JD–72–11
Ann Arbor, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 190, UNITED ASSOCIATION OF JOURNEYMAN
AND APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES AND CANADA
(UA), AFL–CIO AND GREATER MICHIGAN UA LOCAL 190
JOINT TRAINING COMMITTEE (JTC), Joint Employers

and Case 7–CA–52652

LOCAL 164, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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for the General Counsel.
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of Farmington Hills, Michigan, and *Craig S. Schwartz, Esq. (Butzel Long)*, of Bloomfield Hills, Michigan, for the Respondent JTC.
Paul T. Gallagher, Esq. (Gallaher and Gallagher, PLC), Ann Arbor, Michigan, for the Respondent Local 190.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me in Detroit, Michigan, on June 8–9, and July 21, 2011, upon an original charge filed by Local 164, International Brotherhood of Teamsters (the Union or Local 164), against Plumbers and Pipefitters Local 190 (Local 190) and Greater Michigan UA Local 190 Joint Training Committee (JTC), as joint employers on January 15, 2010. On February 19, 2010, Local 164 filed an amended charge against Local 190 and JTC, and a second amended charge on March 18, 2010.

On April 26, 2011, the Acting Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint against Local 190 and JTC alleging that both entities either jointly or individually violated Section 8(a)(1), (3), and (5), and Section 8(d) of the National Labor Relations Act (the Act) by unlawfully discharging employee Elaine Frye and not honoring her claim for unpaid benefits, and also failing to bargain in good faith with Local 164 by not providing or untimely providing to the local certain requested information deemed necessary for and relevant to Local 164's duties as the exclusive collective-bargaining representative of employees jointly and severally employed by Local 190 and JTC.

On May 9, 2011, JTC and Local 190 timely filed their respective answers to the complaint and essentially denied the commission of any unfair labor practices and asserted certain defenses.

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs[1] and arguments of the parties, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent Local 190 is a labor organization and unincorporated association with a place of business in Ann Arbor, Michigan, and represents employees in collective bargaining with employers. During the calendar year ending December 21, 2010, in conducting its operations herein before described, Local 190 collected and received dues and initiation fees in excess of $50,000 and remitted from its Ann Arbor, Michigan facility dues and initiation fees in excess of $50,000 directly to the headquarters of the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA), AFL–CIO, located in Annapolis, Maryland. Local 190 admits, and I would find and conclude, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

The Respondent JTC is a trust created by the collective-bargaining agreement between the Greater Michigan Plumbing and Mechanical Contractor's Association, Inc. (PMCA), a Michigan corporation with an office and place of business in Ann Arbor, Michigan, and has been engaged in the business of providing plumbing and pipefitting training services for employees of members of the PMCA and members of Local 190. The Respondent JTC admits that during the calendar year ending December 31, 2010, in conducting its business operations, it performed services valued in excess of $50,000 for both the PMCA and Local 190, and that the PMCA and Local 190 were directly engaged in commerce.

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

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[1] Local 190 did not file a formal brief but asserted in its answer and throughout the hearing that this matter should be deferred to the decision of the arbitrator who heard Frye's grievance pursuant to the Spielberg/Olin standard enunciated by the Board. This will be discussed later herein.

[2] At the hearing Local 190 also agreed and stipulated (with regard to the following complaint allegations) that:

2(b) At all material times, the Greater Michigan Plumbing and Mechanical Contractors Association, Inc. (PCMA), a Michigan corporation, with an office and place of business in Ann Arbor, Michigan, has been an organization composed of various employers engaged in the business of performing plumbing, heating, refrigeration service and piping work, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Local 190.

3(b) During the calendar year ending December 31, 2010, a representative period, the employer-members of the PCMA, collectively, in conducting their operations described in paragraph 2(b), derived gross revenues in excess of $100,000, and purchased and received at their various facilities from within the State of Michigan, goods and materials valued in excess of $50,000 directly from points outside the state of Michigan.

I would find and conclude that the PMCA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

The Respondents Local 190 and JTC admit, and I would find and conclude, that at all material times, Local 164 is a labor organization within the meaning of Section 2(5) of the Act.

III. The Appropriate Unit

Under and pursuant to collective-bargaining agreements between Local 190 and Local 164, covering June 1, 1994, through May 31, 2013, the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: "All secretarial and clerical employees."[3]

Local 190 in its answer denied only that it should not be deemed a "unit" with JTC because it contends that it is not a joint employer with JTC. As to the appropriateness of the aforedescribed unit as set out in the respective collective-bargaining agreements between it and Local 164, Local 190 states in its answer that said agreements "speak for themselves."[4] I would find and conclude that the respective collective-bargaining agreements between Local 190 and Local 164 indicate clearly that the appropriate unit for purposes of this cause is all secretarial and clerical employees working for Local 190 during the relevant period.

Local 190 admits, and I would find and conclude, that at all material times Local 164 has been the exclusive collective-bargaining representatives of the aforesaid unit.

IV. The Unfair Labor Practice Charges

The complaint allegations essentially revolve around the unlawful discharge of a single employee, Elaine Frye, on September 25, 2009, by one or both of the named Respondents—Local 190 and/or JTC; in addition to her allegedly unlawful discharge, the complaint alleges that one or both Respondents also unlawfully have failed and refused to pay Frye's accrued sick and vacation leave since discharging her; all in violation of Section 8(a)(3) and (1) of the Act.

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[3] In the recognition section of the collective-bargaining agreements for June 1, 1996–May 31, 1997 (GC Exh. 12); June 1, 1997–May 31, 2001 (GC Exh. 13); June 1, 2001–May 31, 2005 (GC Exh. 14); and June 1, 2005–May 31, 2009 (GC Exh. 15), the specific language employed to describe the unit in question is as follows:

> The Employer [Local 190] agrees to recognize the Union [Local 164] as the sole collective-bargaining agent for all secretarial and clerical employees. The Employer further agrees to bargain in good faith with the Union on all matters *of wages, hours of work and other conditions*. (Emphasis supplied.)

In the recognition section of the most recent collective-bargaining agreement covering June 1, 2009–May 31, 2013, the unit is described as follows:

> The Employer agrees to recognize the Union as the sole collective-bargaining agent for all full-time and part-time secretarial and clerical employees employed at the office of Local Union Number 190 located at 7920 Jackson Road, Ann Arbor Michigan 48103 and the office of Local Union Number 190 Training Center located at 8040 Jackson Road, Ann Arbor Michigan 48103. The Employer further agrees to bargain in good faith the Union on all matters of wages, hours and other working conditions.

[4] I have reviewed the recognition clauses in the Local 190-Local 164 collective-bargaining agreements, and it is clear that the secretarial and clerical employees of Local 190 comprise an appropriate unit under the Act.

The complaint further alleges several violations of Section 8(a)(1) and (5) and Section 8(d) of the act by one or both Respondent as follows.

1. Failing and refusing to pay Frye for her accrued sick and vacation leave without prior notice to and without the consent of Local 164;

2. Partially repudiating the collective-bargaining agreement with Local 164; and

3. Failing and refusing to furnish and/or unreasonably delaying in furnishing Local 164 with certain information requested by it in letters sent on October 5 through December 4, 2009, to Local 190 and on February 24, 2010, to JTC.

V. The Witnesses at the Hearing

A. The General Counsel's Witnesses

Elaine Frye testified that she interviewed with Donald House, the then-Local 190 business manager, for a job as an office professional around January 5, 1995. Frye stated that she knew that House also served as a trustee of the JTC. Frye noted that when she was hired, House told her that she would be working 1 day a week for Local 190 and 3 days for the JTC, basically a 4-day per week job. However, after about a year on the job , her work schedule was increased to 5 days per week—1 day at Local 190 and 4 days at JTC. According to Frye, she was paid weekly solely by Local 190 and received three checks from the Union and one check from the Local 190 organizing fund; and the JTC reimbursed Local 190 for her work for the training center.

Frye stated that this pay arrangement changed in 2001 at the direction of House who told her to pay herself and JTC Training Director Scott Klapper, out of the JTC funds. As a result beginning in 2001, Frye said she received only the one weekly check from Local 190, and three (or four) checks from the JTC.

Frye said that as a Local 190 office professional, she was represented by Local 164 from the beginning of her employment. According to Frye, when House hired her, he provided her with a copy of the Local 190/Local 164 collective-bargaining agreement and told her that she would be (as per the contract) a probationary employee for 6 months (180 days). According to Frye, House did not provide her with any work rules covering either Local 190 or the JTC, nor did he inform her as to how her job functions were to be allocated between 190 and JTC.

However, Frye recalled that at the time House did mention to her that the other Local 190 office professionals were very busy handling the JTC meeting minutes and agendas along with the accounts receivable and payable. Moreover, at the same time House said that the training program was expanding.

Frye stated that she paid her union dues during her employment out of her Local 190 check, usually during the weeks of scheduled union meetings for which the secretaries were paid overtime. Frye noted that when she started receiving checks from the JTC funds, no dues were ever deducted; dues continued to be taken from her Local 190 checks.

Turning to her duties as an office professional (sometimes Frye called herself a secretary, as did others), Frye stated that for Local 190 she collected dues, issued vacation paychecks, and prepared and compiled job and project tracking reports called Dodge Reports, along with other office-type duties. As to her JTC duties, Frye said she prepared the agendas

and meeting minutes, collected tuition and textbook fees for the apprenticeship and journeyman upgrade programs, typed the medical, gas and welding certification cards, and scheduled the hepatitis shots for the participants.

Frye testified that in 1995 when she was first hired, she worked full-time at the 190 union hall in Ypsilanti (Michigan). The JTC maintained then a barn-like facility at a local community college where the apprentice and journeymen upgrade training took place. Frye said that she and the two other unit employees worked together at the union hall where the JTC administrative office was also housed and from which she performed her duties for the training center. Frye noted that at busy times, especially when the JTC was receiving apprenticeship applications, her sister unit members and coworkers were enlisted by Local 190 officers to assist the training center and were given overtime pay by that union.

Frye also related that her work locations changed on three occasions—one in 2000, another in 2006, and one in 2008. Frye stated that around 2000, the various area plumbers' and electricians' unions built a new building at 7920 Jackson Road and the entire Local 190 staff to include herself, Business Manager Ron House, and her two coworkers, moved to the new location along with a business agent for a gas distribution concern and JTC Training Director Scott Klapper. Frye said that she worked 40 hours per week at this location.

Then, in 2006, Frye said that an addition was built onto the training facility at the local community college and a new office was set up there. Frye stated that she alone was moved to this new office along with Training Director Klapper,[5] who now acted as her supervisor at the new training center facility.

Frye related that during her first year at the new college facility, she worked (physically) at the union hall 1 day out of each week, usually on Mondays, a really busy day. Frye said that this back and forth was inconvenient for her so she asked House to permit her to perform her Local 190 duties from the training center and once he assented, she made trips to the hall only if she needed to handle paperwork or assist with the union meetings which were scheduled for Mondays.

In 2008, Local 190 purchased a new building (at 8040 Jackson Road) and she and Klapper moved there along with another Local 190 organizer (Tom Yaks), and she worked a 5-day week at the new location through December 2008.

Frye testified that during the entire time she was still being paid 1 week per month by Local 190 and the other weeks by JTC. However, according to Frye, she was told by Local 190 (House) that she was working 1 day per week by Local 190 and 4 days by JTC.

Frye also noted that irrespective of this arrangement, her actual work activities were not that neatly or precisely carried out. According to Frye, as an office professional, she was given any assignment by House necessary to service the members, and some of the assignments were ad hoc and any such assignment could control her work activities for the time. For instance, Frye related the time House petitioned the Local to be certified as an authorized test facility for big work projects, so she focused for the time on helping put on welding classes and certification testing. Frye stated in similar fashion when there were ads to be placed in

[5] Frye noted parenthetically that at the time she was not told of any problems she may have had with the other office professionals.

newspapers for apprenticeship training opportunities and transcripts had to be collected, she performed these duties irrespective of the 1 day for Local 190 and 4 days for JTC arrangement.

Frye stated that there came a time that Bryce Mitchell became the Local 190 business manager, replacing House. According to Frye, Mitchell on occasion (about three times per week) would come to the new facility and make assignments or Klapper would go to Bryce's office at the hall[6] to confer about projects and other assignments. According to Frye, her work assignments were never specifically designated JTC or Local 190 by Local 190 business managers or Klapper. Frye cited as an example that she prepared and compiled the Dodge Reports for Local 190 while working physically at the training center, where she also prepared agendas and meeting minutes. Frye recalled that at one point Mitchell, in fact, told her that she actually had three bosses, Sandy Miller, a trustee of the JTC, Scott Klapper, training director and her immediate supervisor, and himself.[7]

Frye testified that when she was hired by House, he told her to keep track of her hours and what she did and for whom during each workday. Frye stated this approach was proving to be confusing for her so she consulted the JTC trust fund attorney (Warren Widmayer) and asked him how she should or could comply with House's request. Widmayer suggested that she use a Microsoft program to make up a calendar and jot down her daily work activities. Frye said that she did this for a couple of years but stopped doing this in 2006 when she moved to the college and was working full-time at the training center. According to Frye, no one from Local 190 voiced any objection.[8]

Frye turned to the matter of her discharge on September 25, 2009, and explained the circumstances leading to her termination by Local 190 and/or JTC as follows.

According to Frye, Bryce Mitchell informed her on or about March 27, 2009, that JTC trustee Sandy Miller wanted to fire her and that Miller was attempting to garner support from the other trustees to terminate her.

Frye stated that this was the first of several conversations she had with Mitchell regarding her employment status and these conversations took place in the context of a mixup in meeting dates for the JTC trustees.

Frye related that one of her JTC duties included setting up the monthly trustee meetings at the center which were scheduled generally on the fourth Thursday of any given month. As it happened, the February 2009 meeting was cancelled; according to Frye, she was not informed about its rescheduling. In the meantime, Frye said she was heavily involved with the apprenticeship intake process that had taken place in January and February and was required to update the files of around 200–300 apprentice files. Frye said that she was using the conference room at the training center (on Thursday, March 26) to assemble the files; this conference room was utilized by the trustees for their monthly meetings. At the time the room was not suitable for any meeting because of the files and also there was a water cooler along with a sleep-over mattress for the apprentices scattered about the room.

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[6] Frye said that the union hall was located only about 100 feet from the new building.

[7] Frye noted that Sandy (Sandra) Miller was the president of the Plumbing and Mechanical Contractors Association as well as a JTC trustee. Frye said that Miller never gave her any assignments; that was Klapper's job.

[8] Frye noted that she had never been written up or disciplined by any of her supervisors while working as an office professional.

According to Frye, while the room was in disarray, the trustees suddenly appeared and she was then informed that a meeting had been scheduled. Frye said that she asked Klapper about the matter; he also did not know about the meeting. Frye said that she scurried around to find a meeting place and made copies of the minutes for the December and January meetings and prepared an agenda; and the meeting took place in another area.

Frye noted that the meeting had not ended when she left at about 4:30 p.m. that day. However, the next day (March 27), Mitchell came to the center very upset and even furious over the condition of the conference room and yelled at her and told her that this would never happen again.

Frye said that the second conversation with Mitchell took place on the following Monday at the union hall around 9:30 a.m. According to Frye, Mitchell told her that Sandy Miller wanted her gone. Frye said that she initially protested, saying that Miller was powerful but a bully and she (Frye) would not be bullied. Frye stated that out of exasperation she told Mitchell that she would retire, that she would be 55 years old in December of 2009. According to Frye, Mitchell said that he believed he could get Miller to go along with her proposal.

Frye testified that after this conversation with Mitchell, she called the Local 164 representative, Al Sprague, and informed him that Mitchell told her that Miller wanted to terminate her. According to Frye, Sprague was surprised to hear this, but asked her to provide the identities of the JTC trustees. Frye stated that she asked Sprague whether he simply wanted to know their names (identities) or how they were listed in the trust document.[9]

Frye testified that after she told Mitchell she would be retiring, things at work improved along with her personal life. She noted that, first, many of the problems associated with the move to the new training center had resolved and, second, some of her more pressing personal problems were no longer in play.[10]

According to Frye, things were going well at work going into the summer of 2009. However, around late August (August 28), Mitchell presented a letter to her on Local 190 letterhead which requested that she sign off on her previous agreement to retire by the end of December from both the JTC and Local 190.[11] Frye said that she told Mitchell that she really could not afford to retire at age 55, that the pressure associated with the move to the center had subsided, and her sister-in-law had passed and everything at work was going well. According to

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[9] As Frye put it, she asked Sprague whether he wanted to know their (the trustees'] identities or what the trust document stated. (Tr. 102.)

[10] Frye stated that when she moved to the new center there was no hot water, no computers, and no telephone system and along with the heavy apprentice intake activities; she was under a lot of pressure. Frye also said that her sister-in-law was diagnosed with cancer and only had 3 months to live. Frye said her sister-in-law passed away, allowing her eventually to relax somewhat.

[11] See GC Exh. 18, a copy of the letter which, in pertinent part, stated:

> As per our previous discussion regarding your retiring on the last work day of December 2009, we will need you to sign this letter to confirm the above agreement. *The Joint Apprenticeship Training Committee* will need to start a search for your replacement. (Emphasis supplied.)

Frye was instructed to return the signed letter no later than Friday, September 4, 2009. The letter was signed by Mitchell.

Frye, Mitchell very firmly told her that she needed to sign the letter, otherwise they (the trustees) were going to fire her.

Frye stated that she told Mitchell she was going to contact her union representative and that nothing (adverse) was documented against her, that "everything" was unfounded and unsubstantiated.[12] According to Frye, Mitchell asked her if her husband had health insurance, to which she responded that he did not although he was a veteran. Mitchell insisted that she retire even if it meant a $500 loss in monthly income.

Frye stated that she contacted Sprague perhaps the following Monday and advised him that she was instructed to sign the letter by September 4, 2009. Sprague later told her that a meeting with Mitchell was scheduled for September 14.

Frye recalled that the September 14 meeting took place at 9 a.m. at Mitchell's office with Sprague, a welfare fund representative, Mitchell, and herself in attendance. Frye stated that Mitchell and Sprague conversed about her case with Mitchell insisting that Frye had said that she was going to retire, and Sprague responded, insisting that she had the right to change her mind especially since she had not signed anything committing herself to retire.

According to Frye, Mitchell said that the JTC was going to fire her. Frye said that Sprague countered, telling Mitchell that Local 164 had a contract covering the pool of secretaries at Local 190, that she (Frye) had the most seniority of the three secretaries, and that if JTC no longer wanted her to work there, then Mitchell should send another secretary to the JTC. According to Frye, Sprague told Mitchell that the secretaries were 40-hour employees and if there were any reductions, Frye was the last to be let go.

According to Frye, Mitchell then said that she was an at-will employee with JTC[13] and that if he took her back to Local 190, he would give her work for 1 day a week. Sprague insisted that he did not represent any at-will employees and that if Mitchell's position was firm, he would file a grievance. According to Frye, Mitchell asked Sprague not to file a grievance just yet, that he (Mitchell) would get back to him. Frye said the 10-minute meeting ended on this note.

After the meeting, Frye said that she and Sprague conversed and he volunteered to her that he believed Mitchell and the JTC were serious about terminating her.

According to Frye, Sprague then asked her to provide him the JTC trust documents so that he could determine the identities of the trustees. Frye said that she asked Sprague if she would get in trouble by doing this, and Sprague replied she already was in trouble and her job was at risk. Accordingly, Frye said that she went to the training center office on September 14 and faxed a copy of the amended trust agreement along with the names and addresses of the current trustees.[14] Frye noted that Sprague on the following day (September 15) also

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[12] Frye testified that she has never been written up or disciplined for poor work and that Mitchell, in particular, had never told her that her work was erratic or that she was not performing any of her assignments accurately or not performing it at all, or refusing to follow his instructions. I should note that the record does not include any written disciplines for Frye regarding her performance for Local 190 or JTC.

[13] Frye stated before the meeting that she was never told that she was an at-will employee of JTC.

[14] See GC Exh. 19. Frye noted that she included Madeline Lowery's name on the cover sheet because Sprague asked who was in charge of the Michigan Gas Distribution Contractors

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requested a copy of the original trust agreement and she faxed a copy of this to him.[15] Frye stated that both documents were retrieved by her from the file cabinet in her office, and that she regularly used them as part of her job at the training center.[16]

Frye testified that Sprague informed her that he needed the trust documents and trustee names to determine how they might vote on her termination, what their authority was regarding the matter, or whether they were in fact supportive of the decision; Sprague basically said that he was trying to secure her job with the documents. Regarding Madeline Lowery, Frye said that Sprague had told her he was going to call her in May, but he did not say he was going to send her a copy of the trust documents.

Frye recalled that after sending the documents to Sprague, she heard nothing from anyone until September 25 at around 10:50 a.m. when Mitchell, accompanied by Klapper, informed her that she was terminated and presented her with two letters—one from John Darr, chairman of the JTC trustees, and another from Local 190 (Mitchell); both were dated September 25, 2009.[17]

Frye said that Local 164 filed a grievance over her discharge that same day and ultimately the matter was referred to arbitration. The arbitration concluded that she was entitled to be reinstated to Local 190, but only for 1 day per week;[18] the arbitrator concluded that he had no authority over any matter concerning JTC.

Turning to her claim for personal leave, vacation, and sick benefits, Frye testified that her claim was based on the Local 164 collective-bargaining agreements with Local 190 and covers the period of her employment with Local 190 (and JTC) from 1995 through September 15, 2009.

Frye stated that the three office professionals in the unit kept their own time and attendance records and employed an unofficial honor system. Frye said that she maintained her time and leave records in her personal computer at the office and put her vacation schedule on the office calendar. Frye said that neither House nor Mitchell ever questioned her about her system and never asked her for her records, which she has never officially provided to the local.

Association. Frye also noted that she identified the trustees as either “company” or “union” on the list of the names of the JTC trustees.

[15] See GC Exh. 20, a copy of the Agreement and Declaration of Trust.

[16] Frye noted that the file cabinet is unlocked and is in a rather public area of the office. She noted that while she recognized that the documents were important, she never was told that they were to be treated as confidential by her supervisor or anyone from Local 190.

[17] Frye identified GC Exhs. 21 and 22 as copies of the JTC letter and Local 190 letter, respectively. It should be noted that the JTC letter states that Frye was being terminated as an at-will employee. The Local 190 letter states that “The reason for your termination is conduct outside of your job description, during working hours. Your actions leave us no choice.” Frye testified that she never signed an employment agreement with either Local 190 or JTC when she was hired. She believed her employment was strictly associated with the Local 164 contract, and that she never held an at-will status with either Local 190 or JTC. Frye further testified that at the time she was clueless as to what acting out of her job description meant.

[18] Frye said that she discovered at arbitration that she was terminated by Local 190 for sending the trust documents to Sprague.

Frye said that after the September 14 meeting with Mitchell, she emailed her time and leave records to herself, but did not send a copy to Local 164 until December 2, 2009.[19]

Alan Sprague testified that he was employed by Local 164 and had been president of the local for about 7 years and an officer for about 11 years. Sprague also stated that Local 164 has exclusively represented the secretarial and office professionals employed by Local 190 at least since 1994; and in June 2009, Local 164 entered into its latest collective-bargaining agreement with Local 190.[20] Sprague noted that he became directly involved in contract negotiations with Local 190 in 2001 and personally negotiated collective-bargaining agreements with Local 190 Business Managers Ronald House and later Bryce Mitchell.

Sprague testified that in 2009 the employees comprising the secretarial office professional unit were Melissa Wood, nee Blackburn, Elaine Frye, and Karin Spearin; Wood led the negotiations as an employee representative for the latest contract. Sprague noted that Bryce Mitchell represented Local 190 in their latest negotiations, but that he knew also that Mitchell (like his predecessor House) was a trustee of the JTC. Sprague stated that in the contract negotiations with Local 190, he always believed he was dealing with the business manager in both capacities, and especially so with respect to Mitchell.

Turning to his first involvement with Local 190 during the 2001–2005 contract negotiations, Sprague testified that it was then that he became directly and personally aware of the secretarial pool that comprised the unit of employees under the contract, that Frye was a member of the unit, and that the JTC existed so that Local 190 members could obtain training as apprentices or journeymen. According to Sprague, when he negotiated this first contract with Local 190, Frye worked physically at the Local 190 office with the other two unit members, all three were located in the same facility. Sprague said that some time later he discovered that Frye had been moved to the local community college and was working out of an office there. Sprague noted that he did not know the reasons for her transfer, but when he visited with Frye and the others periodically, there were no complaints of any kind given by any of them. When Local 190 bought the new building—practically right next door to the Union's offices—and established it as the new training center, Sprague stated that Frye began working there.[21]

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[19] Frye identified GC Exh. 23 as a copy of the record of her claim for vacation, sick, and personal days due and owing to her from 1995 through September 14, 2009.

[20] Sprague identified GC Exhs. 14, 15, and 16, respectively—the collective-bargaining agreements between Local 164 and Local 190 covering June 1, 2001, through May 31, 2005, June 1, 2005, through May 31, 2009, and June 1, 2009, through May 31, 2013, as the contracts he negotiated. See also GC Exhs. 12 and 13, respectively, the collective-bargaining agreements between the two locals covering June 1, 1994, through May 31, 1997, and June 1, 1997, through May 31, 2001. I would note that clearly the parties have had a substantial and long-time bargaining history covering this relatively small bargaining unit.

[21] Sprague noted that since Frye was now working at the new training center, and to him this meant that Local 190 had its own building—was no longer at the college—and he should add the new facility's address to the contract he negotiated for June 1, 2009, through May 31, 2013. Accordingly, in the new contract's recognition provisions (Art. I) he included full and part-time secretarial and clerical employees employed both at the Local 190 offices and at the training center. Sprague noted at the time of the latest contract he did not know whether Frye was actually working regularly 1 day at the Union and another 4 at JTC. [I would note that this contract for the first time acknowledges by its terms the training center location and part-time employees in the unit.]

Sprague testified that in the spring or early summer of 2009, Frye contacted him to tell him that things were not going well at work and that there were some problems with the JTC trustees and that she had told the Union (Local 190) that she was going to retire. However, Frye then later said that she had changed her mind about retiring and asked him if she had to retire. According to Sprague, he asked Frye whether she had signed anything committing herself to retiring and Frye said that she had not. Sprague stated that he told Frye essentially that unless she had signed a formal commitment, she could not be forced to retire.

According to Sprague, Frye told him then that the situation with the trustees was "out of whack" and that there had been an amendment to the JTC trust agreement indicating that Michigan Gas Distribution should be represented on the trustee board or that its president, Madeline Lowery, could either herself be placed on the board or appoint someone.

Sprague stated that he had heard of Lowery and decided that he would enlist her help on Frye's behalf. Accordingly, Sprague said that he called Lowery in the early spring of 2009 and asked her if she knew that she was eligible to hold a position or could appoint someone to the JTC board of trustees. According to Sprague, Lowery said that she did not know of this and asked him for proof. Sprague said that he told Lowery at this time he had no documentation and could not furnish any proof of his claim. So for the time being, Sprague said he let the matter drop and discontinued any further communication with Lowery.

However, in late August (or early September) 2009, Frye again contacted him and informed him that Mitchell had presented for her signature a letter stating that she was going to retire based on her previous conversation. Sprague said that he told Frye that since she had not made a written commitment to retire, she did not have to retire if she had changed her mind and, furthermore, the collective-bargaining agreement governed the matter.

Sprague testified that he contacted Mitchell and a meeting was scheduled to discuss the issue. Sprague stated that Frye, Mitchell, and another man whom he did not know, Tom Hayden, and he met in Mitchell's office.

Sprague presented his version of the events that took place at the meeting. According to Sprague, Mitchell insisted that Frye should retire as she had indicated, but that if she did not she would suffer the consequences and could be terminated. Sprague stated that he responded, telling Mitchell that the contract governed terminations and there had to be some cause or reason to terminate Frye. Mitchell countered, stating that Frye was an at-will employee and no reason to discharge her need be given. Sprague said that he demurred on this point and told Mitchell that Frye was a senior unit employee under the contract and that as Mitchell suggested, he would or could give her a mere 1-day-a-week work schedule; this, too, was governed by the contract. Sprague said that on this latter point, it was his opinion that Frye, as the senior employee, could only have her hours or workload reduced as per the contract which dictated such moves be done on the basis of seniority in the unit.

Sprague noted that he told Mitchell that by contract Frye was one of three secretaries in the pool and that if Frye was not performing satisfactorily with JTC, he (Mitchell) could assign another unit secretary there, but he could not terminate Frye. Sprague said that at the end of the meeting, he advised Mitchell that if he insisted on the discharge path, he would file a grievance that very day. According to Sprague, Mitchell asked him to hold off for a few days to give him time to deal with the matter. Sprague said the meeting ended on this note and that he informed Mitchell that Frye was not going to retire.

After this meeting, Sprague said he met with Frye and advised her that he could not force Local 190 to keep her at the JTC because clearly there were problems, and in his view the trustees possessed the prerogative to remove her. As part of his strategy, Sprague said he asked Frye whether she had any allies among the trustees, that she needed someone to speak up for her. Sprague said that he also told Frye that Lowery wanted some proof regarding possibility of an open position on the trustee board and asked her if she possessed any documents to support her earlier claim.

In response, Sprague said that Frye later faxed him the addendum to the JTC trust,[22] and he in turn faxed this to Lowery at her request. Sprague stated that later he thought that it were better for Lowery to have the entire trust agreement and asked Frye also to fax that document, which she did. Accordingly, Sprague said that in addition to the previously faxed trust amendment document, he also mailed to Lowery the Local 164/190 agreement, the entire apprenticeship trust (dated January 1, 1980), and the trust addendum. Sprague also included a cover letter directing Lowery to a certain page of the trust addendum dealing with Michigan Gas Distribution, soliciting her feedback on the matter, and promising to inform her as to the next meeting of the JTC trustees.[23] Sprague stated that in his view the trust documents were not confidential in any sense of the word.

Sprague related that when he requested the trust documents from Frye, he told her that he was going to contact Lowery in an effort to halt her termination, that his strategy was to secure some allies to speak up for her. As part of his strategy, Sprague stated that he believed that they had to enlist Lowery to her side. Sprague noted, however, that he did not tell Frye precisely how he was going to achieve the goal of saving her job, and did not tell her that he was going to send the trust documents to Lowery. Sprague said that he did tell Frye that Lowery wanted proof that she (Lowery) was entitled to a trustee position and asked Frye whether she could provide such; Frye then sent him the documents as per his request.

Sprague testified that it was his view that when he spoke to Lowery, he could then represent that he had the proof she had earlier requested. If Lowery did indeed request the proof, he would send the documents and then make a pitch for assistance for Frye; however, according to Sprague, he did not want to divulge his plan to Lowery to assist Frye before providing her with the information she had requested regarding Michigan Gas's possible participation on the JTC trustee board. Sprague said that later he asked Lowery where she would stand if the trustees wanted to fire Frye.

Sprague stated that on September 25, Frye informed him she had been terminated from both JTC and Local 190. Sprague said that he asked Frye to come immediately to his office to prepare a grievance which he filed on September 25, 2009.[24]

Sprague testified that prior to Frye's termination, he did not know that Frye received separate paychecks from JTC and Local 190 funding sources, or that she was working on a split schedule, "working one day here, one week there." Sprague stated that he believed that Frye

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[22] Sprague identified GC Exh. 19, a copy of the fax cover sheet dated September 14, 2009, and a list of the trustees and the amendment of the apprenticeship trust dated April 19, 2001.

[23] Sprague identified GC Exh. 24, a copy of the cover letter to Lowery with the stated enclosures that he received from Frye. Sprague said that he received the addendum on September 14 and the entire trust agreement on September 15 from Frye.

[24] Sprague identified GC Exh. 5 as a copy of the grievance he filed on Frye's behalf against Local 190.

was simply part of the Local 190 secretarial pool and was simply permissibly assigned to work for the JTC by the Union's business managers as they deemed it appropriate under the contract.[25] Sprague said that he was unaware that Frye worked under any special type of compensation plan or that she occupied a different status from the other secretaries. Sprague volunteered that in all of her negotiations with Local 190, the Union never disclosed to him that she was a 1-day per week, part-time unit employee. If indeed Frye's terms and conditions of employment were actually different from the other unit employees, Sprague said that in his view this was not emblematic of bargaining in good faith.

Sprague noted that when he began his bargaining relationship with Local 190, he had no idea the Union would claim that it formally employed Frye only 1 day a week, and that JTC formally employed her for 3–4 days per week. He did not discover that this arrangement was in place until her termination in September 2009. Sprague insisted that under no circumstances would he (Local 164) sign a contract that permitted a unit employee to work merely 1 day per week for an employer.

Sprague stated that as far as he was concerned, none of the three unit employees, including Frye, was a part-time employee, and that in his view Frye was merely assigned to the JTC by Local 190, and not employed by that entity in any formal way. Sprague noted that if he had known about Frye's situation or had she complained, he would have grieved the matter long before her termination. Sprague said he did not know and Frye never complained, so the situation was not addressed prior to her termination.

Turning to Local 164's request for information from Local 190 and JTC, Sprague testified that on October 5, 2009, he faxed to Mitchell a request for certain information he needed, mainly a copy of Frye's personnel file to prepare for the arbitration of Frye's grievance filed on September 25; Sprague also advised Mitchell that Frye was making a claim for payment for accrued benefits under the contract.[26] Sprague stated that he spoke with an attorney, J. Michael Guenther, whom he initially believed represented both Local 190 and JTC, about his request and received a written response from him on or about October 15, 2009.[27]

Sprague said that by letter on October 23, he reminded Mitchell that he had not received the requested information, mainly Frye's personnel file, including any reprimands or warning letters related to her job duties. Sprague also renewed his request for payment to Frye for her benefits.[28]

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[25] It should be noted that all of the Local 190/164 agreements covering contract periods June 1, 1994, to May 31, 2013, contain in Art. 2 thereof fairly comprehensive management-rights provisions which permit Local 190 wide discretion in the use and deployment of its secretaries.

[26] Sprague also advised Mitchell in this fax that Frye was owed payment for 76 unused sick days, 3 personal days (unused) 3 days and 1-1/2 hours for unused vacation, and prorated vacation pay for January 2009 to October 2009. (See GC Exh. 6.)

[27] See GC Exh. 7. The letter from Guenther advised that he only represented Local 190 and that the Union was in the process of obtaining Frye's employment records; Guenther also proposed a settlement meeting as per the contract. There was no mention of the benefits allegedly owed Frye in this letter.

[28] See GC Exh. 8, a copy of this October 23 letter. Sprague also identified his letter of November 13, 2009, to J. Michael Guenther informing him that he had sent this letter to Mitchell but had received no response to date. The October 23 letter was included as an enclosure in the November 13 letter.

According to Sprague, he later received a call from Guenther who said that Local 190 could not find any record of Frye's sick and vacation days. Sprague said that he told Guenther that he would get this information to him. Sprague stated that he also reminded Guenther in this conversation that he still needed Frye's personnel file. According to Sprague, he never received Frye's personnel and discipline file from Local 190.

On December 4, 2009, Sprague said that he requested by letter the following information from Local 190 (Mitchell):

> 1) A copy of the Union's International Constitution and a copy of the UA 190 Local Union By-Laws.
> 2) The names and addresses of the Executive Board members of UA 190 Local Union.
> 3) The names and addresses of all UA Local 190 Joint Training Committee Executive Board members and/or trustees.
> 4) A copy of the Trust Agreement for UA Local 190 Joint Training Committee.
> 5) A copy of the minutes from the board meeting that took place when the decision was made to terminate Elaine Frye and the names and addresses of those who were in attendance.[29]

Sprague noted that an attorney for Local 190, David Nacht, by fax sent February 15, 2010, provided Local 164 with all of the requested information except a copy of the International's Constitution and Local 190's bylaws and the names and addresses of the Executive Board of Local 190 and the addresses of the JTC trustees.[30] According to Sprague, he was given no reasons for the delay in providing this information, or the incompleteness of what was provided by Local 190.

Sprague also noted that he requested by letter the following information from the JTC on February 24, 2010, because he had been informed that Nacht did not represent the training committee and he needed the information to prepare for Frye's arbitration case scheduled for March 4, 2010:

> 1. Copies of Elaine Frye's personnel records
> 2. Any and all write-ups or discipline warnings
> 3. The name of who will be representing the J.T.C. at the arbitration case (a copy of the grievance is attached and was filed as joint employers)
> 4. Notice of when Elaine will receive compensation for her sick and vacation days that were unused.
> 5. A copy of the minutes for the September 25, 2009 meeting held by the Committee unjustly discharging Elaine.[31]

Sprague testified that he believed that JTC was a joint employer of Frye and was obliged to provide the requested information that he needed for the arbitration case; Sprague also noted

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[29] See GC Exh. 10, a copy of this letter.

[30] See GC Exh. 15, a copy of the fax Nacht sent to Sprague and documents enclosed with the fax. Sprague said that the notations on the various documents were made by him, but not the redactions.

[31] See GC Exh. 11, a copy of this letter addressed to John Darr, chairman of the JTC. Sprague included his telephone number in the letter in the event Darr desired to discuss the request.

that he was not getting responses from Mitchell and Local 190, and this failure governed his request to the JTC. Sprague stated that JTC never responded to his request.[32]

As to Frye's vacation records, Sprague said that he requested Frye to provide the data supporting her claim since Guenther said that the Local could not locate any such records. According to Sprague, Frye told him that she kept good records of her time so he asked her to supply the records in support of her claim. Sprague said that he forwarded her records to Guenther.

Bryce Mitchell[33] testified that he was employed by Local 190 from about 2001 until October 1, 2010, when he retired; his last job with the Union was business manager, a position he held for about 2 years and 10 months. Mitchell said that he also served as a trustee of JTC and was in that position from 2001 until he retired; Mitchell said that he succeeded former Local 190 Business Manager Ron House. Mitchell stated that as Local 190's business manager, he supervised the local's clerical workers, including Frye. Mitchell, however, said that while he did not hire Frye, he did terminate her in September 2009.

Mitchell related some background information to Frye's tenure at Local 190. Mitchell recalled that before he became business manager, Frye always worked in the office with the rest of the clerical staff. However, it seemed that some issues arose between and among the clerical staff that centered on Frye; a bad situation had developed. Accordingly, then-Business Manager House decided to move Frye to the JTC offices to eliminate the problems in the union office. According to Mitchell, there was a "litany" (his word) of problems surrounding Frye, her performance, and relationship with the other clericals that made the move necessary as he understood things at the time, around 1995 or so.

Mitchell recalled also that when Frye was transferred to the JTC offices, her wages and other terms and conditions of employment—identical to the other two office clericals—did not change, nor did her supervision by the business manager. According to Mitchell, the only thing that changed for Frye was the location of where she physically worked.[34]

Turning to the issue at hand, Mitchell stated that as a "labor" trustee for JTC, an unpaid position, he was responsible for creating, monitoring, and overseeing the Local 190 apprenticeship and journeyman plumber upgrade programs, which essentially are designed to keep the Local 190 members competitive in the industry and market place. Mitchell said that

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[32] On cross-examination, Sprague was shown a copy of a January 21, 2010 letter addressed to him from JTC Attorney Warren J. Widmayer which, inter alia, essentially advised him that he was responding to his request for information (as contained in his December 4, 2009 letter to Local 190), that the JTC had no valid collective-bargaining agreement with Local 190 covering Frye and that JTC would not be providing any information to him. Sprague conceded that the letter was addressed to him, but that he could not recall it. (Tr. 234–235). Sprague also conceded that he has never seen a collective-bargaining agreement between Local 190 and JTC.

[33] Mitchell was called by the General Counsel as an adverse witness under Rule 611(c) of the Federal Rules of Civil Procedure. Notably, he was also called as a witness by the JTC.

[34] Upon my questioning, Mitchell agreed that the decision to move Frye to the JTC offices was more like a transfer from the Local 190 offices to the JTC building by House, who believed Frye posed personnel problems in the union office. (Tr. 70.) [I should note that Mitchell made this statement when on the stand as a witness for the General Counsel.]

while he also served as the business manager of Local 190, this gave him no more authority among the trustees who were all equal participants on the board.

Mitchell testified that he could not provide the exact date that Frye was hired, but that she was employed by the JTC as an administrative assistant; Mitchell stated that she also was concurrently employed by Local 190 as an office professional for 1 day per week; and as Local 190's business manager he supervised her in that job.[35] Mitchell noted that Frye's Local 190 duties included handling the Dodge Reports and editing the Building Trades paper and whatever she could be assigned to keep her busy for her 1-day per week schedule.[36] According to Mitchell, the balance of her employment (4 days per week) took place at the JTC.

Regarding her performance for JTC, Mitchell said that even as early as 1995 or 1996, there were concerns about Frye's performance there. He related that before he became business manager, as an agent for Local 190 on several occasions he confronted her about her performance, but to her credit Frye did correct her deficiencies.

As to her performance with JTC, Mitchell recited certain problems he experienced with Frye. He noted that when Local 190 was constructing the new training building, he tried to get Frye to use the Excel software to manage the JTC expenses, but Frye refused or would not use it and as a result he could never get the program implemented; that Frye would always give multiple reasons for not using the program. According to Mitchell, Frye did not keep the apprenticeship records complete and that this was embarrassing to him as a trustee. Mitchell related that all of the trustees had outside jobs and met only once per week to get the JTC business completed. Mitchell said that because Frye did not have the records complete—information was lacking—the trustees could not evaluate the apprentices. According to Mitchell, the trustees grumbled all the time and "every one of them" was displeased with Frye in this regard.

Mitchell testified that in April 2009, matters had come to a head and he informed Frye that she was going to be fired by JTC. According to Mitchell, Frye was not "happy" over this but she offered to retire, that she would be 55 years old at the end of December 2009. Mitchell stated that he took her response to the trustees and they all agreed to allow her to stay until she retired. However, over the summer of 2009, Mitchell said they got word (through rumors) that Frye was not going to retire. Accordingly, Mitchell reported this information to the trustees who decided to prepare a letter of resignation for Frye's signature, effective the last workday in December.[37]

On August 28, 2009, Mitchell said he presented the letter (GC Exh. 18) to Frye who then said that she had changed her mind about retiring, that she could not afford to do this and, moreover, that there was no need (justification) for her to retire. Mitchell said that he advised Frye that *they*[38] will probably terminate her.

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[35] It should be noted that Mitchell made these statements as a witness called by the JTC.

[36] Mitchell stated that Frye's performance of her Local 190 duties was erratic at best, that, for example, she only occasionally prepared the Dodge Reports and her Building Trades articles were less than accurate.

[37] Mitchell said that he told the trustees that it was his view that Frye was not going to "live up" to her earlier decision to retire. (Tr. 701.)

[38] I have emphasized this aspect of Mitchell's testimony for reasons that I will discuss later herein.

Mitchell then reported Frye's decision to the trustees who elected to terminate her on September 25, 2009.[39] Mitchell volunteered that based on his discussions with the trustees, Frye would have been fired prior to September had she not offered to retire earlier in the year.

Mitchell stated that he was not aware nor did he understand Frye to be covered by the contract between Local 190 and Local 164 when she was working for JTC which had never recognized any union to represent any of the employees. Mitchell stated that Frye was an at-will employee of JTC in his view.

Mitchell acknowledged that he negotiated the latest contract with Local 164 and never mentioned to Sprague that he was in any way representing JTC in the negotiations and never agreed to bind JTC to the contract. Mitchell stated that the reference to part-time employees was initiated by Sprague, and he agreed to its inclusion because while Frye worked at the training center, she worked 1 day a week for Local 190 while located there.

Mitchell testified (under direct examination of Local 190 counsel) about his decision to terminate Frye on September 25, 2009,

According to Mitchell, it was his understanding that when Frye first agreed to retire, she was going to retire from both JTC and Local 190. However, when he presented the termination letters to Frye on September 25, for his part he was terminating her from Local 190 due to an accumulation of her not performing her job and because Local 190 did not really need a 1-day-per-week employee. Mitchell testified that he was not aware of any union activity on her part at the time.

Under cross-examination by the General Counsel, Mitchell initially testified that he learned *after* Frye was terminated that Frye had provided JTC trusts documents to Local 164's Sprague around September 25, describing what she had done as an "infraction." However, when the General Counsel reminded Mitchell of his testimony at the arbitration hearing that he had learned that Frye had provided the trust documents *before* her termination, he agreed that he had indeed said that. (Tr. 52–53.) Mitchell went to say that at the arbitration he could not recollect the exact dates.

Asked by the General Counsel whether Frye's providing the trust documents was the reason for his terminating her, Mitchell first stated "not necessarily"; then he said that this was not the sole reason; and finally Mitchell said he "might have said that was the final straw, that (the documents) had a bearing on it (the decision to terminate her).

Mitchell finally agreed that Frye's giving the trust documents to her union representative was one of the many reasons he terminated her, but that at the arbitration hearing he cited the documents matter as the only reason, that he viewed her giving the documents as a breach of trust. (Tr. 55–58.)

Mitchell later admitted that he was told by Madeline Lowery that Sprague had provided the JTC trust documents to her and this bothered him because Lowery was the lead negotiator for Michigan Gas Distribution with whom he has to bargain. Mitchell also admitted that he was upset that Frye shared the trust documents with Sprague who in turn gave them to Lowery who

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[39] Mitchell recalled that the trustees voted unanimously (8–0) to terminate Frye on September 25. According to Mitchell, the trustees terminated Frye because they were not timely getting from her the information they needed to make decisions.

now had an insight into the activities at the training center, all of which had a direct influence over his (Mitchell's) negotiating ability. (Tr. 59.)

B. The Respondent's Witnesses

Sandra Miller testified that she was president of the Greater Michigan Plumbing and Mechanical Contractor Association (Greater Michigan),[40] a position she has held for about 20 years; she has been employed by this association for about 40 years. Miller stated that she is a JTC trustee, serves as its secretary, and sits on the oversight committee comprised of herself and the business agent of Local 190. Miller said that she has been on the JTC oversight committee for about 20 years and during that time Local 190 Business Agent Ron House and, up to 2009, Bryce Mitchell served as co-members.[41]

Miller described her duties as a JTC trustee. According to Miller, she attends monthly meetings and sets up the training curriculum for apprentices (which is conducted under the auspices and aegis of the Washtenaw Community College). Miller noted that JTC's main purpose is to enlist the best prospects for training in the plumbing and pipefitting industry. She noted that since the Greater Michigan member contractors have to be union employers, the JTC's mission is to provide training in the latest techniques and regulations associated with the trade to people who will be come members in the area's unions and thereby provide the best employees for the member contractors.

Miller testified that she and the Local 190 business agent comprise the JTC oversight committee whose principal role is to make decisions for the JTC between meetings where necessary. Miller said the practice of the oversight committee was to make a necessary decision and then to bring the matter up in the next full JTC meeting for approval. Miller noted that historically all decisions of this committee have been approved, but if the full trustee board were to not approve the measure, it would be rescinded. Miller stated the oversight committee always attempts to keep the trustees completely involved (and informed).

Miller said that among the powers conferred by the JTC trust agreement is to use trust fund assets to employ clerical assistance to effect the purposes of the trust, which in the main is to implement the apprentice and journeyman training program.[42] Accordingly, the JTC hired a training coordinator and a clerical worker, respectively Scott Klapper and Elaine Frye. Miller stated that both employees were hired on an at-will basis.

Miller explained the circumstances surrounding the hiring of Frye. According to Miller, she knew Frye as a former employee of the Bricklayers union, but also as a personal friend with whom she would socialize for lunch and other activities. Around 1995, the JTC employed a part-time training coordinator who also was performing clerical work. This was proving to be unworkable, so she and Local 1990's House decided to bring in someone to do the JTC's clerical work on a part-time basis. Miller said that because Frye's work with the Bricklayers union in her view lent itself to the JTC administrative requirements, and she was available,

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[40] Miller said that Greater Michigan is a trade association that represents contractors who employ union members. Greater Michigan provides member contractors with various services to include contract negotiation, employee benefit assistance, and various lobbying activities on their behalf. Greater Michigan's jurisdiction covers several Michigan counties.

[41] Miller noted that Mitchell no longer is a trustee, his having retired in 2009. Local 190 Business Agent Kevin Graber has been his replacement since Mitchell's retirement.

[42] See Art. II, Sec. 2 of the Apprenticeship Trust Agreement as contained in GC Exh. 20.

House and she decided to hire her in January or February 1995. According to Miller, the trustees approved their decision and Frye was scheduled to work 3 days for the JTC and 1 day for Local 190. Miller noted that Frye's schedule was later changed to 4 days with JTC and 1 day for Local 190.

Miller described Frye's duties. According to Miller, Frye's' responsibilities included keeping and maintaining employee/apprentice record, typing trustee meeting minutes, putting together trustee agendas, and working with the training instructors. Miller noted that Frye's duties were set forth in a job description that was not specifically tailored for Frye, but included the functions the JTC expected her to perform. According to Miller, Frye was given a copy of the job description (by Klapper) when she was hired in 1995.[43]

Regarding her compensation, Miller said that like Klapper, the training coordinator, Frye's compensation was pegged to the Local 164 collective-bargaining agreement with Local 190. Klapper was paid at the agreement rate for a journeyman plumber and Frye at the rate for the Local 190 secretarial staff. According to Miller, both Klapper and Frye were paid out of trust fund assets.

Miller testified about Frye's performance issues. According to Miller, Frye's performance came into question around 2004 or 2005, stemming from complaints from the trustees—the entire body—that they were not timely getting information about the participating apprentices for purposes of their evaluations. At that time, according to Miller, the trustees met separately to discuss possibly replacing Frye.

Miller stated that for her part she became concerned that Frye was not being given proper guidance and information required for the job. Accordingly, the oversight committee met three times to design a new job description, devise an annual calendar, and prepare various forms to make the process easier for all, but especially for Frye. Miller said that the oversight committee went over the job description and other matters with Klapper who was directed to go over it and then with Frye.[44] Miller also noted that Frye had much difficulty with working with the Excel recordkeeping program, at least according to the reports she received from Klapper at the time.

In any case, Miller stated that eventually Frye's performance improved and the trustees started getting the necessary information timely and completely to make the evaluations; this was around 2005–2006 and things generally went well, but only for a few months at a time and then Frye's performance again would slip. Accordingly to Miller, Frye's job performance was roller coaster-like in its inconsistency.

Then in late 2008, and the first part of 2009, Miller related that the trustees again experienced problems in getting from Frye the necessary information to evaluate the apprentices who, when called in for interviews, did not have current or updated files. Miller agreed that Frye would do a great job and was complemented for her good work. Then

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[43] See JATC Exh. 4. Miller identified this document as a copy of the job description that she directed Klapper to provide to Frye. I would note that the document is undated and based on Miller's later testimony about Frye's performance, the job description may have been devised sometime in 2005 or 2006, not at the time of Frye's hiring by House (and perhaps Miller) in 1995.

[44] Here again Miller identified this job description as contained in JATC Exh. 4 as the job description given to Frye in the 2004–2005 time frame, nearly 10 years after Frye was hired.

regrettably, according to Miller, her performance would fall off again. Miller stated that Frye's failure to keep the apprentices' files current was very serious, especially where complaints had been leveled against an apprentice. Miller said the trustees simply did not want to expel an apprentice without good information.

Miller recalled that when the JTC moved to the new facility in late 2008 or early 2009, Frye complained about the lack of internet among other problems as reasons for not getting the necessary apprentice information. Miller said that she (and the trustees) finally told Frye that she should do nothing but get the apprentice files up to date. Miller said that after about a month, it was reported to her that everything—mainly the files—was up to date.

However, according to Miller at the next trustee meeting (presumably in early 2009) an apprentice was called in and the trustees discovered there was no current paperwork. Miller said that Klapper went to Frye to see the last entry in the person's file and saw that it was a year old. More disturbing, according to Miller, was Frye's notation that the contractor in question did not provide the information. However, the contractor in question was the trustee board's chairman, John Darr, who said that this was totally untrue. According to Miller, Darr stated that he did not know the last time his company received a call for information (from Frye) and the other trustees concurred.

According to Miller, the trustees were of one mind, that things could not go on like this with Frye, and that she should be terminated. However, before the trustees could act, Mitchell informed the trustees that he had spoken to Frye about the problems with her performance and she had decided to voluntarily retire. Miller said that was an acceptable resolution of the matter given the difficulty some trustees had with terminating Frye, a long-time employee; furthermore, Frye would be available to train her replacement. According to Miller, the trustees believed this was the more palatable way to deal with Frye and her performance issues. However, Miller noted that irrespective of Frye's decision to retire, her work performance continued to "ebb and flow" and she seemed to be just "gliding along."

In any event, Miller noted that in the meantime the trustees began to search for her replacement. However, sometime in August 2009, the trustees got word that Frye was not going to retire as she had represented to Mitchell, and the trustees had taken on faith that she would.

According to Miller, the trustees decided at the August meeting that the JTC needed certainty as to Frye's intentions and unanimously decided to draft a letter requesting that Frye agree to retire December 31, 2009 and present it (through Mitchell) to her around August 28, 2009.[45] Miller stated that Mitchell reported to the trustees that Frye had decided not to retire, that she could not afford to do so.

According to Miller, the trustees had decided prior to presenting the letter to Frye that if she refused to sign it, then the trustees would take a vote to terminate her.

Noting that the trustees usually met for their monthly meeting on the third Thursday of the month, Miller said that they did not meet on September 24, 2009, because there were two

[45] Miller identified GC Exh. 18 as a copy of the letter the JTC authorized Mitchell to present to Frye for her signature. The letter referred to Frye's earlier agreement to retire and asked her to confirm her intentions to retire on December 31, 2009. The letter is dated August 28, 2009.

union trustees—friends of Frye[46]—who could not attend that day. So the trustees met on September 25, 2009, and unanimously voted to terminate Frye because her deficiencies in providing information to the trustees hindered them in securing the best people for the apprenticeship program.[47]

Turning to the matter of Frye's having provided a copy of the JTC trust agreement to Local 164's Sprague, Miller said she learned of this around the middle of September 2009; Miller said she also learned that Sprague had sent a copy to Madeline Lowery, known to her as executive director for Michigan Gas for about 10–15 years. Miller disputed Frye's testimony about her relationship with Lowery and said she had a good business relationship with her and Lowery seemingly had a good relationship with Local 190's business managers, both House and Mitchell, whose retirement parties Lowery attended.[48]

Miller also noted that in point of fact the JATC trust documents are filed with the U.S. Department of Labor and are available to the public. Miller testified that if Lowery had requested a copy, she would have provided one to her. Miller went on to say that these trust documents are not ("absolutely not") "confidential" in her view and that she did not know the source of this characterization because these documents have never been deemed or considered confidential in nature by JTC.

Miller insisted that Frye's having provided copies of the trust documents to an outside party (Sprague) had no bearing on her decision to terminate Frye. According to Miller, as far as she was concerned, her decision was made earlier in 2009 when she discovered Frye had not kept the files up to date, and in fact at the September 25 meeting no one raised the matter of Frye's providing documents to anyone.[49]

Turning to Local 164's request for information, Miller acknowledged that the JTC through its chairman, John Darr, received a letter from Local 164 about February 24, 2010, requesting certain information regarding Frye's termination from the JTC.[50] Miller testified that it was the position of the JTC that it had no bargaining relationship with Local 164, hence no legal obligation to Local 164 to honor the request; JTC regarded Frye as an at-will employee and was at liberty to discharge her without regard to any collective-bargaining agreement Local 164 had

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[46] Miller identified Al Culbreath and Terry Stalker as the two union trustees whom she knew to be friends of Frye and very concerned about the decision to terminate Frye.

[47] See JATC Exh. 10, a copy of the minutes of the JTC meeting in executive session.

[48] Miller went on to say that Lowery in her experience had absolutely nothing to do with the JTC. Miller stated she has not always agreed with Lowery about fringe benefits issues but never in a cross or acrimonious way. Miller noted that the 2001 trust agreement amendment (GC Exh. 19) only came about because Michigan Gas employees were covered by the JTC and Michigan Gas did not want to make decisions about them. Accordingly, Michigan Gas did not want to have a trustee on the Board. However, that agreement required equal union and company trustees. So the amendment solved the problem.

[49] Miller testified that only she and Mitchell of the trustees knew about Frye's giving the documents to Sprague, and they decided not to disclose this to the trustees out of their concern and a fear of being seen to "pile on." Miller stated that the decision to terminate Frye had already been made if she did not sign the letter. So there was no need to mention the documents.

[50] See GC Exh. 11, a copy of Local 164's letter to John Darr, chairman of the JTC, in which Sprague requested certain items needed for Frye's arbitration matter.

with Local 190. Accordingly, Miller stated that the JTC never complied with Local 164's request for information[51] and refused to participate in the arbitration of her grievance.

Turning to Frye's claim for payment for her leave and other benefits covering the 14-year period of her employment, Miller acknowledged that she had received and considered the documents Frye submitted in support of her claim. Miller noted that first she could not find the documents in Frye's work computer. Second, according to Miller, JTC used an outside payroll services company and because Frye submitted the payroll data, she was certainly aware of this and should have timely submitted her leave and vacation information every 2 weeks. This was not done. Miller also said that Frye's vacation and sick benefits were pegged to the Local 164 collective-bargaining agreement, so whatever she was due should have come through that contract. Miller stated that upon Frye's termination, JTC gave her 2 weeks' severance pay as an at-will employee and that was all she was entitled to.[52]

Miller denied that the decision by JTC not to pay Frye pursuant to her claim for unpaid vacation, sick, or other entitlements had anything to do with any union activity. Miller insisted that her claim was not paid because JTC did not deem it credible, mainly because the data for the claim was not on her computer and was not included in the payroll system (the ADP system) and contained inaccuracies that did not correspond to the provisions of the Local 164/190 collective-bargaining agreement which JTC had agreed to match.[53]

Miller unequivocally stated that the JTC trustees who agreed to have Mitchell present the August 28 letter to Frye did not tell him to include any reference to Frye's retirement from Local 190. Miller stated that Mitchell acted on his own in that regard and that she and the trustees of JTC were not concerned that Frye would retire from Local 190.

John Darr stated that he was a trustee of the JTC and served as its board chairman for about 10 of the 20 years he served; his chairmanship covered all of 2009. Darr said that he is semi-retired from his mechanical contracting firm, John Darr Mechanical, a union contractor.

Darr testified that he knew Frye, but did not personally supervise her; that was the job of Scott Klapper, the JTC training coordinator. Darr stated that he did not hire Frye and did not interview her for the job of assistant to the coordinator and had nothing otherwise to do with her hiring. Darr related that to his knowledge, Frye had no employment agreement with JTC. According to Darr, Frye just showed up one day and helped out at JTC. Darr believed she was working at the time for Local 190, but insisted that JTC did not hire her from Local 190.[54]

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[51] Miller noted in passing that with regard to Local 164's letter of February 24, 2010, which requested among other things a copy of Frye's personnel file and any writeups or discipline (GC Exh. 11), she could not find any such files or information at the JTC offices. Miller noted further that the trustees were not responsible for Frye's day-to-day job duties, that Klapper as her immediate supervisor was responsible for any discipline or writeups as well as her personnel file.

[52] Miller noted that Frye never discussed with her (or the other trustees) any unpaid sick or vacation time prior to her termination.

[53] Miller noted by way of an example of inaccuracy, Frye in her claim paid herself 2 weeks' vacation during her first year of employment. The Local 164/190 agreement required her to work a full year to be entitled to vacation. Moreover, Frye carried over her vacation days, which is contrary to the CBA which provides for a lump sum payment at the end of the year for unused vacation.

[54] Upon my query, Darr said that we must have hired her because she ended up working for

Continued

Darr stated that one of the JTC trustees' primary functions was to assess the progress of those enrolled in the apprenticeship program and working on various contract jobs and projects. Pursuant to this function, the job foremen were tasked with filling out apprentice evaluation forms, usually every 6 months. Darr said that Frye's duties and responsibilities as assistant to the coordinator including organizing and keeping track of these and other records which memorialized an individual apprentice's tardiness, classes attended, and other metrics associated with his participation and progress in the program. Darr said the trustees met monthly to discuss various apprentice program matters.

According to Darr, there came a time that the trustees as a group believed that Frye was not organized enough to have the information the trustees needed for their review of the periodic foreman assessments of the apprentices. Darr explained that the apprentices periodically are summoned to appear before the trustees because of problems and on many occasions, the apprentice's file did not have sufficient information; for example, his grades in school, attendance record, or the foreman's evaluations.

Darr recalled a specific incident involving his company. According to Darr, an apprentice was scheduled to appear before the trustee board and the trustees requested files associated with him prior to his appearance. Frye said that she did not have very much information on the apprentices because she did not get a response for the information from the contractor's foreman. Darr stated that he believed his company was the contractor in question and his company always provided the pertinent information when requested.

In any case, Darr said that as early as the spring of 2009, discussions took place among the trustees to terminate Frye, and Mitchell told him that he had conveyed the sentiments of the trustees to Frye that it was the trustees' intention to terminate her.

Darr said that later, perhaps in the summer, he learned that Frye in fact did not intend to retire so the trustees met and decided to terminate her. However, the trustees decided to present a letter to Frye asking her essentially to commit to a definite retirement date, but it was also agreed that if she refused to sign the letter she would be terminated. According to Darr, the entire training committee met in August, with the possible exception of two members,[55] and by unanimous vote decided to terminate Frye if she did not sign the letter. Later, when it was learned that Frye refused to sign the letter, the trustees met on September 24 or 25 and voted unanimously to terminate her.[56]

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us [JTC], but there was no (employment) contract that he is aware of. According to Darr, Frye just more or less came to work for JTC but he had nothing to do with this. Darr speculated that the JTC may have hired Frye "way back, years ago." Darr could not recall where she came from. (Tr. 332–333.)

Darr also said that JATC hired a replacement for Frye after her discharge, but he had no involvement as such, but that the committee went through a "bit of an interview process" for the part-time position. Darr stated that he does not exactly know how the replacement came on board, but that she was to be a temporary worker. (Tr. 337.) [While Darr did not expressly state that the "steering" committee retained the replacement, based on the evidence of record, I would conclude that JTC steering committee is what he meant.]

[55] Darr noted that the trustee board was composed of an equal number of union and management representatives. Darr believed that the two absent trustees at the August meeting were Terry Stalker and Ivory Sims, both union trustees.

[56] Darr stated that he voted yes for termination.

Darr related that he never personally discussed with Frye anything about her deficiencies but definitely observed the incomplete files; he could not attest otherwise to her overall performance from the time she started with JTC until she left. Darr stated that he did not know why Frye could not collect the needed information but assumed she simply was not doing the job.[57]

Darr testified that prior to his (and other trustees') decision to terminate Frye, he did not know that Frye had given the JTC trust agreement to any third party. However, around Christmas 2010, Darr said that he later learned in an off-the-cuff conversation with fellow trustee Sandra Miller, that Frye had done this.

Jeff Darr testified that he is president of Boone and Darr, a union mechanical piping and plumbing contractor. Jeff[58] stated that he has been a JTC trustee since the mid-2000's, perhaps 2007, and that the position is unpaid.

Jeff stated that he knew Frye as she performed administrative duties for JTC. According to Jeff, Frye's job entailed maintaining information on the apprentices such as their test grades, performance reviews, and absenteeism; Frye also was basically responsible for doing all the JTC paperwork associated with the training of the apprentices.

Jeff recalled that Frye's job performance was discussed at the JTC meetings and for his part, he thought her performance was "up and down" in that she did not always keep the files in an accurate condition, and sometimes there were no files or information at all for the apprentices who had been called before the trustees to deal with various issues.[59] According to Jeff, these types of deficiencies frustrated the trustees' preparation for the monthly meetings and ushered in discussions about Frye's termination.

Jeff also recalled that serious discussions among the trustees about Frye's termination started in 2009, and the training coordinator or Mitchell was instructed by the trustees to discuss with Frye her performance issues. Jeff said that he did not participate directly in any discussions with Frye about her performance. According to Jeff, Frye's performance was a topic of discussion probably at three or four meetings during 2009. Jeff conceded that he did not directly supervise Frye and did not work in an office with her; he saw her only once monthly at the meetings.

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[57] Darr said that about a year before Frye was terminated, the trustees tried to define better her responsibilities because of the problems that were cropping up. The trustees wanted Frye to have a better idea of what her job responsibilities were, and at the same time the trustees could know what to expect from her.

Darr recalled that at the time Frye herself was involved in this effort by being asked to keep track of her time, what she had done, or was doing daily for a certain period. Darr acknowledged, however, that he never personally discussed these matters with Frye.

[58] I will use Darr's given name herein so as not to confuse his testimony with that of John Darr.

[59] Jeff recalled that at one time the trustees discussed at a meeting both the training coordinator and Frye out of a concern that both persons were not fully aware of the requirements of their respective jobs; and in the discussions the trustees discussed job descriptions that were to be provided to both so that they would know what materials were needed at the monthly meetings. Jeff noted that to his knowledge neither employee was ever written up or otherwise disciplined.

Jeff stated that sometime in mid-2009, Mitchell told the trustees that Frye intended to retire at the end of that year. Jeff noted that although Frye's termination had been discussed, the trustees decided since Frye was going to retire, they would just deal (put up) with things until she left. Jeff, however, added that if Frye had not said she was going to retire, there would have been a request for a vote to terminate her and she would have been terminated then. But at the time, Jeff said Frye's termination was put on hold.

Jeff said that the trustees later heard that Frye was hesitant about retiring, that she might not. Accordingly, the trustees decided to write a letter requesting her to sign off on her commitment to retire at the end of the year and have Mitchell present it to her. Jeff stated that Frye refused to sign the letter and indicated that she would not be retiring. Later, according to Jeff, the trustees voted unanimously to terminate Frye.

Jeff stated that at the September termination meeting, Mitchell reiterated Frye's performance issues over the last couple of years and the specific deficiencies in her performance that caused difficulties to the trustee board's performing its duties; Mitchell decided that Frye's performance was not up to par and voted to terminate her.

Jeff recalled that Klapper, the JTC training coordinator (director), was present at this meeting as he was at all of the monthly meetings, but was not asked for nor did he provide any input regarding Frye's performance.

Jeff stated that during the time Frye worked for JTC, he did not know she was a member of Local 164 and only learned of this after her discharge when he heard the Teamsters were representing her in a lawsuit. Jeff added that to his knowledge, JTC had never executed a collective-bargaining agreement with any union and in point of fact the issue of union recognition never was presented to JTC. Jeff also stated that he was not aware that Frye had provided Sprague of Local 164 a copy of the JTC trust agreement at the time he voted to terminate her.

Alfred Culbreath testified that he was a JTC union trustee for about 2-1/2 years, from 2008–2011. Culbreath stated he is not currently a trustee but had been a plumber/pipefitter associated with Local 190 for about 37 years.

Culbreath said that he knew Frye, that she was employed by JTC as its secretary for the apprenticeship program and was responsible for all the paperwork associated with the operation of the program.

Culbreath recalled that Frye had performance problems; that is occasionally the paperwork for the trustees' monthly meetings was not available; and because of this about 2 to 3 months before she was terminated, her termination was discussed by the trustees.

According to Culbreath, Mitchell told him that he had spoken to Frye about talk among the trustees of her possibly being terminated and that Frye had indicated that she was going to retire at the end of the year. However, according to Culbreath, sometime along this time he learned that Frye had changed her mind and would not be retiring. Culbreath recalled that a document was drafted to memorialize her agreement to retire before the meeting at which the vote to terminate her was taken. According to Culbreath, Mitchell reported to the trustees that Frye would not sign the document and that at the next scheduled meeting, there would be a vote to terminate her.

At the meeting, Culbreath recalled the matter was discussed, questions were raised. Frye received some favorable remarks but in the end, the vote was unanimous for Frye's discharge. Culbreath noted that the information in support of Frye's discharge came from Mitchell and Sandra Miller, but perhaps also from trustees (John) Darr and Terry Stalker.

Culbreath stated that his understanding was that Frye's job was to have the paperwork ready for the trustees' monthly meetings, and in this regard she was deficient. Accordingly, Culbreath said his vote to terminate Frye was not (totally) based on what others had said but his own experience with her not having the materials available at the monthly meetings.

Culbreath conceded that he never directly supervised Frye. Culbreath volunteered that in his opinion JTC had the right to terminate Frye because she was not doing her job. However, Culbreath noted that he believed Local 190 had hired Frye and could not say that JTC hired her; all he knew was that she came to work at JTC through Local 190. Culbreath said he only understood that the trustees could vote to terminate her.

Richard Westcott testified that he is employed as a general foreman for the John E. Green Company, a union contractor. Westcott stated that he is a member of Local 190 and for the past 3 years, including all of 2009, has served as a JTC trustee.

Westcott stated that he knew Frye and that in her job with JTC, she was required to keep the apprenticeship programs records up to date and also send out announcements regarding the program's activities.

Westcott recalled that around mid to late 2009, Mitchell was instructed (by the trustees) to inform Frye that her employment was about to be terminated and later reported to the trustees that he had done so. According to Westcott, Mitchell said that he told Frye that the board (the committee) was having problems with her and was considering terminating her and that Frye had indicated that she would retire. Westcott said that the trustees decided to accept her proposal.

Later, the trustees decided to ask Frye to sign a paper committing herself to retiring at the end of the year, as she had indicated, to avoid termination. However, according to Westcott, Mitchell said that Frye had refused to sign the document and, in response, the trustees decided to terminate her on September 25, 2009.

Westcott recalled that Frye's possible termination was the subject of several meetings that preceded Mitchell's first conversation about the matter. Basically, according to Westcott, the trustees were not getting the information they needed at the monthly meetings and they felt Frye was not doing her job. Westcott stated that until she said that she would retire, her termination from JTC was to him a done deal.

Westcott noted that at the September 25 termination meeting, all of the trustees in attendance voted to terminate Frye, but that it was thought by all before that vote that unless Frye's performance changed, she was going to be terminated; and Frye's performance never improved. Westcott conceded that he never directly supervised Frye, did not work with her in the office, and never spoke with her about her performance.

Westcott related that he had heard rumors that Frye had given Sprague of Local 164 the JTC trust agreement, but this was after her termination. Westcott testified that his vote to terminate Frye was not based on any union activity on her part. According to Westcott, in point of fact, JTC employees were never to his knowledge ever included in a collective-bargaining

agreement. In fact, according to Westcott, since he has been a trustee, union recognition by JTC was never discussed.

David Jones testified that he is branch manager for the John E. Green Company, a union contractor for whom he has worked since 1988 as an estimator. Jones said that he has served on the JTC as a trustee for about 4 or 5 years, including 2009.

Jones stated that he knew Frye as an employee who worked under training coordinator Scott Klapper as his administrative assistant and was responsible for providing certain needed information to review the apprentices. Jones said that he had observed Frye's performance and considered it poor because she did not have the information regarding the apprentices available for the trustees' monthly meetings.

Jones testified that he believed that the matter of Frye's termination was first discussed in August 2009, but he was not certain about this. However, Jones recalled that he commented to the trustees in the meetings that he was not pleased with Frye's failure to have information available. Jones could not recall the exact date but believed it was the summer of 2009, around August, that JTC trustees decided to present a document to Frye to memorialize her intention to retire as she had earlier represented; and Mitchell (or Scott Klapper) was instructed to make the presentation.

Jones said that he learned Frye had refused to sign the document and the trustees were told that she had said she was not going to retire. According to Jones, once the trustees received this news, they decided to terminate Frye and did so in September 2009, because she was not getting the required information to the trustees who needed to make informed decisions with respect to the apprentices. Jones noted that there were no nonperformance-related matters involved in the decision.

Jones said that he believed that Frye was employed by the JTC and that while he was not sure of the expressed or specific authority, he thought the trustees had the authority to terminate her, and that the decision to terminate her was a collective one.

Jones stated that he possessed no knowledge as to how Frye was hired and has seen no documents regarding her hiring, but that the trustees believed her performance was inadequate. According to Jones, once Frye said that she was not going to retire as promised, they decided to vote her out.[60] Jones conceded that he did not directly supervise Frye, did not work with her in the office, and never spoke to her directly about any of her job performance problems.

Jones noted that during his time with JTC, he was not dissatisfied with Frye's performance the whole time, but her deficiencies in getting the needed information became progressively worse and culminated in the decision to terminate her in September after she said in August that she was not going to retire. According to Jones, JTC's hand was forced upon her decision not to retire.

[60] Jones said that he was familiar with the concept of employment at will, and that he understood Frye to be an at-will employee of JTC.

VI. Applicable Legal Principles

As previously noted, the complaint essentially alleges that the Respondents either jointly or severally violated Section 8(a)(1), (3), and (5) of the Act with respect to their treatment of Frye. I believe that it will be helpful to set out the applicable legal principles enunciated by the Board governing alleged violations of these Sections of the Act.

As a preliminary matter, an important issue, if not the most important issue in this case, is whether Local 190 and JTC were joint employers of Frye and the other secretarial pool employees as this concept is defined by the Board.

In an opinion adopted by the Board in *Airborne Express* (338 NLRB 597, 605 (2002)), the administrative law judge, referring to another opinion adopted by the Board (*Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993)) summarized the Board's current legal test for determining whether two separate (legal entities) corporations should be considered to be joint employees with respect to a specific group of employees. The legal test is as follows:

> Prior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous than it is today. After that decision, however, the Board decided to adopt the Third Circuit's rule and did so in TLI, Inc., 271 NLRB 798 (1984). The test is . . . Where two (or more) separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for the purpose of the Act. In *Laerco Transportation*, 269 NLRB 324 (1984), the Board, referring to the *Browning-Ferris* test, defined the essential terms and conditions of employment as those involving such matters as hiring, firing, disciplining, supervision, and direction of employment.

Turning to the applicable law regarding the 8(a)(1) and (3) allegations, the Board has enunciated the proper analytic framework for violations of these Sections of the Act, stating:

> 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 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.[61]

[61] Taken from *Martinelli Interior Construction Co.*, 351 NLRB 1184 (2007).

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), enfg. 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 No. 132 (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), enfd. 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), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding 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., 3*43 NLRB 408 (2004).

Regarding the principles applicable to the instant 8(a)(5) allegations, it is an unfair labor practice under the Act 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.[62]

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). 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

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

(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).

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 . . . 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 No. 88 (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 and Drug Centers*, 349 NLRB 26 (2007).[63]

With the foregoing serving as a backdrop, we turn to the contentions of the parties.

VII. The Contention of the Parties

A. The General Counsel's Position

The General Counsel asserts first that while the JTC and Local 190 are indeed organized legally as separate entities, for purposes of Frye's employment and her concomitant duties and responsibilities for each, both entities acted as her joint employers. Second, she contends essentially that both entities jointly terminated Frye on September 25, 2009, because Frye engaged in union (and otherwise protected) activity by providing her union representative with a copy of the JTC trust documents in an effort to obtain the Union's assistance in fighting what Frye viewed as an unjust and unwarranted attempt to terminate her.

The General Counsel also contends that even if Local 190 and JTC are not determined to be joint employers, the evidence of record amply demonstrates alternatively each employer separately unlawfully terminated Frye.

The General Counsel contends furthermore that both Respondents jointly refused to pay Frye for her vacation and sick leave because of her having engaged in union activity and in violation of the contract; in the alternative she argues that Local 190 separately unlawfully repudiated its contract with Local 164 by refusing to pay Frye's vacation and sick leave benefits. Lastly, the General Counsel asserts that both Respondents either jointly or separately violated the Act by either not providing at all or timely providing requested information to Local 164.

The General Counsel contends that both Mitchell and Miller simply were not credible witnesses, especially when compared to what she asserts as the clear and precise testimony of both Frye and Sprague. As to Mitchell, she contends that he provided inconsistent testimony both at the trial and the arbitration hearings, and even at the instant hearing added new (and undocumented) reasons for Frye's termination. Regarding Miller, the General Counsel notes that she was present for all of the government's witnesses and, because the hearing was interrupted and resumed for about a month and a half, had ample time to tailor her testimony and include speculative and hearsay information to the matter. The General Counsel acknowledges that while all of the trustees claimed not to know that Frye had provided JTC documents to Local 164, this is suspicious and not credible since Mitchell and Miller both testified that they knew Frye had indeed provided the documents. The General Counsel also argues that the trustees were more interested in protecting their decision to terminate Frye and even testified inconsistently with one another regarding the circumstances of the termination meeting.

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[63] It is noteworthy that the Board in *Raley's Supermarkets* at 2 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.

Lastly, the General Counsel notes that for reasons unknown and inexplicable, Scott Klapper, Frye's immediate supervisor at the training center, was not called as a witness by Local 190 or JTC. She submits that Klapper certainly could have provided valuable information regarding not only Frye's day-to-day work performance and the discussions at the JTC meetings where allegedly complaints were registered against her, but also JTC practices and procedures regarding vacation and personal days and sick leave, most especially their tracking and use by Frye, the sole clerical employee of the JTC. The General Counsel submits that a negative inference should be drawn against JTC for its failure to call Klapper. She further asserts that had he testified, Klapper would have testified more consistently with Frye's version of her experience working at JTC than that depicted by Miller and Mitchell (and the trustees).[64]

As to Local 190's defense offered at the trial, that the resolution of the Frye discharge should be deferred to the arbitration's decision regarding the grievance Local 164 filed against it and in which the arbitrator ruled in favor of the Union, the General Counsel contends that deferral to the arbitral award is inappropriate. She argues mainly that the arbitrator determined that any liability for violation of the Local 190-Local 164 contract could only be found against Local 190. The arbitration found that JTC was not engaged in a collective-bargaining relationship with either Local 190 or 164 so as to be bound by his decision. Accordingly, the arbitrator did not reach any possible liability of JTC with respect to Frye's discharge. Moreover, the arbitrator determined that Frye should be reinstated only to her 1-day-per-week/1-week job with Local 190, an insufficient remedy given the totality of the evidence produced at the instant Board hearing.

The General Counsel concedes that the Board will defer to arbitral awards under certain circumstances as set out under the *Olin-Spielberg Mfg. Co*. standards which include a requirement, inter alia, that all parties agree to be bound by the arbitrator's decision. In the instant case, the General Counsel notes that the arbitrator did not include JTC in his decision—

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[64] The General Counsel also requests that a negative inference be drawn against JTC because of its alleged failure to provide subpoenaed documents covering the General Counsel's request for Frye's personnel file, citing *Bannon Mills*, 146 NLRB 611 (1964). As grounds for this request, the General Counsel asserts that JTC claimed to have no documents pertaining to Frye's personnel file, which it could not locate. However, on the last day of trial, JTC produced a work log created by Frye during her employment in September 2009. (See GC Exh. 10.) The General Counsel asserts that this was the type of document an employer would keep and maintain ordinarily in an employee's personnel file. By withholding this, and perhaps the other documents ordinarily kept and maintained in an employee's personnel file, the General Counsel contends that JTC was effectively able to avoid its obligation to provide her with the type of documents she requested (with no objection from JTC) by lawful subpoena duces tecum to assist her on the issue of whether JTC was a joint employer of Frye or whether Frye was a poor performer.

I will not grant this request mainly for reasons that I will discuss later herein. However, I am not persuaded that the log in question is the type of document an employer would necessarily keep or maintain in an employee's personnel records. The document could be a business record though not necessarily a personnel file record such as job applications, disciplinary writeups, promotion letters, training, or other similar documents. The log in question could also be likened to a time and attendance document which could exist out of an employee's personnel record. In short, whether the log was a personnel file type of record is debatable. Accordingly, I will not grant the request.

in fact ruled out its participation—and that JTC could not be said to have agreed and has not agreed to be bound by his decision.

In contradistinction, the General Counsel asserts that the instant unfair labor practice charges were prosecuted under a theory of joint and several liability of the Respondents that, if found meritorious, would require a remedy that would reinstate Frye to a full 40-hours weekly work schedule, not the 1-day-per-week as awarded by the arbitrator. Accordingly, the arbitration award also did not adequately consider the entirety of the unfair labor practice issues associated with the instant litigation.

B. The Respondent JTC's Position

JTC affirmatively contends that Frye was not discharged from a joint employment, but rather from two entirely separate employments with two separate and independent entities.

JTC argues that it is a labor management trust fund governed by Section 302 of the Labor Management Relations Act (LMRA), which requires such trust funds to be separately managed and operated from any labor organization such as Local 190.

JTC notes that as a nonprofit 501(c)(3) apprentice trust, it has been granted tax exempt status, is funded by contributions from unionized employers—Greater Michigan—not union dues, and is governed by the Apprenticeship Trust Agreement. This trust agreement establishes a board of trustees whose members in equal numbers are appointed by the participating union employers and Local 190. JTC emphasizes that while these trustees may be affiliated—either as officers or employees of Greater Michigan or Local 190—when appointed and acting as trustees, by explicit terms of the agreement, they cannot be considered as agents of their appointing bodies.

Regarding its operations, JTC submits that all business decisions are governed by the trust agreement, and in particular JTC is empowered by the agreement to hire suitable personnel to carry out the functions of the JTC; each trustee has one equal vote for all decisions under consideration.

Other than the part-time instructors, JTC had two full-time employees—Scott Klapper, training instructor, and Elaine Frye, clerical secretary—during the times material to this litigation. JTC contends that both employees were paid solely by JTC with their compensation and benefits, however, being tied (or "mirrored") to the journeyman plumbers/pipefitters area-wide construction agreement, and the Local 190/164 agreement for Klapper and Frye, respectively. JTC notes both Klapper and Frye were hired as at-will employees.

As to Frye, JTC notes that she was initially hired by JTC in 1995 on a 3-day-per-week basis, later increased to 4 days a week; Frye was hired by Local 190 at the same time on a 1-day-per-week basis. JTC further submits that her employment status was known by Frye and accepted by her at the time.

JTC also contends that pursuant to her employment with JTC and Local 190, Frye was not commonly or jointly supervised. Frye was directly supervised by Klapper alone when performing her JTC duties, and by either Mitchell or his predecessor when performing her duties for Local 190. According to JTC, Frye was subject to Local 190 supervisory action without any input or approval of JTC.

JTC submits that the separateness of Frye's employment with the two entities is further evidenced by her receiving three paychecks per month from JTC and one from Local 190, paying her dues solely from the Local 190 check, with each entity paying separate workers' compensation and unemployment premiums covering Frye.

JTC submits that in addition to JTC and Local 190's having separate checking and savings accounts, accountants, and attorneys, it rents at market rate the Local 190 owned property out of which the apprenticeship program operates; and as Frye testified, Local 190 and JTC have had at least as of 2006 separate phone and computer systems.

Furthermore, JTC argues that it has never had a bargaining relationship, let alone obligation with Local 164 and until the latest Local 190/164 agreement, it has never even been referred to in any way in any previous agreements between the two. Moreover, both Mitchell and Miller credibly testified that JTC has never recognized or bargained with Local 164, a matter which would have required a vote of the trustees, a vote that has never taken place.

JTC submits where the latest agreement between Local 190 and Local 164 refers to JTC, it is not designated as an employer under the contract and, of course, JTC is not a signatory to the agreement. JTC notes that as Mitchell explained, the inclusion of JTC in the recognition clause was agreed upon only because Frye was working at the training center for Local 190 1 day per week, but he was to a certainty not negotiating on behalf of JTC (as a trustee) so as to have JTC recognize or agree to bargain with Local 164. JTC notes that even Sprague did not think that the change in language that he proposed resulted in an agreement that JTC recognized or agreed to bargain with his union. JTC submits that Sprague consistently maintained that Frye was a Local 190 clerical employee, simply assigned to work at JTC by Local 190.

JTC also points to the September 16, 2010 decision of the U.S. District Court wherein the judge ruled that JTC never signed the (collective-bargaining) agreement (with Local 164) and never had an agreement to arbitrate grievances filed by employees represented by Local 164. JTC notes that this decision was affirmed by the Sixth Circuit Court of Appeals on July 11, 2011.[65]

Turning to Frye's termination, JTC first notes that a critical portion of her job was to maintain and keep up-to-date apprentice files, that is all school records, hours, reports, and the 6-month written evaluations from the contractors for whom they were working. These files were highly important because if an apprentice had disciplinary or attendance issues, he was summoned to appear before the JTC trustees who could or would take appropriate action that could include dismissal from the apprentice program. JTC submits that the trustees viewed having the apprentice files current and complete as a vital component of their fiduciary responsibility to evaluate apprentices fairly. The trustees, JTC contends, generally testified that Frye's basic responsibility as far as they were concerned was to make sure the information was in the files prior to the scheduled meeting with the apprentice under scrutiny. JTC notes that as Miller credibly testified (and the trustees individually affirmed), the trustees were dissatisfied with Frye's performance as early as 2004 or 2005, and discussions about replacing her ensued then.

However, the JTC did not try to get rid of Frye. Instead, the trustees decided to assist Frye and, in effort to improve her performance, devised a better defined job description of her duties and responsibilities. Additionally, Klapper was assigned to explain these responsibilities

[65] This decision was attached to JTC's brief, herein as Exh. A.

in detail to her. Moreover, Miller and her assistant personally worked with Frye in preparing the Excel spreadsheet program with which Frye was having difficulty using.

While Frye seemed to improve, albeit somewhat inconsistently, between 2005 to 2006, JTC submits by the beginning of 2009, the trustees, as they testified, viewed her performance as seriously deficient in terms of keeping the apprentice files up to date; and discussions about her termination were renewed. Then, on the occasion when JTC Chairman Darr informed the trustees that Frye's comment on an apprentice file that the contractor—Darr himself—had not provided current information was false, the trustees once more actively discussed terminating Frye.

JTC contends that Frye would have been terminated in early April 2009, had she not indicated that she was agreeable to retiring and would do so by the end of that year. However, in August, when the trustees were informed that Frye had changed her mind about retiring and refused to sign the letter confirming her intention, the trustees decided that she would be terminated at the September meeting of the trustees, and that her termination was unanimously voted on by them on September 25.

As to Frye's providing Sprague with the trust documents, JTC first notes Frye never informed the JTC trustees that she was going to do this and never sought the approval of Klapper or any trustee before doing so. Additionally, JTC further notes that Sprague never informed any of the trustees that he was making or made contact with Lowery of Michigan Gas, and neither did Frye. JTC concedes that Miller learned that Frye had sent the documents before Frye was terminated (in mid-September) to Sprague and that he forwarded them on to Lowery. However, J TC contends that Miller credibly testified that this had no bearing on her decision to vote for Frye's termination, that the trust documents were not confidential in her view; that Miller's decision regarding Frye was made earlier in 2009.

JTC also concedes that Mitchell knew of Frye's transmittal of the trust documents at some point prior to her termination but that he too, "wearing his trustee hat," testified that he did not vote to terminate her for this reason; and furthermore he did not inform the other trustees that she had provided the documents to Sprague. JTC notes that seven of the eights trustees voting for Frye's termination all credibly testified that Frye was terminated because of her poor performance and not because she provided the trust documents to Sprague, about which all had no knowledge in September 2009.

The Respondent contends that Frye's forwarding of the trust documents to Sprague was not a factor in the JTC's decision to terminate her on September 25, 2009, that in point of fact her poor job performance as determined by the trustees in April 2009 was the sole reason for the decision. JTC submits that its decision to terminate Frye was not violative of Section 8(a)(3) and (1) of the Act and this charge should be dismissed.

Turning to Local 164's information request, JTC concedes that a copy of Sprague's request of December 4, 2009, was forwarded to the JTC and that its attorney (Widmayer) responded in writing to Local 164 on January 2, 2010. Standing on its position that it had no bargaining relationship and therefore no obligation to provide the requested information to Local 164 (as set out in Widmayer's letter), JTC argues that it did not provide the requested information, and hence has not violated Section 8(a)(5) and (1) of the Act. JTC submits that this charge also should be dismissed.

With regard to Frye's claim for sick and vacation pay, JTC relies on Miller's testimony that she (JTC) refused to honor Frye's claim because she could not find any record in the JTC

computer system of the records Frye submitted in support of her claim, that there was nothing JTC could use to determine the validity of her claim, and that Frye did not herself provide any source documentation for when she took time off or did not. Also, JTC notes that Frye's claim was predicated on a singular document—GC Exhibit 23. Frye claimed that this document reflected her keeping track of her used and unused sick, vacation, and personal time in the JTC computer system and that she emailed this information to her personal computer on September 14, 2009, and that the document was an original source document in the JTC computer system that was kept and maintained annually.

JTC submits that the document on its face points to the falsity of Frye's testimony. JTC notes that first the document clearly is a summary document and, moreover, was prepared in 2009, not annually over a 14-year period. JTC notes that in terms of its form, type, and heading, each entry of the 14 annual separate entries are precisely the same. JTC submits that this is simply inconceivable, and implausible.

JTC also notes that Miller credibly testified that Frye's calculations contained serious discrepancies that did not comport with the terms of the Local 190 contracts under and pursuant to which her vacation and other benefits derived and "mirrored" for purposes of her employment with JTC.

JTC submits that Miller credibly testified that any union activity Frye may have engaged in had no bearing on her (JTC's) decision not to honor her claim for the vacation and other benefits. The JTC contends that Miller decided not to pay her only because her claim was utterly lacking in verification and validity. Accordingly, JTC contends this charge should be dismissed.

Discussion and Conclusions

In my view, this case at its core revolves more around the issue of Frye's initial employment and not so much her termination, about which there is no issue. The Respondent Local 190 agrees (admits) that it employed her and that she was a member of a unit of their secretarial employees represented by the Charging Party, Local 164. However, Local 190 argues that unlike the other secretaries, Frye's formal employment was only for an agreed work schedule of 1 day per week or 4 days per month. Moreover, Frye was employed on this basis for the entire 14 years she was employed by it. Local 190 asserts that when Frye was terminated on September 25, 2009, she was fired from her 1-day-per-week job.

The Respondent JTC agrees that it, too, employed Frye as an administrative assistant employee (secretary) but under a separate (from Local 190) agreement with her that included her working initially for 3 days per week, but shortly later for 4 days per week or about 3 weeks of a month. JTC asserts that when Frye was terminated by it on September 25, 2009, she was and had been merely an at-will employee and, as such, could be discharged for cause or no cause; but in her case she was discharged because of poor work performance.

Local 164, based on the testimony of its representative, takes the position that Frye was formally employed in 1995 by Local 190's business manager as a unit employee, and for the entirety of her tenure she was merely assigned or deployed by him to assist JTC with carrying out the various secretarial or administrative functions associated with the apprentice training program. Local 164 asserts that Frye was hired under its agreement with Local 190, became a member of the represented unit of secretarial employees, and was and is entitled to the protections afforded by that agreement. Local 164, in essence, maintains that at no time was Frye separately hired by JTC, and hence could not be discharged by it for any reason or cause.

The General Counsel takes the position that either one or both entities employed Frye, and either one or both unlawfully terminated her.

If I may be permitted an observation, it would occur to me that one's formal employment status with an employer should be determined from the beginning of the employment and not at the end thereof, nor in the interim periods of the tenure of the employee. Accordingly, I have undertaken an examination of all of the credible evidence both testimonial and documentary, coupled with reasonable inferences drawn therefore, to arrive at a determination of the critical question of by whom was Frye employed in the formal sense of the concept. Once this determination is made, I will turn to the issue of whether she was unlawfully terminated and denied benefits and whether the Respondent(s) breached any obligations under the Act to bargain in good faith with Local 164 about her termination, the subsequent grievance, and her claim for unpaid benefits.

I would note at the outset that my analysis and consideration of the evidence has been restricted somewhat because of the absence of two persons who in my view could have shed additional light on the entire inquiry, namely, Ronald House and Scott Klapper, both admitted supervisors/agents for Local 190 and JTC, respectively. It is inarguable that House played a substantial role in Frye's hiring as well as her supervision on the job. Likewise, Klapper was undoubtedly Frye's first-line supervisor when she performed her duties for JTC. I note that neither the General Counsel nor either of the Respondents called House or Klapper and their nonappearance was not explained. This being the case, I must fill in certain unknowns about Frye's employment through inferences and credibility findings. However, I decline to draw any adverse inferences regarding the failure of the two to appear and testify. Notably, under our rules, witnesses do not "belong" to any particular party to the litigation in question. The General Counsel presumably could have called either House or Klapper but evidently elected not to. In likewise, the Respondents could have called either or both but did not. I will not second guess or speculate over the strategies employed by the parties in the presentation of their respective cases.

Turning to Frye's hiring, Frye testified that she was interviewed and subsequently hired by House in January 1995 and was told then that her time would be spent working 1 day per week for Local 190 and 3 days (later expanded to 4) per week for the training center. Frye said that she was not told that she was considered a 1-day-per-week employee for the Union and separately a 3-day per week employee for JTC. Frye believed that she was a member of the three-employee unit of secretarial employees working for Local 190. Frye said that her wages, dues, and other benefits were predicated on the various agreements Local 190 had with Local 164. Moreover, Frye did not interview with Sandy Miller or any of the other JTC trustees and said she never was directly supervised by them during the entire time she worked at JTC. It may be an assumption, but I would think that when other Local 190 secretaries assisted the JTC temporarily, they also were not supervised by the trustees.

Miller testified that at the time of Frye's hiring, both she and House were trustees of the JTC and sat as a steering committee that often made decisions on behalf of the entire trustee board between its monthly meetings. Miller went on to say that when she and House made decisions, they routinely presented the matter to the entire trustee board for consideration (and as a practical matter their approval) and that the separate votes are recorded and reduced to writing in the minutes. According to Miller, this was done on the occasion of Frye's hiring by JTC and Frye's hiring was approved by the trustees. According to Miller, Frye was to work initially 3 days per week for JTC and her wages and other terms and conditions of employment were to be tied to or "mirror" the Local 190/164 contracts. Miller noted that JTC never paid

Frye's dues or assessments required under these agreements and that Frye's schedule was later increased to 4 days per week. Miller said that neither she nor any of the other trustees ever directly supervised Frye; this was Klapper's job.

Local 190 and Local 104 have had a fairly long-term bargaining relationship. Accordingly, I have carefully examined the various agreements between Local 190 and Local 164 covering the period October 19, 1989, through the latest agreement negotiated in 2009 to assist in the resolution of the hiring issue.

The October 19, 1989 agreement,[66] like all subsequent contracts, recognizes Local 164 as the sole representative for collective bargaining of the Local 190 secretarial employees. This agreement also states, inter alia, that Local 190 shall not enter into any agreement or contract [with unit employees], individually or collectively, without written approval of [Local 164].

In the agreement between Local 190 and Local 164 covering June 1, 1994, through May 31, 1997 (negotiated by House), in addition to recognizing Local 164 as the exclusive representative of the secretarial unit, Local 190 also agreed to bargain in good faith with Local 164 on all matters of wages, hours of work, and other conditions.

In this agreement in the management-rights provision (Art. II) Local 190 is accorded the right to determine the number of [unit] employees to be employed . . . assign and direct their work . . . to determine the personnel, methods, means and facilities by which operations are conducted . . . to set the starting and quitting time and number of hours and shifts to be worked . . . to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operations or services . . . and to take whatever action is necessary or advisable to determine, manage and fulfill the mission of Local 190] and to direct [Local 190] employees.

Local 190 (in Art. VIII) also agreed not to subcontract any customary unit work and specifically was prohibited from transferring, leasing, diverting, assigning, or conveying in whole or part to any other entity or mode of operation without giving Local 190 a reasonable notice of its intent to subcontract.

The agreement (in Art. IV) also allows Local 190 to hire temporary employees for a period of 180 days; after that period the temporary employees shall be terminated or become permanent employees and, as a condition of employment, become and remain members of [Local 164] in good standing.

Regarding unit employee's work schedules, the agreement in (Art. VII) states for all employees hired after June 1, 1990, 8 hours shall constitute one full workday, and 40 hours shall constitute one full work week.

Notably, in Article XV, the agreement states that any written statement or verbal agreement made between an employee and [Local 190] which may conflict with the agreement shall be null and void. Notably Local 190 (in Art. V) agreed not to discriminate against an employee because of his or her union activity as a member of [Local 164].

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[66] See JATC Exh. 1. This agreement, unlike other subsequent contracts, covers only October 19, 1989, through March 1, 1990. The parties did not produce any agreement between Local 190 and Local 164 for the period covering 1991 through May 31, 1994.

The Local 190/164 agreement covering June 1, 1997, through May 31 (also negotiated by House), is essentially identical to the previous agreement (except for wage increases) in terms of exclusive recognition, good-faith bargaining, subcontracting, management rights and union security, as discussed above, as well as essentially prohibiting "side deals" between unit employees and Local 190.

The agreement for the period June 1, 2001, through May 31, 2005, between Local 190 and 164, negotiated by House and now Al Sprague (of Local 164) while essentially identical to the previous one, included for the first time Frye by name as one of the unit employees covered by the agreement. In terms of wages, Frye received the second highest hourly wage rate of the three employees in the covered unit.

I would note that this agreement, like the previous agreements, made no mention of part-time employees except in Article IX which dealt with holidays. The agreement stated that part-time employees could "not enter into this section of the contract as their workdays are not on a regular basis, and their work days not always the same." In my view, this provision would not apply to Frye because as all parties agree, she received the same contract benefits as the other unit members.

The agreement between Local 190 and 164 covering June 1, 2005, through May 31, 2009, is essentially identical to the preceding contract, and again lists by name Frye as one of the three unit secretaries and the wage increases each was to receive under the new contract. This contract was also negotiated by House and Sprague.

The final agreement between Local 190 and Local 164 covers June 1, 2009, through May 31, 2013, and was negotiated by Mitchell and Sprague. This agreement is essentially identical to the previous contract except that Local 190 now agreed to recognize Local 164 as the sole collective-bargaining agents for all *full-time* and *part-time* secretarial and clerical employees employed both at the Local 190 union offices and the JTC training center. Like the 2005-2009 agreement, this agreement included the names of the three unit members, including Frye, and wages they were to receive under the contract.

When one considers these agreements, along with the negotiations that had to take place between Local 190 and 164, it is clear that one, there is no provision for part-time workers in the unit; two, Local 190 was free to assign members of the unit as it deemed fit and necessary; and three, it seems abundantly clear also that Local 190 never informed Local 164 that one of the unit members was only part-time and, in fact, was employed by another entity.

In my view, the payment of dues by Frye is matter worth exploring in terms of determining by whom Frye was employed. First, JTC admits that it did not pay any of Frye's union dues and assessments and presumably any initiation fees, and my examination of the aforesaid agreements supports this. By contract, (Art. VI) all union dues, initiation fees, and assessments are to be paid to Local 164 by a check-off authorization payable monthly on the first pay period of each month.

According to Sprague, as of June 10, 2009, Frye paid $60 in dues and $7 in assessments, respectively.[67] I would note that no evidence was adduced at the hearing that

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[67] See JATC Exh. 6,a copy of a letter to Mitchell of Local 190 dated June 10, 2009, notifying him of the changes in dues for the three-unit members.

Notably every contract between Local 190 and Local 164 that I reviewed in this case calls

Continued

Frye paid a prorated dues and assessment amount during the time she was supposedly working only 1 day per week for Local 190.

Regarding Frye's health, welfare and pension benefits, Local 190 agreed in Article XIV of the 1994–1997 agreement that it would provide health and welfare benefits at the same levels and under the same terms and conditions as those benefits are available to members of Local 190.[68]

JTC admits that it agreed with respect to Frye's health, welfare, and benefits to match or mirror her entitlements under the Local 190/164 contracts. It is not clear whether the JTC paid these amounts directly or reimbursed Local 190.

Finally, there is Sprague's testimony about Frye's relationship with Local 190 vis a vis JTC. As noted, Sprague negotiated the last two contracts with Local 190 on behalf of Local 164. Sprague stated that in spite of his role he did not know that Frye was actually being carried and treated as a part-time unit employee, and that she worked for and was paid separately by JTC until Frye informed him that her job was threatened. Sprague stated that his assumption was that Frye, like the other two members of the unit, was a full-time Local 190 employee; Sprague suggested that neither of the Local 190 business managers ever advised him in contract negotiations that Frye was employed part-time by Local 190 and part-time with JTC, and was an at-will employee of JTC.

Turning to Miller's version of the alleged hiring of Frye by JTC in 1995, as noted she said that House and she collaborated on the hiring decision in their capacity as steering committee members. Miller went on to say that the trustees later approved their decision in a formal vote. However, JTC did not produce the minutes of the meeting either affirming Frye's employment with JTC or the terms of which as stated by Miller—initially 3 days per week and all wages and benefits including vacation, sick and personal days and health, pension, and welfare to match or "mirror" the contract between Local 190 and Local 164. Notably, John Darr, then chairman of the JTC board, testified that he did not know how Frye came to work for JTC, that essentially she just showed up one day and began performing her duties with JTC.

I have also perused several exhibited documents adduced at the hearing which could buttress possibly JTC's contention that Frye was hired as an at-will employee.

For example, there is the February 1994 job description (JATC Exh. 3) that Miller claimed was applicable to Frye as the training center's "keeper of records"; also there is the document entitled JTC Employees Duties (JATC Exh. 4) that sets out the duties and responsibilities not only of Frye—the office professional—but also the "Coordinator."[69] Miller cited this latter document as proof that Frye was indeed employed by JTC. However, Frye testified that when she started working for Local 190 and JTC, she did not receive any such job description. Miller, herself, admitted that the JTC Employee Duties document was not put together until possibly 2004–2005, when Frye experienced some performance problems. I

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for the payment of dues and initiation fees to Local 164 by the check-off provisions associated with each contract.

[68] Under all successive contracts between Local 190 and Local 164, this article changed little if at all, and Local 190 agreed to provide the stated coverage consistent with that of Local 190 members.

[69] It seems this title applied to Scott Klapper, who JTC insisted at the hearing was not a coordinator but the training director.

would credit Frye in this regard, that is that she did not receive any job description from JTC when she was interviewed by House in 1995.

It should be clear to all, but certainly to me, that Frye's employment situation was a mix and a muddle from its inception and on its face was charitably speaking irregular in its execution. I will try to make some sense of this matter in view of what I consider the importance of vindicating the policies and purposes of the Act for all parties concerned.

First, in agreement with JTC, it is a labor management trust fund governed by Section 302 of the LMRA, and as such was separately managed and operated from Local 190, as is required by applicable law.[70] Second, in agreement with JTC, I would find and conclude it never recognized or bargained with Local 164 and never negotiated or approved any collective-bargaining agreements with Local 164. I would also find and conclude that Frye was the only Local 190 unit employee who regularly performed services for JTC.[71] I would also find and conclude in agreement with JTC that while the trustee board is comprised of officers or employees of Local 190 or Greater Michigan, the trust agreements mandate that when acting as trustees, they are not acting on behalf of or as agents of either Local 190 or the employer association. The record herein also supports a finding that JTC was authorized to hire employees, both supervisory and clerical, to assist the trustees and in the performance of the trust obligation by the trust agreements under whose aegis it operated.[72]

On balance, then I would find and conclude that while JTC was an independent entity and authorized to hire a clerical employee like Frye, JTC did not in fact hire her in the formal sense of employing her as one of its employees. In agreement with Local 164's representative, Sprague, it is my opinion based on this record that only Local 190 hired Frye and, pursuant to the Local 190/164 contract(s), assigned her to perform clerical duties for JTC. In short, in my view, Frye was *employed* by Local 190 and *deployed* by Local 190 to work at the JTC facilities

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[70] JTC is clearly a nonprofit Sec. 501(c)(3) apprentice trust granted tax exempt status by the Internal Revenue Service (See Jt. Exh. 2.) JTC also files with the IRS Form 990, Return of Organization Exempt from Income Tax. (See Jt0. Exh. 3.) In contradistinction, Local 190 filed with the Department of Labor Form LM2, Report of Labor Organization. (See Jt. Exh. 1.)

[71] I note, however, that based on the credible testimony of Frye, on occasion other Local 190 secretarial employees assisted JTC at certain times, more particularly during busy apprentice application times, and these employees were paid overtime by Local 190.

[72] I would note that the JTC's application for Exemption under Section 501(c)(3) filed December 22, 2000 (Jt. Exh. 2), in the part calling for the names, addresses, and titles of officers, directors, and trustees, Scott Klapper's name appears along with others such as Sandra Miller and John Darr, However, Klapper's title is not disclosed and according to the document, he receives no compensation. JTC testified through Miller that JTC hired Klapper and paid him according to the salary of a journeyman plumber. This discrepancy was not explained at the hearing. I note that Klapper is not listed as an employee of Local 190 on Schedule 12 of the LM2 included with this exhibit.

I would also note that there is no specific mention in the application of JTC's clerical employees by name or category. There is only reference (on p. 5) to JTC's incurring from 1997 through 2002 "administrative fees" which one could consider covered a clerical salary. But this is not clear from the form, and this was not explained in hearing testimony or in the JTC brief.

In the JTC Form 990 filing with the IRS for 2009 (Jt. Exh. 3), the trust is requested to provide the compensation for all trust officers, directors, trustees, key employees, highest compensated employees, and independent contractors. I note that Klapper's name is not listed. This fact also was not explained at the hearing or in the JTC brief.

up until the time she was discharged. In this light, of course, I cannot find that JTC jointly employed her. My reasons include the following.

First, Frye was not unfamiliar with unions, having worked for another union—the Bricklayers—during her working life. Frye knew that Local 164 represented the secretarial unit, a fact established with her going to "her union rep" when her firing was first raised. In any case, House certainly knew that Frye as a clerical would be included in the unit.

The Local 190/164 contract negotiated by House by its terms prohibited any special arrangements between unit members and management and if any such took place, they were null and void (ab initio). So in my mind, neither Frye nor House could "agree" to an arrangement calling for Frye to be a 1-day-per-week unit employee and a 3-day-per-week at-will employee with JTC. In candor, this arrangement is to me nonsensical for anyone to agree to a 1-day-per-week job with contract protections and at the same time agree to a 3-day-per-week job with no protections. Frye appeared to me to be intelligent, seasoned, and sensible, and this arrangement did not make sense.

Second, there is no documentation to support any contention that Frye was formally hired by JTC in January 1995. Miller, who impressed me as a person who took her responsibilities as a trustee very seriously and to the letter, did not produce any minutes or other documents indicating not only that the trustees voted to hire Frye, but that her employment was even an agenda item. Then the trustee chairman, John Darr, testified that he did not know how Frye came to work for JTC. This suggests that Miller was either not telling the truth or she was mistaken. In any case, it is very clear that irrespective of Miller's possible intentions Frye, by Miller's own standards, was not properly hired by JTC. Again, the more likelihood situation is that House hired her and assigned her to work at JTC; that Frye was otherwise a full-time unit member, but one simply assigned to help out at JTC.

This result in my view is also compelled by the fact that Frye paid union dues in the full amount as opposed to a pro rata assessment for her 1-week-per-month schedule.[73]

I am also persuaded to my finding because Frye's alleged part-time position with Local 190 never came to light to Local 164 until she was about to be fired. As I have set out here, Local 190 and Local 164 negotiated several contracts and Frye's special arrangement never saw the light of day. To be sure, the Local 164 representatives knew that Frye was off and on working both at the union offices and the training facility locations. However, at no time did Local 190 negotiators—House and Mitchell—ever disclose that Frye was an employee for both it and JTC. Notably, all of the Local 190/164 contracts I examined required that both unions negotiate in good faith and not do anything to reduce the terms and conditions of the represented employees. If Local 190 considered Frye a 1-day-per-week part-time employee when the other unit members were not so considered, in my view good faith required this disclosure to Local 164; not to disclose Frye's special arrangement would result in bad-faith bargaining. However, I decline to attribute bad-faith bargaining to Local 190's representatives.

[73] It is not at all clear on this record whether a unit member was entitled only to pay partial dues for less than full-time work. However, it is counter-intuitive that a member of a union would pay the full amount of dues for a part-time—1 week per month—job. I note that in all likelihood if Frye were to have paid only partial dues, this would have alerted Local 164 to Frye's part-time work status which probably would have initiated bargaining over the matter.

Rather, it is my view that from the inception of her employment with Local 190, she was solely employed by it and not JTC either jointly or severally.[74]

Since JTC is not a joint employer of the clerical bargaining unit represented by Local 164 and that in fact JTC never employed Frye, she cannot be considered an employee within the meaning of the Act. Therefore, in my view, JTC could not and did not discharge her. Accordingly, I would find and conclude that JTC did not violate Section 8(a)(3) and (1) of the Act, and this aspect of the complaint should be dismissed.

Also, based on this record, I would find that since JTC had no lawful bargaining relationship with Local 164, JTC did not violate the Act by not providing the information requested by Local 164.

Additionally, with respect to Frye's claim for alleged accrued unpaid sick, vacation, and personal days against JTC, I would find and conclude that since Frye was not employed by JTC, JTC's denial or refusal to pay said claim did not violate Section 8(a)(1), (3), or (5) of the Act. I would recommend dismissal of all of the complaint allegations against JTC.

This brings me to Frye's termination by her sole statutory employer, Local 190.

As to Frye's termination and the circumstances leading up to this on September 25, 2009, clearly by this time Frye's performance was considered deficient by the JTC trustees. In fact, based on the credible evidence offered by Miller and the other trustees who voted then to remove her, Frye would have been let go in April of 2009, had she not volunteered to retire by December 31, 2009. When she decided not to retire, I am convinced that the trustees, acting as trustees—wearing their trustee hats as it were—with cause decided that Frye was not up to the tasks required of her duties with JTC. In my view in that regard, the vote against her was more in the way of a vote of no confidence in her that could only be effective to transfer or reassign her back to the secretarial pool. JTC had no authority to fire her because she was not, as I have determined, its employee.

As we know, Mitchell, wearing his trustee "hat" along with the other trustees, voted to remove Frye on September 25. However, Mitchell also on the same day decided to fire her from her job with Local 190. It is Mitchell's act or the effects thereof that remain at issue for purposes of determining whether the Act was violated. In this regard, the *Wright Line* analysis is called into play.

That Mitchell discharged Frye on September 25, 2009, is not disputed. Also admitted by him and therefore inarguable is that Mitchell's decision to terminate her was influenced (strongly) by her providing the JTC trust documents to Sprague of Local 164. In fact, as he testified, this was the final straw although he disingenuously attempted to tie some of Frye's undocumented performance issues to his decision to terminate her.

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[74] While I have found that JTC did not formally employ Frye, I note that JTC regularly only utilized Frye and not other members of the Local 190 secretarial unit. Those members were only assigned to JTC to help out on special occasions and were paid overtime by Local 190. This not only militates against a finding of joint employer status but also supports my finding that Frye, like the others, was merely assigned to work at the JTC facilities but was not employed by JTC.

Mindful that Local 190 did not file a brief in this case, relying as it does on the arbitrator's ruling, I would hasten to add that I have given consideration to what could be Local 190's position that it would have fired Frye in April, irrespective of her having provided the documents and that it was only her agreement to retire that forestalled her termination then.[75]

When Frye, as Mitchell put it, reneged on her promise, he said that the JTC trustees and he for Local 190 both decided to fire her in August as they had earlier decided. But this argument in my view does not hold water. As Mitchell and Frye both attest, when he approached her in April and informed her that the trustees were dissatisfied with her work performance and wanted to fire her, Mitchell clearly was acting as an emissary for the trustees, wearing his trustee "hat" as it were. Most notably, Mitchell did not say that he, as her Local 190 supervisor, was dissatisfied with her work for the Union; Mitchell said "they" wanted to fire her. So clearly in April, Mitchell did not, independent of the trustees' concerns, express anything negative about her work for Local 190. Accordingly, I cannot find that Local 190 would have terminated Frye in April 2009, but for her agreement to retire in December of that year.

In my view on September 25, 2009, Mitchell, as he reluctantly testified, was really upset over Frye's having given the JTC documents to Sprague who shared them with Lowery, a person Mitchell viewed as a bargaining competitor, and it was for this reason he decided to terminate Frye from Local 190. I view Mitchell's attempt to portray Frye as a problem employee with Local 190 as pretextual. I note that that he produced no documentation indicating any significant discipline for her over a 14-year career, during which she evidently received all of her contract-mandated raises and benefits.

Equally fallacious in my view is Mitchell's claim in his September 25 termination letter to Frye that her discharge was for conduct out of her job description during working hours. Clearly, on this record Frye's job description, if there was one such for Local 190, had nothing to do with her providing JTC records to Sprague. To me, this justification seems completely made up to cover up Mitchell's anger over Frye's giving Sprague the JTC documents.

As to Frye's providing the trust documents to Sprague, it should be remembered that she only did this because her union representative requested them. Notably, Frye went to Sprague for his assistance after having been informed first in April, and then later in September, that her employment was in jeopardy.

In my view, the protected activity engaged in by Frye was her contacting Sprague and requesting assistance from him as her union representative, and not necessarily giving Sprague the documents. It should be noted the request by Sprague for the trust documents was part of his (not her) strategy to save a unit member's job, a strategy with which Frye was not really familiar. In my view, in the case of a represented employee facing loss of her job like Frye, engaging the assistance of one's union is practically per se protected. Here again, in my view, Mitchell improperly and unlawfully took out on Frye his anger over what was done by Sprague, acting on her behalf.[76] Accordingly, I would find and conclude that Mitchell (Local 190) discharged Frye in violation of Section 8(a)(1) and (3) of the Act.

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[75] Mitchell, as I heard him on the witness stand, to me tried to conjoin his decision to terminate Frye with the JTC trustees' decision to terminate her in April 2009 before she provided Sprague with the trust documents in September.

[76] In my view, Mitchell's problem was with Sprague and he should or could have complained to him or grieved the matter. However, it should also be noted that the trust documents in question belonged to JTC and not Local 190; so given the separation of the two entities, it is

Continued

As to the remaining issues for discussion and resolution, namely Local 190's alleged failure and refusal to provide (or provide timely) certain information requested by Local 164, Local 190's alleged discriminatory refusal to honor Frye's claim for unpaid vacation and other benefits, and finally Local 190's claim that the arbitrator's decision and award should be recognized as the controlling determination regarding Frye's discharge, I will be brief.

Regarding the information request matter, clearly the information sought by Local 164 in the October 5, 2009 fax, its October 23, November 13, and December 4, 2009 letters to Local 190 was necessary for and relevant to Local 164's performance of its duties as the exclusive collective-bargaining representative of the secretarial unit, specifically here Local 164's representation of Frye in the processing of her grievance against Local 190. The evidence of record indicates that Local 190 did not provide any of the requested information until February 14, 2010. Notably, the information regarding Frye's personnel file and records evidently did not or may not exist.

As noted by the General Counsel, Local 164 filed its grievance over the Frye discharge on September 25, 2009, and within 10 days sought Frye's employment records and then within about 8 days renewed its requests as the information was not forthcoming; Local 164's November letter again reminds Local 190 that the employment records had not been sent but that Mitchell had not even made a response in any way to the request.

Local 164's December letter requested information in addition to Frye's employment records, but clearly indicated that the information was needed to prepare for the arbitration of Frye's grievance.

Local 190, by way of defense, asserts that the arbitrator adjudicated that Local 164 had the requested information—documents—in its possession months before it filed the instant unfair labor practice charges with the Board, that is before January 15, 2010.[77] Presumably, Local 190 argues that there can be no violation of the Act under such circumstances.

However, in agreement with the General Counsel, I would find and conclude that Local 190's 2–4 month delay in responding to Local 164's requests was unreasonable, that the information requested was presumptively relevant and that Local 190 has not asserted a valid defense to the delay in providing the information. Therefore, I would find and conclude that Local 190 violated Section 8(a)(5) and (1) of the Act.

Regarding Frye's claim against Local 190 for unpaid and other benefits, I have determined that she was unlawfully discharged by her employer, Local 190. Accordingly, I will recommend by way of a remedy that she be made whole, which will include fully restoring any benefits to which she is entitled. I note that Frye's claim as presented at the hearing covered a period of 14 years, the entirety of her employment with Local 190. However, during that time, her unit was subject to the various collective-bargaining contracts between Local 190 and Local 164. Frye's claim to benefits in my view should be governed by the contracts extant and in force during the relevant periods covered by the contracts.

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difficult if not impossible to rationalize Mitchell's decision to fire Frye without considering his anger over Sprague's contacting Lowery.

[77] Local 190's position, as noted above, was included in its answer filed in this matter on May 9, 2011.

Since I have found that Local 190 violated Section 8(a)(3) and (1) of the Act relative to Frye's discharge, my recommended make-whole remedy in my view will cover any rightful claim she may have to unpaid benefits. Accordingly, I decline to find that Local 190 unlawfully refused to honor Frye's claim, and I would recommend dismissal of this aspect of the complaint.

Finally, regarding the deferral matter, in complete agreement with the General Counsel I would find and conclude that deferral to the arbitrator's decision over Frye's discharge is inappropriate. The General Counsel has well researched the applicable law governing the issue and coupled with my own, it is clear based thereon that the arbitrator's decision would not vindicate the purposes and policies of the Act as applied to the facts and circumstances surrounding Frye's discharge.

I note in particular that the arbitrator did have available to him the evidence and information that was available to me in the unfair labor practice hearing. Specifically, he did not have JTC, Miller, and the other trustees in particular as a party and witnesses, respectively, before him, and rightly so I might add. Therefore, the arbitrator did not have for his consideration evidence as did I that Frye might not have ever been truly hired by JTC at all. If he had the evidence, he might still have concluded that Frye was unjustly discharged but that she was entitled to be reinstated to a full-time unit position, not just the 1-day per week arrangement and benefits that were part of his award.

Essentially then, in my view, the arbitrator's award not only did not fully remedy Frye's wrongful discharge, but more importantly it did not reinstate her statutorily guaranteed rights as an employee. Accordingly, I would find and conclude that deferral of the arbitrator's decision here is not appropriate, and I would recommend that it not be deferred to by the Board.

CONCLUSIONS OF LAW

The Respondent Local 190 is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 164 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee, Elaine Frye, on September 29, 2009, because she engaged in union and other activity protected by the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide to Local 164 timely and in writing certain information requested in written requests of October 5 and 23, November 13, and December 4, 2009.

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

6. 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 find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act, to include furnishing any of the requested information that may

not have been provided upon written request of Local 164, and to provide timely any such relevant requested information.

Furthermore, the Respondent's having discriminatorily discharged its employee, Elaine Frye, it must offer her immediate reinstatement to her former job or, if the former job no longer exists, to a substantially equivalent position without prejudice to her seniority rights previously enjoyed and make her whole for any loss of earnings and other benefits suffered by her as a result of her discriminatory discharge; and remove from its files any references to the termination issued to her and notify her in writing that this has been done and that the unlawful action will not be used against her in any way. Backpay shall be computed on a quarterly basis from the date of Frye's discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 299 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

I also recommend that within 14 days after service by the Region, the Respondent be ordered by Region 7 to post at its facility copies of an appropriate "Notice to Employees," a copy of which is attached hereto as "Appendix" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[78]

ORDER

The Respondent, Local 190, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (UA), AFL–CIO, of Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(b) Discharging or otherwise disciplining employees because they engage in activities on behalf of or seek the assistance of Local 164, International Brotherhood of Teamsters (the Union).

(b) Refusing to bargain collectively with the Union by failing and refusing to timely furnish it with information that the Union requests that is relevant and necessary to its performance as the collective-bargaining representative of the Respondent's bargaining unit employees.

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

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

[78] 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.

(a) Promptly furnish the Union with the information requested by it in its October 5 and 23, November 13, and December 4, 2009 correspondence.

(b) Make employee Elaine Frye whole for any loss of earnings and other benefits suffered by her as a result of her discriminatory discharge, with interest.

(c) Offer Elaine Frye full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Remove from its files any references to the discharge issued To Elaine Frye, and notify her in writing that this has been done and that the unlawful action will not be used against her in any way.

(e) Within 14 days after service by the Region, post at its facility in Ann Arbor, Michigan, copies of the attached notice marked "Appendix."[79] 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. 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 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 (date of unfair labor practice).

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

Dated, Washington, D.C. December 2, 2011

_____
Earl E. Shamwell Jr.
Administrative Law Judge

[79] If this Order is enforced by a judgment of a United States court of appeals, the words on 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."

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 on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything which interferes with, restrains, or coerces you with respect to these rights. More specifically,

WE WILL NOT discriminate against you by terminating or otherwise disciplining you because you engaged in activities on behalf or sought the assistance of Local 164, International Brotherhood of Teamsters.

WE WILL NOT refuse to bargain collectively with Local 164, International Brotherhood of Teamsters, by refusing to timely furnish it with information that it requests 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 in any other manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL make employee Elaine Frye whole for any loss of earnings and other benefits suffered as a result of her discriminatory discharge, with interest.

WE WILL, within 14 days of this Order, offer Elaine Frye full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL promptly furnish Local 164 with the relevant information requested in its correspondence of October 5 and 23, November 13, and December 4, 2009.

WE WILL, within 14 days of this Order, remove from our files any references to the termination issued to Elaine Frye, and WE WILL, within 3 days, notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

LOCAL 190, UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY OF THE UNITED STATES
AND CANADA (UA), AFL–CIO

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
Hours: 8:15 a.m. to 4:45 p.m.
313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.

JD–01–12
Ann Arbor, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 190, UNITED ASSOCIATION OF JOURNEYMAN
AND APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES AND CANADA
(UA), AFL–CIO AND GREATER MICHIGAN UA LOCAL 190
JOINT TRAINING COMMITTEE (JTC), Joint Employers

and Case 7–CA–52652

LOCAL 164, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Judith A. Champa, Esq. and *Jennifer Y. Brazeal, Esq.*,
for the General Counsel.
Lawrence C. Atorthy, Esq. (Kaufman, Payton and Chapa, P.C.),
of Farmington Hills, Michigan, and *Craig S. Schwartz, Esq. (Butzel Long)*, of Bloomfield Hills, Michigan, for the Respondent JTC.
Paul T. Gallagher, Esq. (Gallaher and Gallagher, PLC), Ann Arbor, Michigan, for the Respondent Local 190.

SUPPLEMENT TO DECISION

On December 2, 2011, I issued a decision including a recommended order that, inter alia, determined that the Respondent Local 190, United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA), AFL–CIO, violated the National Labor Relations Act in certain particulars.

While finding that Local 190 violated the Act, I mistakenly stated that the Union did not file a brief in support of its position that it had not violated the Act in any respects with regard to its treatment of alleged discriminatee, Elaine Frye. On December 2, the Board issued its Order Transferring Proceeding.

After the issuance of the decision, I discovered that Local 190 had indeed timely filed a brief in support of its position. As a consequence, I sought from the Board a rescission of the Board's Order in order to reconsider my decision in light of the Local 190's filing of its brief. On December 19, 2011, the Board issued its Order Rescinding Order Transferring Proceeding to the National Labor Relations Board and remanded the matter to me for reconsideration of my December 2, 2011 decision.

Local 190 submits in its brief the following arguments in support of its claim that it did not violate the Act in any way regarding its treatment of alleged discriminatee Elaine Frye. I will treat with each argument separately and state my conclusions thereon after considering each.

Local 190 first argues that Frye was not discharged (by it) for or because of her having engaged in union (or other protected) activities. Local 190 contends that her discharge

stemmed from her poor performance about which she was warned long before her discharge on September 25, 2009, and that her discharge was only forestalled by her agreement to retire at the end of the year. Local 190 submits that when Frye told her supervisor (Mitchell) that she had changed her mind, Local 190 then formally acted on its earlier decision and terminated her on September 25. Local 190 contends that the only arguably protected activity engaged in by Frye prior to her termination was secretly removing the JTC trust documents and giving them to Sprague of Local 164. However, Local 190 contends that the decision to terminate Frye had already been made prior to her turning over the documents in question. Accordingly, Local 190 asserts that Frye's discharge was not based on any animus on its part against Local 164 or in retaliation against Frye for providing the documents to her union representative. Local 190 asserts that even if Frye's providing the documents to Local 164 was protected, it would have discharged her regardless because of her poor performance issues.

Local 190 also contends that it did not violate the Act in terms of Frye's claim for unpaid sick and vacation pay; that there simply was no evidence any animus against her for engaging in protected activity or Local 164. Local 190 asserts that any issues regarding the claim were fully addressed at the arbitration hearing.

As will be noted in my December 2 decision, I fully addressed the issue of Frye's discharge as well as her claim for unpaid sick and vacation pay. Notably, in that decision I considered (preemptively) in the main Local 190's argument on brief and determined that its discharge defense failed. Accordingly, I determined that Frye was unlawfully discharged essentially because she sought the assistance of her Local 164 union representative and that Local 190 retaliated her because of the actions of her Union—Local 164. I also determined that, in essence, that Local 190's claim of Frye's poor performance was not only unsubstantiated, but also undocumented and, in my view, was pretextual. Notably, in agreement with Local 190, I recommended that Frye's charge of unlawful denial of her claim for unpaid vacation and sick leave be dismissed, that any such claim could be resolved in my proposed make-whole remedy for her unlawful discharge.

Next, Local 190 contends that it is not a joint employer with JTC. In my decision, I concurred with Local 190's argument on brief, and nothing more about that issue need be said.

Local 190 next contends that it did not fail or refuse to furnish and/or unreasonably delay furnishing Local 164 with the information requested by it. Local 190 submits that Sprague repeatedly requested several documents that were already in his possession. Moreover, other requested documents were clearly irrelevant or did not even exist. Local 190 concedes that there was some delay in providing certain documents to Local 164 but that this was due to a medical condition of the Local 190 attorney charged with dealing with the information request. Local 190 asserts that it engaged in no bad faith with regard to the delayed production, that the delay was occasioned by illness and the need to retain new counsel who, once retained, completed all production that was possible by February 15, 2010. Under these circumstances, Local 190 submits that it did not fail or refuse to furnish the requested information and that any delay was excusable.

Local 190 also contends that to the extent Local 164's request called for the production of documents related to the administration of JTC, such information cannot be contrived to be "reasonably necessary" to Local 164's responsibilities as Frye's exclusive representative since Local 190 had no bargaining relation with JTC. Local 190 also notes that Local 164's Sprague also already had in his possession certain JTC information such as names and addresses of the trustees, and prior to Frye's termination. In that regard, Local 190 asserts that it was Local 164 that did not act in good faith and may be said to have violated Section 8(a)(5). Local 190

submits that it did not act in bad faith even with a delayed production of the requested information.

As noted in my decision, I determined that the information requested by Local 164 of Local 190 was presumptively relevant because of its connection to Frye's grievance and that the 2–4 month delay in providing the information was unlawful. I note that at the hearing Local 190 did not raise its attorney's illness as a reason for the delay in production of requested information. If this were the case—and I note that two different Local 190 attorneys were evidently involved with the information request—Local 190 did not apprise Local 164 of the illness. Actually this defense, as far as I recall, was first raised in Local 190's brief. Be that as it may, I would find and conclude that consistent with my conclusion in my December 2 decision, Local 190 violated the Act by its unreasonable delay in providing the information requested by Local 190.

Finally, Local 190 contends that the arbitrator's decision and award regarding Frye's discharge should be deferred to and the complaint allegations against it should be dismissed.

As did the General Counsel, Local 190 cites the criteria enunciated by the Board in *Olin Corp.*[80] in support of its position that the arbitration award here should be deferred to.

I have given due consideration to the arbitrator's decision and in particular to his determination that JTC had no bargaining relationship with Local 164 and therefore any possible involvement of the training center in Frye's discharge and other matters raised in the grievance by Local 164 were not considered by him. In my decision I noted that in this regard the arbitrator's decision in the final analysis did not fully remedy what the arbitrator concluded was Frye's "unjust" discharge. For the reasons stated in my decision, I would find and conclude that deferral in this case is not appropriate.

Based on the foregoing, my decision issued on December 2, 2011, remains unchanged in terms of my findings of fact, conclusions of law, and recommended order.

Dated, Washington, D.C. January 6, 2012

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Earl E. Shamwell Jr.
Administrative Law Judge

[80] 268 NLRB 573 (1986); see also *Spielburg Mfg. Co.*, 112 NLRB 1080 (1955).