation reflects a selective lifting of language out of Kortz' entire communication to the employees and totally ignores the context of the situation making for the announcement. The Respondent argues that this charge should be dismissed.

2. The February 6 rule regarding the posting of materials with approval of the Company

The complaint alleges, essentially, that the Respondent promulgated on February 6 a (new) rule requiring that all materials posted by the unit employees had to be approved by the Respondent's supervisors, without prior notice to and without affording the Union a meaningful opportunity to bargain with respect to the rule change and the effects thereof, in violation of Section 8(a)(5) of the Act.

The General Counsel contends that along with Kortz' warnings about taunting and other unacceptable behavior, he also told the employees that postings of signs, letters, or other printed materials would be subject to obtaining (prior) approval from the supervisors; and that notice of the rule change was not given to the Union, nor was any opportunity provided to bargain over the change.

The General Counsel asserts that in the past, employees used the plant bulletin board to post all types of materials, including notices of cookie, house, and car sales without obtaining management's approval.

Therefore, when Kortz announced the new posting policy, he promulgated a new rule regarding the use of the bulletin boards, which the General Counsel contends is a basic condition of employment and a mandatory subject of bargaining, without

extending notice and bargaining opportunities to the Union.

The Respondent counters that in point of fact, the rule the General Counsel claimed is a new rule or posting was not new at all—that the posting rule complained of had been in existence since at least 1981 and was incorporated in the published work rules (specifically rule 30), which were established in accordance with past applicable collective-bargaining agreements, as well as the expired agreement. Thus, the Respondent asserts that the very premise for the charge is incorrect.

The Respondent also notes that the evidence of record clearly shows that the use of the bulletin boards, including the Union's board, did not change as a result of Kortz' statement or restatement of the posting rule on February 6. The Respondent cites further that the collective-bargaining agreement was in force and effect except for the implemented provisions of the last and best final offer on February 6 and thereafter. Specifically, the Respondent points to the specific provision of the agreement that establishes a bulletin board for the Union's exclusive use. The Respondent asserts that in its view, the provision was not abrogated by the last, best, and final offer.

The Respondent further submits that Kortz did not even mention the Union's bulletin board on February 6, and it remains up and in place for the Union's exclusive use to this day. The Respondent contends also that in the correspondence with the Union during negotiations over the issue of communicating with the replacement workers, the Company even reminded the Union that the bulletin board was still available to contact them. The Respondent submits that this point alone contradicts any claim that the employees had to obtain permission to use the union board. Moreover, the Respondent asserts that the record indicates to a certainty that the Union did indeed use its board without management's approval after February 6.

The Respondent also points out that before and after February 6, employees routinely posted personal items such as vehicle and cookie sales on the breakroom bulletin board without obtaining management's approval.

The Respondent submits that Kortz' comments about postings actually pertained only to postings at employee workstations, a source of complaints by employees. The Respondent notes on this score that alleged discriminatee Helton had complained prior to February 6 that coworker Mark Dean had posted offensive materials at his workstation. Kortz, in response, told Dean to remove the materials. Thus, on February 6, Kortz was directing his comments to situations like this and, in an effort to eliminate or control such behavior, stated that all such postings had to be approved. However, the Respondent argues that was simply a reinstatement of work rule 30, which basically stated that all postings on company property were prohibited unless otherwise allowed by the collective-bargaining agreement. This rule was in place and had been in place long before (25 years) February 6.

The Respondent submits that the General Counsel's characterization that it promulgated a new posting rule on February 6 is simply incorrect, and that this charge should be dismissed.

Turning to the complaint allegations covering the Respondent's purported rules changes of February 6, I should first point out that I found Kortz very credible regarding his stated reasons for making the February 6 announcements and his tes-

timony in general about the situation he faced when the strike concluded, including the seemingly volatile mix of individuals then constituting the workforce at Grass Lake. Also, I note that as he testified he was calm, yet straightforward in his presentation, and his testimony was consistent with other evidence of record, especially his correspondence with the Union on the pertinent issues that cropped up in the negotiations.

Regarding Kortz' announcement that employees were asked not to say anything that might be deemed offensive or evoke a response from another employee, in my view this statement in context of the events leading to its utterance, while broadly worded, does not explicitly restrict employee activities protected by the Act.¹²⁴

As to whether employees would reasonably construe Kortz' words to prohibit Section 7 activity, in agreement with the Respondent, I cannot conclude that the workforce as then constituted—union picket line crossers, replacement workers, returning strikers and those who did not strike at all—under the totality of the circumstances associated with the strike and its aftermath, would construe that management intended to prohibit their Section 7 rights. Kortz' clear and unmistakable (in my view) message was that in spite of the recently concluded job action and their individual roles in and opinions about the matter, the workers were there to work, to respect one another, and to conduct themselves in an appropriate fashion.

Notably, the Board in *Lutheran Heritage Village-Livonia*¹²⁵ stated:

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827. Consistent with the foregoing, our inquiry into whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

¹²⁴ Notably, Sec. 7 (29 U.S.C. §157 provides the following:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Sec. 158(a)(3) of this title].

¹²⁵ 343 NLRB 646, 647 (2004).

The Board, in affirming Judge Rosenstein's conclusion in *Lutheran Heritage Village-Livonia*, stated that the employer's rule prohibiting "abusive or profane language" was lawful, noted, that as recognized by the District of Columbia Circuit's decision in *Adtranz ABB Daimler-Benz Trnsp., N.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), employers have a legitimate right to establish a civil and decent workplace and they have a right to adopt prophylactic rules banning such language because they face civil liability under Federal and State laws.¹²⁶

The Board in *Lutheran Heritage Village* went on to state whether particular employee activity is protected by Section 7 of the Act turns on the specific facts of each case. Moreover, the Board raised the issue of whether the rule in question served a legitimate business purpose, i.e., to maintain order in the workplace and to protect the employer by prohibiting conduct that could result in liability presumably under the Act.

No reasonable employee in my view, given Kortz' letter and speech, could feel that he was instructing them not to speak at all about the Union or the strike. A reasonable employee in my view would or could reasonably and accurately construe that Kortz wanted them to move past the strike and all of the sentiments and actions that were a part of it, try to get along with each other, and get quality product out to the customers. Moreover, it seems abundantly clear that Kortz wanted all to know that improper behavior would not be tolerated and that instances of bad behavior should be reported to management for appropriate action.

As to whether Kortz' announcement was promulgated in response to union activity, it surely could be said that the Union's strike was the primary impetus for Kortz' announcement. However, Kortz testified that he called the meeting not because of the strike, which had concluded, but because the work force as constituted, along with Walker's statement that there could be conflict among the employees, presented to him a possible disruptive situation in the workplace. So, in my view, there was actually no union activity serving as an impetus for his announcement; rather, it was the volatile situation with the workers as seen through Kortz' eyes that prompted him to call the meeting and remind the gathered employees of their and the Company's basic *raison d'être*—producing quality product through means of a workforce that comported itself properly.

It is also clear to me that there was no credible evidence that Kortz' announcement was applied in such a way to restrict the exercise of Section 7 rights by the employees. I recognize that on about January 20, 2006, Helton was disciplined for wearing a T-shirt with language deemed objectionable by management. This incident predated Kortz' announcement but may have influenced him to ask the employees to refrain from taunting each other on February 6. However, this matter, the subject of a separate charge, did not involve union activity by Helton or anyone else on February 6.

As to the employees' response to Kortz, it seems that while some employees, most notably the returning strikers, felt that

¹²⁶ In *Adtranz*, the court noted that under such laws, employers who fail to maintain a workplace free of racist sexual and other harassment—verbal language could constitute verbal harassment—can trigger liability under applicable state or Federal laws (at 27).

their right to talk about the Union or the strike was curtailed by Kortz' announcement, I do not credit them in this regard. First, this was not true. The returning strikers and the replacement workers did in fact amicably interact and talk with each other and on occasion addressed not only the Union in their conversations, but also the strike as well as other terms and conditions of employment, all without management's intervention or permission. Given these circumstances, it is clear to me that Kortz' instruction did not serve to chill the employees in the exercise of their Section 7 rights. Moreover, under these circumstances, I would find and conclude that on February 6, Kortz' written notice and speech were designed and intended to maintain order and discipline in the workplace, and not to interfere with the Section 7 protection guaranteed the employees at Grass Lake. I would recommend dismissal of this aspect of the complaint.

Turning to Kortz' statement regarding the posting of materials, I will be brief. For the reasons stated by the Respondent in its brief, this was indeed not a new rule. Rather, in my view, in the context of the "powder keg" situation he faced, Kortz was merely reminding the work force of the long established rule that the employees could not post anything without the approval of management unless otherwise provided by agreement. Clearly, the "agreement" he referred to in rule 30 was the collective-bargaining agreement last entered into by the parties and which the Company still considered operative in all aspects, except, as noted, the last, best, and final offer matters. This agreement, though expired, by its terms allowed the Union the exclusive use of its bulletin board which remained in place after the strikers returned and was actually utilized by them off and on after February 6 to post various notices without management's approval. Also, it seems that the other bulletin boards were in continuous use by the employees to post notices of sales and the like before, during, and after February 6.

In my view, Kortz credibly testified that he was concerned about vituperative "postings" in the locker areas. Therefore, on February 6, he merely reminded the employees of the requirement of approval for such, in an effort to forestall any inappropriate behavior between and among the work force and to maintain order and discipline at the plant.

I would recommend dismissal of this aspect of the complaint.

F. The January 20, 2006 Discipline of Helton

The General Counsel argues that with respect to Helton, she has clearly satisfied her burden under *Wright Line* to establish the unlawfulness of the discipline given him by the Respondent. She contends that it is indisputable that the Respondent knew of Helton's union activities and support. She further states that the Company (mainly Kortz) harbored animus against him because of his pronion sentiments and activities. She notes that when he was initially hired by the Company, he was almost immediately—within weeks—discharged by the Company because of his pronion comments, along with his supervisor's (Eggleston) labeling him a troublemaker. In that regard, she states that around the time Helton was discharged, a new hire, Linden, credibly testified that Kortz himself told him that an unidentified employee had been let go because he was

stirring up trouble, had been the recipient of a lot of complaints; and that this person's prouion attitude was not conducive to a good work environment. According to Linden, she further notes, Kortz said that the attitude of this worker would not be tolerated and that was why he was no longer with the Company. The General Counsel asserts that the troublemaking employee could be no other person than Helton.

The General Counsel concedes that while his discharge was ultimately settled and Helton reinstated, the Company's animus against him remained intact on January 20, 2006, when he was disciplined over the T-shirt incident. She submits that at the time Helton was a rather unique employee—he was the only employed strike supporter; he had been reinstated because of his support for the Union; and the Union had given him special permission to cross the picket line—and Kortz was well aware of his situation.

The General Counsel notes that Helton was disciplined for wearing a T-shirt that first said, "thou shall not scab;" a message later changed to different ones by Helton, but that all of the messages basically expressed a prouion or at least antireplacement worker point of view. She suggests that Helton was punished solely for being impertinent and brazen enough to wear a shirt that in effect was critical of management's decision to hire the replacements. Thus, taken as a whole, the General Counsel contends that she has amply met her initial evidentiary *Wright Line* burden.

Regarding the Respondent's defense, the General Counsel contends that the Company would not have disciplined Helton absent his protected activity as evidenced by their not disciplining an antiunion employee—Mark Dean—who Helton testified had taunted him verbally and even on the company website with disparaging names like reject and mole.

The General Counsel submits that the Respondent has failed to establish persuasively that it would have taken the same action against Helton even in the absence of his union or concerted activities.

The Respondent contends, contrary to the assertions of the General Counsel, that the Company lawfully counseled Helton because he intentionally disregarded his supervisor's instructions on several occasions during the same shift to change into an approved shirt; that his discipline (counseling) was predicated on his insubordination, not his union activity and support. While conceding that "scab" is arguably protected speech, the Respondent notes that Helton's counseling was not given when he displayed the "scab" comment on his shirt. The Respondent asserts, however, such an utterance in the context of a bitter and ongoing strike justified a request from the Company to remove or cover up the terms in the interests of promoting harmony among the workforce and reduce any bitterness and acrimony between employees who were at odds over the strike.

In this case, the Respondent argues that in the context of a then 10-month-old strike during which there was abusive language, reports of threats by the strikers against those who crossed the line, physically striking and damaging vehicles, and threats of violence and physical harm, Eggleston's request to Helton was a reasonable precautionary measure to preserve order within the facility. Helton's refusal to comply with his supervisor's request, the Respondent submits, was an act of

insubordination fully meriting the relatively minor discipline of a written counseling.

I would agree that the General Counsel established her initial *Wright Line* burden. Clearly, the Respondent knew of Helton's activities and support for the Union by virtue of his comments when first hired in 2005, and that he was given a special exception by the Union to cross the picket line after the strike began. Then, too, it is reasonable to infer that the Company knew that during the strike he was observed on the picket line. That he was a known union supporter and activist is beyond dispute.

In likewise, I would agree that Helton's wearing the T-shirt with the scab language and even the other messages, in context, were emblematic of protected speech on behalf of the striking unionists' cause. In my view, under the circumstances, they were not solely directed at his personal interests. Accordingly, Helton's discipline reasonably could be said, *prima facie*, to have been motivated by his union activities and support, as well as his having engaged in protected speech and concerted action on behalf of his striking union brethren.

The question remains whether the Respondent would have disciplined him as it did even in the absence of his having engaged in protected activity. The Board authorities cited by the Respondent indicate that while similar activities of union adherents or supporters are protected by the Act, such employees are not insulated by the Act from charges of insubordination,¹²⁷ that language and symbols ordinarily protected may not in certain circumstances be permissible in the interest of workplace harmony and order.¹²⁸

In agreement with the Respondent, I would find and conclude that under the total circumstances at the time at the Grass Lake facility the Respondent would have counseled Helton even in absence of his union support and other protected activities for not obeying his supervisor's instructions to remove or cover up messages that the supervisor deemed provocative and disruptive in the workplace. I would find and conclude that the supervisor's instructions in my view were a reasonable precautionary measure to preserve order in the plant.

I note in passing that in the case of Dean who allegedly harassed Helton, calling him names and all, Kortz credibly testified that he took action against the employee—ordering him to remove offending remarks from his locker. (It was not clearly established to me that Dean authored any comments on the company website.) In my view this was the functional equivalent of the "counseling" Helton received. Therefore, I would not consider Helton to have been disparately treated regarding the T-shirt incident.

I further take special notice that at the time of Helton's counseling the strike, a bitter and acrimonious affair by all accounts, had been ongoing for about 10 months, and Helton, himself, had been implicated by a witness in making a violent gesture—making a finger gun—on the strike line. Whether this was

¹²⁷ The Respondent has cited *Domsey Trading Corp.*, 310 NLRB 777, 789 (1993), for the proposition that union activists are protected by the Act for their union activity, but not for their insubordination. Also, similar holdings were made in *Consolidated Bisquit Co.*, 346 NLRB 1175 (2006), and *Hilty Tank Corp.*, 273 NLRB 979 (1984).

¹²⁸ *Reynolds Electrical & Engineering*, 292 NLRB 947 (1989); *United Aircraft Corp.*, 134 NLRB 1632 (1961).

actually known by management on January 20 was not established on this record. However, Helton, by his own admission, was not above becoming confrontational with the replacement workers; he admitted that his T-shirt messages on January 19 were directed at them.

In my view, clearly on January 19, Helton was attempting in his own way to bring the strike into the workplace, then populated by workers who for months had had to endure a gauntlet of abuse as they came to and left work. In my view, the Respondent's management, well aware of what was transpiring during the strike, was within its rights to try to control things that might erupt within the facility among the employees.

Accordingly, I would find and conclude that Helton's discipline was mainly predicated on his insubordination but also because his T-shirt message was unreasonably provocative, and potentially disruptive of the workplace. Given the volatile circumstances associated with the ongoing strike, irrespective of the protected nature of his activities, I would find and conclude that the Respondent would have disciplined him even the absence of such activities. I would recommend dismissal of this charge.

G. The Withdrawal of Recognition Allegations

The General Counsel contends that the Respondent's withdrawal of recognition of the Union on December 4, 2006, was unlawful. She contends that at the time of the withdrawal there were pending and outstanding allegations of unfair labor practice violations, notably those contained in the instant complaint. Moreover, she asserts that the Respondent, under the circumstances of this case, cannot avoid its duty to bargain by relying on any loss of majority status attributable to its own unfair labor practices. The General Counsel further submits that there is a clear causal relationship between the Respondent's commission of the instant unfair labor practices and the withdrawal petition (of December 4) filed by some of the Company's employees.

The General Counsel argues that consistent with the charges herein, the Respondent effectively cut off the Union's ability to communicate with the permanent replacement workers (and presumably other workers) by unilaterally imposing rules restricting verbal communications and postings in the facility; and refusing to provide the Union requested necessary information, all of which impeded the Union's ability to contact all employees and prepare for contract negotiations. She submits that these violations of the Act created an impression among the employees that the Union was ineffective and not adequately representing their interests.

She contends that it is reasonable to conclude that these unremedied unfair labor practices had a direct and causal connection to the employees' disaffection with the Union; and that the Respondent's withdrawal of recognition under circumstances of its own making should be deemed unlawful.

The Respondent principally and essentially contends that the unfair labor practices alleged in the complaint did not and could not have caused the employees to petition the Company to withdraw recognition of the Union. In short, the Respondent argues that the General Counsel did not establish that any of the unfair labor practice allegations caused the employees' disaf-

fection or had a meaningful impact in bringing it about. Accordingly, the Respondent contends that its withdrawal of recognition based on a verified petition signed by 77 percent of the employees on December 4, 2006, was lawful and should be allowed to stand.

I begin my discussion of this aspect of the charges by noting first there is no dispute that the vast majority—around 77 percent—of the Respondent's Grass Lake employees comprising the appropriate unit signed the petition to withdraw recognition and on December 4, 2006, presented it to management, and that the Respondent's withdrawal was in reliance thereon. Accordingly, I would find and conclude that at least 50 percent of the unit employees signed the decertification petition, a crucial determining factor. *Rental Car of Buffalo, Inc.*, 347 NLRB 1284 (2006).

Second, it is useful to reiterate the unfair labor practice charges that were outstanding prior to the withdrawal and my previous findings and conclusions regarding whether the General Counsel established the violations of the Act pertaining to each. The charges and my findings and conclusions are as follows in chronological order:

- The Respondent's failure to furnish the Union with information on September 2, 2005, regarding the installation of video cameras; violation found, but de minimus; dismissal recommended.

- The Respondent's failure to furnish the Union on October 19, 2005, information regarding Helton's written counseling; violation found.

- The Respondent's written discipline (counseling) of Helton on January 20, 2006; violation not found; dismissal recommended.

- The Respondent's failure to furnish the Union with the home addresses of the permanent replacements on January 27, 2006; violation not found; dismissal recommended.

- The Respondent's announcement that materials to be posted had to be approved on February 6, 2006; violation not found; dismissal recommended.

- The Respondent's February 6, 2006 restriction of employee discussion at the facility; violation not found; dismissal recommended.

- The Respondent's failure on February 17, 2006, to furnish the Union with contracts and vouchers for the amount of work performed by the replacement workers during the strike; violation found.

Therefore, of the seven alleged unfair labor practice charges outstanding prior to the withdrawal, I have found that only the Respondent's failure to provide information regarding Helton's written counseling on October 19, 2005, and its failure to furnish the Union on February 13, 2006, with contracts and vouchers for the amount of work of the replacement workers are violative of the mandate of Section 8(a)(5) of the Act for good-faith bargaining by the Respondent.

As noted earlier herein, the Board (and the Federal courts) has made clear that an employer may not avoid its duty to bargain by a loss of majority status caused by its own unfair labor

practices.¹²⁹ By the same token, not all unremedied violations will preclude a lawful withdrawal. The unremedied violations must be of a character as to either affect the union's status, cause employer disaffection, or improperly affect the bargaining relationship itself. *ATS Systems West, Inc.*, 341 NLRB 57, 59–60 (2004).

As noted earlier herein, the *Master Slack* analytical framework is to be used in determining whether there is the causal relationship between the unfair labor practices and the employees' disaffection with the Union. The *Master Slack* factors and discussion are as follows:

1. The length of time between the unfair labor practice (ULP) and the Union's loss of support

Here, the first charged ULP allegedly occurred on September 2, 2005, and the last charge before the withdrawal allegedly occurred on February 13, 2006. Therefore, the length of time between the last ULP and the withdrawal petition was about 10 months; the total time span of the ULPs was about 15 months. I would find and conclude that irrespective of my having found as a matter of law the Respondent only violated the Act in two specific instances—failure to provide Helton's counseling information and the failure to provide the contract and vouchers information—there were pending and outstanding seven unremedied alleged ULPs.

However, in my view, in agreement with the Respondent, the alleged ULPs were significantly and substantially remote from the date that the Company was presented with the withdrawal petition. In that regard, in my view, this 10–15-month period between the first and last prewithdrawal ULP diminishes the causal relationship or connection between the ULPs and the withdrawal itself.¹³⁰

2. The nature of the violations, including the possibility of lasting and detrimental effect on the employees

The alleged violations prior to withdrawal fall in the categories of failure to provide information, Helton's written counseling, and the posting and discussion restrictions.

First, it should be noted that although the Union and the Respondent were not able to successfully negotiate a contract, the Respondent treated the contract to be in effect, with the exception of the provisions of its last and best final offer, which were evidently implemented.

In my view, the Respondent's honoring of the contract as a practical matter inured to the benefit of the Union. Under such circumstances, the unit employees could have concluded that the Union continued to enjoy the respect of the Company in spite of the Union's call for a strike. This accommodating aspect, in my view, pervaded the Company's dealings with the Union throughout the strike and afterwards as is evidenced by the very respectful tone and tenor of the correspondence with the Union.

¹²⁹ *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

¹³⁰ In contra distinction, see *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004), wherein the Board held that there was a temporal proximity when the employer engaged in an allegedly lawful action, but within 3 months before withdrawing recognition.

Be that as it may, as to the alleged ULPs, in agreement with the Respondent I would find and conclude that they are not of the type of prewithdrawal ULPs that would tend to taint a withdrawal of recognition by the employees.

Regarding the information requests, it should be noted that the Respondent at no time exhibited a hostile and uncooperative posture with respect to the providing of information to the Union. To be sure, the Respondent believed that it considered some of the requests to be irrelevant and not producible for reasons of employee security and confidentiality, with which I have agreed.

With respect to the surveillance camera issue, the Respondent believed with some justification that the matter was moot. The Respondent believed in likewise that it had provided all of the requested information regarding Helton's discipline. The Union agreed at the hearing that it had been provided some, just not all of the Helton information.

As to the contracts and invoices, which the Respondent did not provide, I note that it clearly did provide substantial other information as requested regarding the Strom subcontractors. The hanging point was whether these contacts and vouchers were relevant to the question of the amount of work performed by the subcontractor. This constitutes a matter over which reasonable parties could disagree in my view, and as such could not have had a lasting or detrimental effect on those who signed the petition to withdraw.

Turning to Helton's January 20 written counseling, as noted by the Respondent, this was the only one written prior to the withdrawal and ironically to a person who exhibited the most hostility to the 24 petition signers (as a group), whom he considered basically traitors, and acted out on his feelings by wearing a T-shirt with very disparaging messages meant for these coworkers. I cannot logically connect the Respondent's discipline of Helton—justified in my view—as having a lasting or detrimental effect on the signers of the petition.

Regarding the alleged restrictions on employee discussion and postings, which the General Counsel characterized as a substantial unilateral change in the Company's work rules and/or an unlawful interference with employee rights, I would under ordinary circumstances consider these types of ULPs to be of the type that could taint a withdrawal. However, in the instant case, the allegations aside, the charges were simply not established. In point of fact, as the credible testimony made clear, the employees, in spite of Kortz' admonition, were still free to communicate about the Union or other matters—either in individual discussions or by use of the bulletin boards. In my mind, these charges were unfounded.

Accordingly, I would not under the circumstances of this case consider these ULP allegations to have a lasting or detrimental effect on the signers of the petition.

I note in passing that I have considered the authorities submitted by the Respondent suggesting that the Board considers actions of employees that reasonably can be considered to constitute the imposition of more onerous working conditions, e.g., lockouts because of union membership and reduction in wages, to be very persuasive in my assessment of the nature of the ULP allegations here. In my view, the ULP allegations here do not measure up to a standard of more onerous working condi-

tions, such that would affect a signer of the December 4 petition.¹³¹

3. Any possible tendency of the ULPs to cause disaffection from the Union

In agreement with the Respondent, I would find and conclude that the ULPs as alleged are not the type to cause the signers of the withdrawal petition to be disaffected with the Union.

It is important to keep in mind that about 14 of the signers of the withdrawal petition were replacement workers and the rest were those who had disassociated themselves from the Union and the strike. Collectively, these workers were reviled by the Union, including its leadership working at the plant, as scabs and traitors or some other very low form of life. Therefore, it is fair to say that the signers' disaffection with the Union may have begun to form long before the alleged ULPs were even filed; and that a possible tendency of the ULPs to cause disaffection from the Union for this reason alone is negated.

In short, it was clear to the employees that the Union did not want the replacement workers (and possibly the other line crossers) at the plant and instead wanted all of the strikers returned to work and the replacements terminated. It may fairly be said on an objective basis that the Union, by its own behavior and attitude toward the employees in the unit, caused disaffection, not the nature of the ULPs.

As to the alleged ULPs, in my view and in agreement with the Respondent, I cannot conclude that even on their face, they are of the type of violations that would cause a reasonable employee to become disaffected with his union representative and sign a petition to withdraw.

As argued noted by the Respondent, the charges here relating as they do to the surveillance camera installation, home addresses for replacements, and voucher/contract information requests are not, in my view, the stuff about which employees reject their union representatives. Helton's discipline, if candor is appropriate, probably would have been met with something bordering on *schadenfreude* by the signers, but certainly would not have caused them to be disaffected with the Union.

As to the ULPs related to the posting requirement and the Company's request to avoid confrontation at work, based on the evidence of record, I would venture to say that the signers were unaffected by the former because they did not witness any change in the posting rules or the activities of the employees who still posted on the breakroom board or on the union board. On this latter point, Korts' request that all employees at the plant essentially avoid confrontations was probably viewed by the petition signers as it was intended—a precautionary measure to keep order and discipline in the plant to get the job done, in the face of the now possibly volatile mix of employees now comprising the workforce. The signers in all likelihood recognized that Korts' remarks were not addressed solely to the returning strikers—the union members—but to themselves as well, since they were part of the disparate employee elements in

¹³¹ See *Overnite Transportation Co.*, 333 NLRB 1392, 1394–1396 (2001), in which the employer in omnibus fashion committed a plethora of violations which tainted its withdrawal of recognition by the Union. These types of violations are not present in this case.

the plant as stated in Korts' remarks.

In this light the Respondent's alleged posting requirements and confrontation remarks in my view had very little or no possible tendency to cause the signers any disaffection with the Union.

4. The effect of the unlawful conduct on the employees' morale, their organizational activities and membership in the Union

While the Board has held that it is the objective evidence of the commission of unfair labor practices that have a tendency to undermine the union—not the subjective state of mind of the employees¹³²—the testimony of the signers regarding their morale is relevant. In my view, especially is this so in this case where the signers' morale—a matter calling for some appraisal of a person's inner feelings—becomes of importance in determining the effect of alleged unlawful conduct on their decision to disassociate with their bargaining representative.

In the instant case, it is clear that all the signers to a man called to testify at the hearing about their decision to sign the withdrawal petition stated unequivocally that the Company had done nothing to influence their decision. In the main, the signers objected to the conduct of the Union during negotiations, its decision to strike, perceptions of poor representation during the negotiations, picket line misconduct, and even personal feelings antipathetic to unions in general. Significantly, none of the signers testified that any of the ULPs in this case had any influence whatsoever on their decision to sign the withdrawal petition.

Basically, I would find and conclude, in agreement with the Respondent, that the General Counsel did not establish that the signers' disaffection with the Union was attributable to the ULP allegations that had been pending for over a year. In point of fact, it would be my finding and conclusion that the ULPs in this case had essentially nothing to do with the signers' decision to petition for withdrawal of recognition of the Union. In fact, some of the signers' "morale" was indeed evident at the hearing. However, as I observed and heard them, their morale as such was elevated based on their decision to disassociate from the Union.

I would find and conclude based on the foregoing that the Respondent's withdrawal of recognition of the Union on December 4, 2006, was lawful and that this aspect of the complaint should be dismissed.

H. The Respondent's Alleged Failure to Bargain with the Union at the Third Step of the Grievance Procedure on December 6, 2006

The General Counsel argues that by denying a third-step grievance meeting to the Union regarding Prysiazny's termination, the Respondent violated Section 8(a)(5) of the Act.

The General Counsel notes that the (expired) collective-bargaining agreement contained a four-step grievance procedure and where the parties are unable to resolve the matter

¹³² See *Wire Products*, 326 NLRB 625, 627 fn. 13 (1998), *enfd.* mem. 210 F.3d 375 (7th Cir. 2000); *Fabric Warehouse*, 294 NLRB 189, 192 (1989), *enfd.* mem. 902 F.2d 29 (4 Cir. 1990); *C. F. Martin*, 252 NLRB 1192 fn. 2 (1980).

grieved at step one and two, a third step is implemented wherein the UAW International represents the Union on behalf of the grievant.

The General Counsel contends further that there can be no dispute that the Respondent's failure to process the contractual third-step procedure constitutes a unilateral change in the grievant's working conditions.

The General Counsel submits that the Respondent was not entitled to suspend the third-step meeting because, first, the withdrawal of recognition—the Company's principal ground for withdrawal—was illegal. Second, the Union contends that the Respondent was contractually obligated to process any grievances that arose before the withdrawal through the entire grievance procedure.

The General Counsel argues that an employer may not make unilateral changes in the employees' terms and conditions of employment, even in the case of a union's decertification. By analogy, the General Counsel submits that even if, *arguendo*, the withdrawal is deemed valid, the Respondent here is obligated to hold a third-step meeting in spite of the possible legality of the withdrawal.

The Respondent counters, principally contending that it would have been unlawful for it to recognize or continue to recognize the Union which did not have majority support, that the Company had no other choice but decline to process Prysiazny's grievance to the third step.

First, there is no dispute regarding the underlying facts associated with the Prysiazny discharge and grievances. Prysiazny was discharged on November 27, 2006, and the Union through Flannery filed a first-step grievance on November 28 and later requested that it be advanced to the third level. All of these moves were made pursuant to the procedure contained in the expired contract which the parties concede was still operative and in effect.

Accordingly, under the circumstances, Prysiazny's discharge and the grievance filed on his behalf related to his working conditions, and the Respondent's actions in suspending the third-step grievance meeting constituted a unilateral change in that respect which would, in my view, trigger a statutory duty on the Company's part to bargain in good faith.

The question is whether this duty continued in the light of the Respondent's withdrawal of recognition on December 4, 2006, which I have determined to be valid.

In agreement with the General Counsel, I would find and conclude that irrespective of the lawfulness of the withdrawal, the Respondent was obliged to process Prysiazny's grievance through the appropriate steps of the grievance procedure.

Notably, *Levitz Furniture Co.*, 333 NLRB 717 (2001), holds that it is indeed unlawful for an employer to recognize or continue to recognize a union that does not have majority support. But at the time Prysiazny's grievance was filed, the Union was his designated contractual representative.

While the Union is the designated exclusive bargaining representative for unit members per the contract, the grievance procedure contained in the instant agreement, in point of fact, was designed and intended for the protection for the individual unit members. As such Prysiazny as grievant was entitled, as I see the matter, to pursue his claim of wrongful discharge under

the contract irrespective of the lawful withdrawal of recognition of the Union by the Respondent on December 4, an event that happened days after the grievance procedure had been instituted.

In this respect, Prysiazny's contractual right as a unit member to dispute his discharge vested on November 28, and as such he was entitled by the terms of the contract to have the matter advanced to the third step on that day. That his grievance meeting was not immediately scheduled is of no moment. Furthermore, since the contractual grievance procedure inured to his benefit, Prysiazny, in my view, was also entitled to have the Union represent him—a benefit accorded to him by the contract. In my view, all of these rights and entitlements vested for his benefit on November 28, 2006.

While the Respondent's decision to withdraw recognition was indeed valid as of December 4, I would find and conclude that the withdrawal was applicable only to matters arising under the contract and appertaining to the Union after December 4, 2006. In that regard, consistent with my prior findings, I would find and conclude that the Respondent was obligated to bargain with the Union over matters that were outstanding prior to the withdrawal, to include processing Prysiazny's grievance to the third step. In refusing to process Prysiazny's grievance to the third step, I would find and conclude that the Respondent violated Section 8(a)(5) of the Act.

I. The Respondent's Assignment of Unit Work to its Supervisors on March 7, 2007

Because I have determined that the Respondent's withdrawal of recognition of the Union was valid, I would find and conclude that the Company's allowing a supervisor to operate the front-loader tractor on March 7, 2007, was lawful because the Company was under no obligation to recognize or deal with the Union over the matter. Accordingly, there was no violation of the Act.

While not material to my decision, I would also note that the Respondent credibly explained the need to use a supervisor to remove snow—undisputedly work performed by unit employees—from the company parking lot with the tractor on March 7. Essentially, as the Respondent asserted, there was no one from the unit who had been formally trained to operate the vehicle available for work that day. Due to the exigencies of the circumstances, the Respondent gave a supervisor the assignment. I would find no violation of the Act in this regard.

However, be that as it may, I would recommend dismissal of this aspect of the complaint.

CONCLUSIONS OF LAW

1. By failing and refusing to provide the Union verbally or in writing sufficient information regarding the October 13, 2005 discipline issued to a unit employee as requested in the Union's letter of October 19, 2005, the Respondent has unlawfully refused to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

2. By failing and refusing to provide the Union with certain information regarding the amount of work performed by contractors during the strike as requested in the Union's letter of February 13, 2006, the Respondent has unlawfully refused to

bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

3. By failing and refusing to bargain with the Union at the third step of the grievance procedure regarding the discharge of a unit employee, the Respondent has unlawfully refused to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

4. The violations above constitute unfair labor practices affecting commerce within the meaning of the Act.

5. The Respondent has not violated the Act in any other manner or respect.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to furnish the requested information to the Union, to process the affected unit employee's grievance to the third step of the contract's grievance process, and to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³³

ORDER

The Respondent, Tenneco Automotive, Inc., a corporation with offices and businesses in Grass Lake and Jackson, Michigan, its officers, agents, successors, and assigns (the Respondent), shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW), AFL-CIO and its Local 660 (the Union) by failing and refusing to provide the Union with relevant and necessary information requested in its letters of October 19, 2005, and February 13, 2006.

(b) Refusing to bargain collectively with the Union at the third step of the grievance procedure regarding the discharge of unit employee Steven Prysiazny.

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

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

(a) Forthwith furnish the Union in writing with the information as requested both in the October 19, 2005 letter with regard to the October 13, 2005 discipline issued to unit employee Joseph Helton, and the February 13, 2006 letter with respect to the amount of work performed by contractors during the strike called by the Union at the Respondent's Grass Lake facility.

(b) Forthwith bargain collectively and in good faith with the Union at the third step of the grievance procedure as set out in the last collective-bargaining agreement effective March 12,

¹³³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2000, to May 12, 2004, between the Union and the Respondent regarding the discharge of unit employee Steven Prysiazny.

(c) Within 14 days after service by the Region, post at its facilities in Grass Lake and Jackson, Michigan, copies of the attached notice marked "Appendix."¹³⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 2006.

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

Dated, Washington, D.C. April 16, 2008

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain collectively with International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW), AFL-CIO, and its Local 660 by refusing to provide the Union with the information requested in its of October 19, 2005 letter regarding an October 13, 2005 discipline issued to unit employee Joseph Helton and the basis for such discipline.

WE WILL NOT refuse to bargain collectively with Local 660 by refusing to provide certain information requested by it in its February 13, 2006 letter regarding the amount of work per-

¹³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

formed by contractors during the strike called by Local 660 at our Grass Lake facility.

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

WE WILL bargain collectively with Local 660 at the third step of the grievance procedure consistent with our last collective-

bargaining agreement with Local 660 that was effective from March 12, 2000, to May 12, 2004, regarding the discharge of unit employee Steven Prysiazny.

WE WILL furnish Local 660 with the information requested in its letters of October 19, 2005, and February 13, 2006.

TENNECO AUTOMOTIVE, INC.