

**Dresser-Rand Company and Local 313, IUE-CWA,
AFL-CIO.** Cases 03-CA-027141 and 03-CA-
027260

April 19, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On February 18, 2011, Administrative Law Judge Paul Buxbaum issued the attached decision. The Charging Party filed exceptions, a supporting brief, and a reply brief supporting its exceptions and opposing the Respondent's cross-exceptions. The Respondent filed cross-exceptions and a brief supporting its cross-exceptions and opposing the Charging Party's exceptions. The Acting General Counsel filed an answering brief to the Respondent's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

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

The Charging Party excepts to the judge's finding that the Respondent lawfully applied its rule prohibiting "exaggeration, derogatory remarks, guesswork, or inappropriate characterizations" to employee Glen Painter. The Charging Party, however, does not state, either in its exceptions or supporting brief, the grounds on which the judge's finding should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). We find it unnecessary to address this exception for the additional reason that the Acting General Counsel did not allege, and has not excepted to the judge's failure to find, that the Respondent's rule was invalid or unlawfully applied. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006) (the General Counsel controls the complaint, and the charging party cannot enlarge upon or change the General Counsel's theory of the case), enfd. 325 Fed. Appx. 577 (9th Cir. 2009).

To the extent that certain of the Charging Party's exceptions can be construed as challenging the judge's findings that the Respondent's Insider Trading Policy and Fair Disclosure Policy were not facially unlawful, the Charging Party states no grounds on which the judge's findings should be overturned. We therefore disregard those exceptions, as well. *Holsum de Puerto Rico*, supra.

² We affirm the judge's conclusion that the Respondent's discharge of employee Glen Painter did not violate Sec. 8(a)(1). Initially, we agree with the judge, for the reasons stated in his decision, that Painter's calls to the stock analysts constituted protected, concerted activity. But we also agree with the judge that Painter lost the Act's protection by stating during the calls that the workload at the Respondent's Olean

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ron Scott, Esq., for the General Counsel.

Louis P. DiLorenzo, Esq., of New York, New York, and *Lance A. Bowling Sr., Esq.*, of Houston, Texas, for the Respondent.

Thomas M. Murray, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Elmira, New York, on August 2-5, 2010, and in Corning, New York, on October 20-22, 2010. The initial charge was filed May 6, 2009.¹ A second charge followed on July 30 and was amended on October 26. The Regional Director filed the consolidated complaint and notice of hearing on May 26, 2010, and an amended consolidated complaint on July 19, 2010.²

The Acting General Counsel³ alleges that the Employer conducted several unlawful interrogations of employees, unlawfully denied some of those employees' requests for representation by certain officials of the Union at these investigatory interviews, and unlawfully suspended and discharged its employee, Glenn Painter. It is also contended that the Employer promulgated, maintained, and enforced certain unlawful work rules and issued a threat of punishment against its employees if they

facility had dropped by 50 percent. Chairman Pearce and Member Griffin therefore find it unnecessary to pass on the judge's finding that Painter's statement concerning CEO Vincent Volpe's yearend conference call was also unprotected. Member Hayes finds, in agreement with the judge, that both statements were unprotected and that Painter's discharge was therefore lawful. He finds it unnecessary to decide whether Painter's other statements were protected or whether Painter was engaged in concerted activity in making any of the statements.

Finally, we agree with the judge, for the reasons stated in his decision, that the Respondent violated Sec. 8(a)(1) by questioning employees about the Charging Party's internal procedures, policies, and deliberations. Member Hayes agrees that the question regarding the bargaining committee's "plans to provide information to the press, public and/or securities analysts relating to the Company's changes" to its bargaining position was unlawful, and he therefore finds it unnecessary to pass on the judge's findings with respect to the Respondent's other questions inasmuch as they would not materially affect the remedy.

³ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

¹ All dates are in 2009, unless otherwise indicated.

² After the conclusion of the trial, counsel for the General Counsel filed a motion to further amend the complaint by deleting certain allegations. This motion was unopposed, and I hereby grant it.

³ The Acting General Counsel was appointed to that position on June 21, 2010. For ease of reference, I will refer to him in this decision as the General Counsel.

violated those rules. The General Counsel asserts that the Employer's conduct violated Section 8(a)(3) and (1) of the Act. The Employer filed an answer to the amended consolidated complaint denying the material allegations of wrongdoing.

For reasons that will be discussed in detail in this decision, I find that the Employer did violate the Act by interrogating its employees about their protected activities. The remaining complaint allegations raise a number of novel and interesting issues involving interpretation of the Act and the Board's precedents. After careful consideration of those issues and the policy questions that they present, I conclude that the General Counsel has failed to demonstrate that the Employer has violated the Act in any of the other ways that are alleged in the amended consolidated complaint.

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a Delaware corporation, manufactures and services equipment used in the oil and gas industries at its worldwide facilities, including three within New York State, located at Olean, Wellsville, and Painted Post. At its Painted Post facility, it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of New York. The Employer admits⁵ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. Background

Dresser-Rand Company has a venerable corporate history dating from the late 19th Century. It manufactures heavy equipment such as compressors and steam turbines for use in the oil and gas extraction industries. It also services its products in the so-called "aftermarket." The Company has 12 plants throughout the world, including 4 within the United States. The corporate headquarters are in Houston, Texas. It is a publicly held corporation whose initial public offering was made in

⁴ Material errors in the transcript of the first portion of this trial were corrected on the record at the resumption. See Tr. 732-733 and Tr. 740-741. As to the second portion of the transcript, the following mistakes require correction. At Tr. 836, L. 1, I stated that I "hate" to burden the record, not "had" to burden it. At Tr. 895, LL. 22-24, the witness says, "Thank you." The remainder of the statement was made by another speaker. I cannot recall who this was. At Tr. 914, L. 11, the exhibits received into evidence were R. Exhs. 14(a) and (b). At Tr. 954, L. 23, my reference was to Samuel Gompers. At Tr. 1028, L. 2, "advocating" should be "abdication." At Tr. 1069, L. 22, "informally" should be "formally." Throughout the transcript, references to the "SUC" or "SCC" are actually to the "SEC." Similarly, during the testimony of the expert witness, references to "cyantor" should be to "scienter." Other errors of transcription are not significant or material.

⁵ See answer to amended consolidated complaint, pars. II, III, and IV. (GC Exh. 1(p).)

August 2003. It is listed on the New York Stock Exchange under the abbreviation, "DRC."

Because the Company's stock is publicly traded, there are a variety of laws and regulations that govern the manner in which it may convey information to the public. Of particular significance to this case, the regulatory scheme is designed to prevent any selective disclosure of information that would be deemed material by persons considering whether to buy, sell, or hold the Company's stock. In order to secure compliance with this regulatory principle, the Company maintains certain policies, including a Fair Disclosure Policy and an Insider Trading Policy. Those policies are published on the corporate website and incorporated by reference in the Company's Code of Conduct governing its employees' standards of behavior.

While the Company is prohibited from making selective disclosures of information, it does engage in regular activities designed to provide public disclosure of information to interested parties, including the investment community. Indeed, the Company has a director of investor relations, Blaise Derrico. He testified that the investment community includes a cadre of so-called "sell side" analysts who write reports for investors regarding the Company's "prospects, strengths and weaknesses." (Tr. 626.) During the period at issue, there were 12 such analysts who studied Dresser-Rand. Their names were listed on the Company's website.⁶

In order to place information before the public, the Company engages in a variety of practices. It issues quarterly earnings reports. At approximately the same time, it conducts earnings conference calls. At these calls, top officials make representations regarding the state of the Company and field questions from the investment analysts. The public is invited to listen to the conferences on the internet. Advance notice is provided to facilitate this. Not surprisingly, union officials often listen to these calls so as to gain information about the Employer.

It is the Company's three facilities located in the Southern Tier of New York State that are involved in this litigation. Those plants are located in Painted Post, Olean, and Wellsville. The focus of the parties' controversy concerns events at Painted Post. Employees there are represented by the Charging Party, Local 313, IUE-CWA. The bargaining unit consists of approximately 300 to 325 persons. The president of the local union is Steven Coates.

Employees at the other two of the Company's New York facilities also have union representation, albeit by different labor organizations. The bargaining unit at Olean is represented by the IAM under the leadership of its president, John Baglione. Workers at Wellsville are represented by the Steelworkers, whose local president is Joe Austin. Leaders of the three unions meet with each other on a quarterly basis to share information.

In recent years, labor relations at the Painted Post plant have been contentious. After unsuccessful negotiations, a collective-bargaining agreement expired on August 3, 2007. The Union commenced a strike on the following day. The Company con-

⁶ Naturally, there are others who maintain an interest in the Company's stock, including so-called "buy side" analysts who do research for portfolio managers of large funds.

tinued operations during the strike, hiring temporary and permanent replacement workers. On November 19, 2007, the Union made an offer to return to work on behalf of the strikers. The Company responded by instituting a lockout on November 23. On November 29, 2007, the Employer ended its lockout, declared an impasse in bargaining, and implemented its last offer.

Based on the events of 2007, the Union filed charges alleging that the Company had committed a variety of unfair labor practices. A complaint issued and a trial was held in 2009. On January 29, 2010, Administrative Law Judge Mark D. Rubin issued a decision finding that the Company violated the Act in various ways. The judge also found that the General Counsel had failed to prove a number of other alleged violations. See *Dresser-Rand Co.*, JD-04-10 (January 29, 2010), 2010 WL 341549. That matter is presently pending before the Board.

After the strike and lockout, members of the bargaining unit began to be called to return to work at the Painted Post facility. By March 2008, the majority of the former strikers had returned to work.⁷ The Company and the Union also continued negotiations aimed at reaching a collective-bargaining agreement. After the events that form the heart of this case, those efforts met with success and a new agreement was ratified on November 6, 2009.

Turning now to the significant personalities involved in this matter, the Employer's CEO is Vincent Volpe. Other key corporate executives that participated in the controversy include Daniel Wallace, former director of human resources for North America and current director of operations at Wellsville; Douglas Rich, the director of operations for the New York State facilities; Daniel McDonnell, the human resources manager at Painted Post; and Daniel Meisner, a factory manager at Painted Post who previously served as the human resources manager at the facility. There is no dispute that these officials are supervisors within the meaning of the Act.⁸

As to the Union, in addition to President Coates, its leadership consists of its vice president, Terrance Schoonover, and two chief stewards. Brian Scouten is the chief steward for the second-shift employees. The chief steward for the first and third shifts is Glenn Painter. Without doubt, he is the most significant union official with regard to this case. Painter has been employed by the Company as a machine operator since 1977. Along with his role as a chief plant steward, he also served as a member of the Union's negotiating team and executive board. Painter was involved in the strike and lockout and was recalled to work in December 2007.

In addition to the chief plant stewards, the Union has 10 elected shop stewards. Among their duties is the representation of bargaining unit members during investigatory interviews conducted by management.⁹ Coates testified that he personally

notified the Company of the identities of these stewards and confirmed that they had been duly elected to this position.

Prior to the events that produced this lawsuit, the parties had an agreement that Chief Stewards Painter and Scouten would work 4 hours each day on production and 4 hours on union business, including the processing of grievances. As Painter described it in his testimony before Judge Rubin:

[T]here is four hours, up to four hours a day of union activity that I can do, so I go around from shop-to-shop and answer any questions that there may be from the membership, as well as check for overtime posting or whatever.

(R. Exh. 4, Judge Rubin's Tr. 330.)¹⁰

The manner in which Painter allocated his time within this agreed framework produced some controversy. Coates reported that, after the bargaining unit members returned to work following the strike and lockout, there were complaints that Painter was not performing his required work. Meisner confirmed that management had received complaints from Painter's supervisors regarding, "some production issues with Mr. Painter not being at his machine." (Tr. 789.)

Discussions about this problem were held with the assistance of a mediator and a further agreement was reached that Painter would perform the two aspects of his duties in separate 4-hour segments. Painter's compliance with this understanding also became a subject of dispute. Coates reported that management continued to express concern that Painter was not sufficiently productive and that he was spending more than the allotted 4 hours per day on union business. Meisner indicated that Painter's immediate supervisor told him that Painter "is not adhering to the agreement." (Tr. 792.) Meisner took up the issue with Painter and testified that Painter, "confirmed that . . . there's issues he was attending to, so he couldn't adhere to the agreement." (Tr. 792.)

There is one remaining background matter that requires discussion. It will be recalled that management and labor deployed the full panoply of economic weapons in their efforts to gain advantage during their labor dispute. Among the tools used by the Union was an investor outreach program entitled, CWA's Capital Strategies Program. Testimony regarding the nature of this program was provided by an official of the international union, Anthony Daley, Ph.D. Daley is employed as a research economist who is assigned to manage large projects for the research department of the International union.

Daley testified that, in November 2007, the international union directed him to work with Local 313 with the objective of securing the "return to work of our members and the signature of a contract that was fair to our members." (Tr. 12.) As part of this project, Daley conducted weekly conference calls with Local 313's officers, including Coates and Painter. The calls also included other officials of the international union, a representative from the Steelworkers, and a liaison from the AFL-CIO who maintained contact with the French unions that repre-

⁷ As of the trial, 14 former strikers had not yet been recalled.

⁸ See answer to amended consolidated complaint, par. V(a). (GC Exh. 1(p).) In fact, during the course of the trial, the parties resolved all issues regarding supervisory and agency status. For example, see Tr. 727-728.

⁹ Coates reported that, during the period at issue, stewards did not receive any training regarding representation of bargaining unit members.

¹⁰ This arrangement was preserved in the Employer's implemented final offer which provided that chief plant stewards could spend, "[u]p to 4 hours at their current total wage" on "Union business." (R. Exh. 12, tab 2, p. 16.)

sented company employees at the plant in Le Havre, France. These calls were held from November 2007 through April 2008. During the conferences, a variety of strategies were discussed, including the Capital Strategies Program.

A component of this investor outreach program consisted of telephone calls to the investment analysts who evaluated the stock of the Employer and other companies in the industry. Daley described the purpose of these contacts as an attempt “to hold executives accountable for their actions. We felt that Mr. Volpe, in his public pronouncements, and the PR department of Dresser-Rand were making false and misleading material statements that needed correcting.” (Tr. 19.) The hope was that the analysts would use the information provided by the Union to “embarrass Mr. Volpe” by challenging his statements during the Company’s conference calls with the analysts. (Tr. 19.) Daley testified that the particular topic of the calls to the analysts was “that the true costs of the strike were—far exceeded the cost that CEO Volpe referred to in his public disclosure.” (Tr. 24.)

In his description of these activities, Daley made it clear that this was a delicate enterprise. He noted that the potential participants in these calls to the investment analysts were instructed “about not talking the stock price down.” (Tr. 44.) When asked why this was an important limitation on the nature of the contacts with the analysts, Daley explained:

[O]n many different levels—this is just the policy. That it’s—we don’t want this price of our—the stock of our companies to decrease for many reasons; it affects our members’ jobs, it affects their savings, we run into securities litigation. There’s just a lot of good reasons no[t] to do that.

(Tr. 45.) Among the obvious aspects of the need for care and sensitivity regarding statements made to the analysts, Daley observed that “[w]e never, ever, ever lie. I mean . . . you always produce the truth, you always give facts and you always have a good faith effort to achieve factuality.” (Tr. 48.)

The importance attached to the avoidance of potential pitfalls involved in the outreach to the investment community was illustrated by the careful way in which the content of the calls was prepared. Daley described the manner in which the information was developed that would be communicated to the analysts to make the argument that the Company was downplaying the actual costs of the strike. As he explained,

I worked very closely with the Steelworkers with Patrick Young to do what we would call back of the envelope calculations¹¹ about the number of machines that were broken down that needed repair, the amount of work that came back from rework from replacement workers who were doing a poor job of executing their tasks. And we felt that we had enough evidence to plausibly suggest that we were making a good faith effort to come to a correct statement of the cost of the strike.

(Tr. 34.)

¹¹ Later in his testimony, Daley clarified that the so-called “back of the envelope” calculations were actually produced on a spreadsheet. (Tr. 36.)

The person who made the actual telephone calls to the investment analysts was Painter. He had volunteered to undertake this assignment.¹² Reflective of the caution that went into the preparation and execution of this strategy, both Daley and Coates testified that Painter was given a script to follow in these contacts. It is also noteworthy that the Union chose to make the communications to the investment community by calling the analysts at a time when they would not be expected to be at work. The intent was to leave voice mail messages. Rather than sending emails, this method was selected in order to avoid the creation of a written record of the contents of the representations.¹³

Painter testified that he made these telephone calls to the investment analysts from the union hall on February 17, 2008, at 10 a.m. This was a Saturday morning and, as intended, nobody answered the telephone. As a result, Painter was able to leave voicemails. Using the “notes and instructions” from the Union conference calls, Painter gave the investment analysts a “negotiation update” and informed them that, while the Company had reported losses of \$46 million as a result of the strike, the Union calculated the losses as amounting to \$63 million.¹⁴ (Tr. 310.)

It is clear that knowledge about Painter’s contact with the analysts reached the highest levels of management. Shortly thereafter, CEO Volpe visited the Painted Post facility. During

¹² It may well be that Painter volunteered and was selected to make the calls because he had previously made contact with the analysts. In August 2007, Painter had emailed analysts after listening to one of the Company’s earnings conference calls. He reported that he was dissatisfied with Volpe’s “vague” response to a question about the collective-bargaining negotiations. After he sent his email to the analysts, he received a response from one of them, Roger Read. Interestingly, Painter informed Director of Operations Rich by email dated August 16, 2007, that, “I also contacted Roger Read Stock [A]nlyst. He was the person who asked Vince [Volpe] about the percentages of the contract rejection in the Conference Call 8/8/07. This is something that we wanted to do. We are forced to do this.” [Punctuation edited for clarity.] (GC Exh. 19.) Rich’s response did not contain any hint of criticism. Indeed, it complimented Painter as, “the only [Union] committee member who gets the need for change.” (GC Exh. 19.)

¹³ Painter’s testimony regarding the chosen method of communication contained a clear-cut example of impeachment. When asked whether the Union selected telephonic communication as opposed to emails in order to avoid litigation, Painter replied, “Not at all.” (Tr. 388.) He was then confronted with notes from one of Daley’s conference calls that he had provided to counsel for the General Counsel. Under the heading, “Corporate activism,” those notes reflected that the conference call participants had been given the following advice: “Daley and [IUE-CWA General Counsel Peter] Mitchell urged union leadership to make cold calls/e-mails (calls better to forestall lawsuits) using talking points on the cost of the strike.” (R. Exh. 2, p. 152.) Even after being confronted with the notes that he had himself produced, Painter refused to retreat from his assertion that the communications were not made by telephone so as to avoid creating a written record of their contents. This episode in the examination of Painter demonstrates the caution with which his self-serving testimony must be viewed.

¹⁴ As counsel for the General Counsel notes in his brief, “Painter testified that the purpose of these calls was to provide the analysts with the Union’s estimate of the cost of the 2007 strike, and the status of negotiations.” (GC Br. at p. 10.)

a meeting with union officials including Painter, the subject turned to the stock analysts. Painter testified that he did not raise this topic and thought that it had been brought up by Volpe. Local 313's then-vice president, Mickey Keefer, contradicted this testimony. He reported a definite recollection that it was Painter who had raised the topic. As the discussion progressed, Volpe observed that the stock analysts had been "questioning why he's still doing business in New York State." [Counsel for the Employer's words.] (Tr. 899.)

Whatever the differences in recollection about this meeting, there is general agreement that during the discussion about the stock analysts, Volpe turned directly to Painter and said, "Glenn, the stock analysts are not your friends." (Tr. 241, 312, 402, 889.) In response to my query, Painter reported that it was clear from the context that Volpe meant that the analysts were not friends of "the union." (Tr. 406.) Painter did not respond to this assertion.

On February 24, 2008, Painter sent an email to Analyst Read, advising him that Volpe had "made a point to tell me that the Analysts are 'not my friends.'" (GC Exh. 20.) Rather wittily, Painter went on to comment that "[y]ou may not be my friend but Mr. Volpe is not my friend either." (GC Exh. 20.) Read replied by asking Painter to "feel free to continue speaking to the analyst community." (GC Exh. 20.)

Prior to the events that form the heart of this case, Painter made one more contact with a financial analyst. Having learned that the Company's management was going to be making a presentation to Bear Stearns, Painter left a voicemail message for one of their analysts. He testified that he did not recall the precise content of the message, but it pertained to "negotiations." (Tr. 315.) He reported that it was not surprising that he received no response to his voicemail since Bear Stearns closed its doors on the following day. Painter confirmed that he made no additional contacts with any of the investment analysts prior to the events that are about to be described. This was consistent with Daley's report that the investor outreach program terminated in the spring of 2008 when a proposal from the Union to the Company's shareholders was voted down and his superiors directed him to cease conducting his conference calls.

2. The events in controversy

The parties agree that the matters involved in this lawsuit center on the course of their negotiations during April 2009. Those collective-bargaining sessions were held at the beginning of the month, on April 8 and 9, and at the end of the month, on April 28 and 29. On the day before the first of these negotiations began, the Union issued an edition of its newsletter. This contained an article authored by Painter under his penname, "Chief." Strangely, Painter's article foreshadowed the key events that were to follow.

In particular, Painter's article expressed two themes that provide insight into his thought processes at this moment in time.¹⁵ The overarching concern expressed in his submission was what

¹⁵ I mean that one can draw certain inferential conclusions from the tone and content of the article as to Painter's underlying emotional state. Obviously, judges are not licensed to practice psychiatry, but I cannot help but be struck by the peculiar confluence between Painter's predictions and his own conduct a few weeks later.

he characterized as the "**Frustration**" regarding the situation in the workplace. [Emphasis in the original.] (GC Exh. 21, p. 3.) He went on to describe the grievances felt by bargaining unit members and posed some rhetorical questions:

How far away do we believe we are from an impending disaster here at Painted Post? When will an employee feel FRUSTRATED ENOUGH to lash out in Uncontrollable Emotion? I have been told more than once "Someday someone is going to push these employees TOO FAR." This Union will make sure the Company recognizes what people in Leadership Positions are doing with the amount of Abuse of Authority we all see. [Capitalization in the original.]

(GC Exh. 21, p. 4.) In the next paragraph, Painter observes, "Maybe Wall Street would like to hear the REAL story about the Workforce here at Painted Post? Just a Thought!" [Emphasis in the original.] (GC Exh. 21, p. 4.)

Coming on the eve of the resumption of negotiations with the Union, Painter's article caused concern among members of management who interpreted it as a warning regarding the possibility of a violent outburst at the Painted Post facility.¹⁶ HR Director McDonnell testified that, while there had not been any prior incidents of this type at the plant or any prior warnings from Painter, he was directed to undertake an immediate investigation. It was decided that McDonnell would enlist Painter's assistance in conducting a series of interviews with employees whom Painter believed were at risk for violent incidents, either as perpetrators or victims.

Following his instructions, on the morning of April 9, McDonnell went to the site of the collective-bargaining talks to find Painter. Painter was excused from the negotiations in order to assist McDonnell. Painter provided a list of employees to be interviewed and the two men conducted a series of 10 to 15 interviews. Based on the results, they recommended that several employees seek assistance from the Company's EAP program. In addition, the Company issued a notice to all employees signed by four management officials. It stressed the Employer's commitment to a "safe workplace" and urged that any issues that "could lead to the possibility of violence" be reported. (GC Exh. 22.) It also invited employees to utilize the services of the EAP program.

Despite this somber backdrop, union officials were pleased with the course of the negotiating sessions on April 8 and 9. After those sessions, Coates reported that he felt that, "we were pretty close" to an agreement. (Tr. 138.) By the same token, Painter testified that he "thought we had made advancements towards reaching an agreement." (Tr. 320.) Meisner, a member of the management negotiating team, also reported that Painter had advised him that he was "very optimistic about our ability to reach an agreement at our next negotiations that was scheduled for the 28th and 29th." (Tr. 774.) Meisner also testified that he was "a little concerned about the optimism" because, "there were many outstanding issues" and he felt that

¹⁶ Witnesses for both sides agreed that everyone had been shaken by a fatal shooting incident in the nearby city of Binghamton, New York several days earlier.

neither side had shown much movement in their positions since the end of the strike and lockout. (Tr. 774–775.)

The next round of negotiations was scheduled for the end of the month of April. During the intervening weeks between the two sets of negotiating sessions, the Company drafted a response to the Union's most recent proposal. This document contained a number of negotiating positions that would prove to be antithetical to the Union's hope of reaching a prompt agreement. Meisner testified that the Company's revisions reflected several factors, including worsening market conditions, the general economic situation, and the outstanding controversy regarding Painter's productivity and his use of company time to engage in union business.

It is noteworthy that among the Company's revised proposals was one that was intended to address the issue regarding Painter's work time in a dramatic fashion.¹⁷ Thus, paragraph 6 of the Company's revision proposed the complete elimination of paid time off for union business for the chief stewards and the benefit specialist. This proposal was designed to impact just three bargaining unit members, Chief Stewards Scouten and Painter, and Benefit Specialist Brian McNally. Surprisingly, Painter testified that the proposal caused him to be "concerned," but not "angry." (Tr. 471.) This testimony strikes me as implausible since the revision was clearly targeted as a response to what management viewed as misconduct by Painter. Furthermore, if implemented, the proposal would constitute a radical and obviously deleterious change in Painter's terms and conditions of employment. Given the actions Painter took in the hours immediately following the next negotiating session, I conclude that his attempt to characterize his emotional state as placid in his testimony is not credible, especially in light of his prior sense of frustration that was so clearly articulated in his article for the newsletter.

Turning now to the actual bargaining session of April 28, it began with the presentation of the Employer's revised proposal, a document that Coates characterized as making "a 180-degree turn from where the Union's committee thought we were." (Tr. 142.) Beyond this, the management team began the discussion with another announcement that also reflected its concern regarding economic conditions. Meisner testified that "as a courtesy," they told the Union's negotiating committee that, "we may need to explore possibly laying off a few people, 20ish people." (Tr. 777.) He described the information provided to the Union as follows:

We had, you know, kind of laid out what departments we thought would be affected by either a layoff or a shared work week or whatever it was going to be. But we didn't have a lot of specifics at that point.

(Tr. 777.)

Coates confirmed that management raised the specter of prospective layoffs or a reduction in the work week affecting the

¹⁷ It is apparent that this was a response to a discussion between Meisner and Painter that took place shortly before the proposal was drafted. In that conversation, Painter had conceded that he was not adhering to the mediated agreement regarding his use of worktime to engage in union business. Indeed, Meisner reported that Painter went so far as to deny the existence of that agreement.

Parts Focus Factory portion of the Painted Post operation. He indicated that the parties discussed the possibility of a 32-hour work schedule and the manner in which this could be implemented. The Union also requested a list of the departments that would be affected.

Painter also described the discussion regarding the future loss of work. He confirmed that the Company's revised written proposal was silent as to this matter. Orally, the Union's committee was advised that a 32-hour workweek was being contemplated for certain departments. Management was currently unable to provide a list of the departments that would be affected. Painter conceded that they were told that this proposal for a 32-hour workweek was not going to be effectuated for a couple of months.

The negotiating session terminated sometime between 7 to 8 p.m. The Union's unhappiness with the course of events that day was documented in a memorandum it issued to the bargaining unit members that evening. That memo reported that "the company has made a drastic step backwards" in presenting a revised proposal. (GC Exh. 3.) It added that management had also "proposed a 32 hour workweek during the summer," and concluded by asserting that "[t]he company has no interest in reaching an agreement." (GC Exh. 3.)

In his testimony, Painter recounted what occurred after the negotiating session ended. As he explained it,

After the meeting, I was frustrated by the proceedings that day. I returned home. I was concerned that there was going to be an upris[ing] from the employees themselves having the knowledge that we had thought we were close to an agreement and we actually had taken a step backwards with the revised proposal and I decided to employ the strategy of calling the Stock Analysts.

(Tr. 322.) In an effort to explain his purpose in making such calls, Painter elaborated:

[W]ell, it would give the Analysts a—the Union's perspective of negotiations and it would put pressure on the Company to negotiate, to reach an agreement because I knew that there was going to be another [earnings] conference call. As I recall, it was scheduled for the 30th of April.

(Tr. 324.)

Significantly, Painter testified that he chose not to discuss this plan with any of the Union's leaders or members. He made the telephone calls that evening from his home. Before doing so, he drafted a script. As he explained, "I always tried to make sure that the exact same message was given to all the financial analysts." (Tr. 396.) He also reported that he made the calls that evening after normal work hours so that he would not have to speak with any of the analysts but would be able to communicate solely through the use of voicemail.

Having made the unilateral decision to contact the investment analysts who studied the Employer's finances and operations, Painter used his script to leave the same message on the voicemail of each analyst. Because that voicemail was preserved by one of the analysts and later provided to the Employer, there is no dispute as to the precise content of Painter's message. As stipulated by the parties, that message was as follows:

This is a representative of union employees at the Dresser-Rand Company.

Negotiations between Dresser-Rand and Local 313 at Painted Post operations took a turn for the worst April 28th.

The workload and backlog at Painted Post has fallen off dramatically, and the Company has proposed a possible 32-hour work week.

Negotiations are forthcoming at the Dresser-Rand Wellsville operations, and it's not looking good at this time that an agreement will be reached by August 15, 2009.

Olean's workload has also dropped off by 50 percent.

Mr. Volpe stated in his year-end conference call that employment levels would be maintained.

(GC Exh. 8(a).)¹⁸

The parties were scheduled to resume negotiations at a local hotel early on the next morning, April 29. The Union's negotiating team gathered at the hotel but the session was delayed by management for a period of several hours. During that delay the Union's negotiators discussed the Company's revised proposal among themselves. Nevertheless, Painter failed to report his actions the previous evening. I found this to be both puzzling and troubling. In order to gain a better understanding, I asked Painter why he chose not to inform his colleagues about his contact with the investment analysts. The best he could offer in response was that, "I—I just didn't. It wasn't a topic of discussion." (Tr. 407.) Of course, this explains nothing since outreach to the investment analysts could not have been a topic of discussion for the simple reason that, with the exception of Painter, nobody on the Union's negotiating committee knew that it had occurred. Given this response to my inquiry, I then asked Painter whether he did not think it important for his fellow committee members to know about his contact with the analysts. He replied, "[w]hether it was important for them or not, I really didn't think about it at that time." (Tr. 408.)

As may be anticipated, management's delay in attending the negotiating session was caused by consternation due to reports from financial analysts regarding Painter's voice mails. Derrico, the Company's director of investor relations, testified that April 29 was going to be a busy and important day for the Company's management. The Company planned to release its earnings report for the first quarter of 2009 and an accompanying press release. This was going to be followed on the next day with a conference call for investors and the public. Instead, the first thing that actually happened on April 29 was that he received four reports from investment analysts regarding Painter's message. They told him that the unidentified caller had described himself as a union representative and had reported on the status of labor negotiations in the New York State facilities and on the level of work at the plants. On hearing the nature of the caller's representations, Derrico concluded that they were "misinformation" and that they "misrepresented the situation." (Tr. 634.) However, Derrico explained that he was unable to

respond to the information provided to him by the individual analysts due to the securities rules prohibiting the provision of information to selected individuals rather than the general public.

On learning of Painter's calls, Derrico reported his concerns to the highest levels of management. In addition, he succeeded in having one of the investment analysts make a copy of the voicemail and transmit it to the Company. Once the stock market opened, management observed what Derrico characterized as an "unusual pattern" of activity in the Company's stock. (Tr. 634.) Specifically, Dresser-Rand stock's value was "significantly down" when compared to the value of stocks for the 32 companies that comprised the market's Oil Service Industry Index (OSX). Derrico explained that this was noteworthy because, under normal circumstances, "our stock trades fairly consistently with the OSX." (Tr. 635.) Management concluded that the drop in stock value was attributable to the statements contained in the voicemail to the analysts, particularly the representation that, as Derrico put it, "the workload at Olean was down 50%."¹⁹ (Tr. 636.) This assertion constituted a direct and powerful attack on the credibility of the Company's management since they had been telling investors that, "we had a strong backlog [of work] and that was going to, you know, support our expectations for [2009]." (Tr. 647.)

In light of the situation on Wall Street, management decided to seek permission from the New York Stock Exchange to issue a press release to rebut the perceived misrepresentations. The Exchange granted authorization for this action and the press release was issued at 10:44 a.m. As of 1 p.m., the Company's stock was down 7 percent in value since the opening of the market. In contrast, comparable stocks were flat or slightly higher than at the beginning of the day. In addition, the volume of activity in the stock was highly unusual. Derrico testified that the average daily volume of trading in the Company's shares was less than a million. On this date, there were 4.5 million shares traded. This constituted the third highest volume of activity in the corporation's history as a publicly traded entity.²⁰

In light of this situation, management again contacted the Exchange at 1 p.m. During this conference, it was decided to halt trading in the Company's stock until there had been time for the Company to issue its earnings report and investors had been given a chance to digest its contents. That report was issued at 2:38 p.m. and trading was resumed at 2:45 or 2:50 p.m. After that, the stock regained most of its value, ending the trading day with a loss of 1.32 percent.²¹ Derrico opined that the cause of the volatile trading in the Company's shares was the content of the voice mails delivered to the investment ana-

¹⁹ The only other specific statement from Painter's voicemail that Derrico cited in this connection was the assertion regarding the negotiations at Wellsville.

²⁰ The only two dates that had seen higher volumes were the day of the initial public offering and another day on which the Company had offered a new issue of stock.

²¹ A chart that documents the trading history of the stock throughout April 29 is in the record as R. Exh. 5(a). It shows a dramatic decline in value in the middle of the day, especially when compared to both the OSX and Dow Jones (DJI) indices.

¹⁸ GC Exh. 8(a) is a corrected transcript of Painter's voice mail. A recording of that voicemail is preserved in the record as GC Exh. 8.

lysts since, “[t]here was no other information to our knowledge in the marketplace that would cause our stock to react the way it reacted from the opening bell, until we communicated more fully the facts.” (Tr. 662.)

It will be recalled that the Union’s negotiating team had been kept waiting throughout this hectic morning while management attempted to address the crisis on Wall Street. Meisner testified that the Company’s negotiating team had actually arrived at the site of the talks at 7 a.m. At 8 a.m., they learned that “some analysts had been called and left messages about workload at Painted Post and a 50% reduction in the work.” (Tr. 779.) This caused the Company’s negotiators to attempt to divine whether the information had come from “the group we were meeting with, the Local’s negotiating committee.” (Tr. 779.) It was decided to use a ploy to see if committee members would admit to being the source of the voice mails to the analysts.

At approximately noon, the management negotiators finally met with their union counterparts. As the meeting began, the Company’s labor attorney, Louis DiLorenzo, Esq., executed his ploy.²² As Coates and Painter described, DiLorenzo began the meeting by chuckling while stating that “somebody was getting good at this game.” (Tr. 347.) He then informed the committee that someone had contacted the investment analysts. None of the union officials present made any response to DiLorenzo’s attempt to elicit information regarding the contacts with the analysts. Finally, DiLorenzo posed a significant question to the Union’s negotiators, a question that Painter testified he “distinctly” remembered. (Tr. 478.) That question, addressed specifically to the Union’s attorney, Thomas Murray, Esq., was whether the Company’s negotiators had previously “mentioned anything about a 50% reduction in work.” (Tr. 780.) Murray checked his notes and replied that the Company “didn’t mention anything about a 50% reduction in backlog.” (Tr. 781.)

Having failed to elicit any response to DiLorenzo’s attempt to learn about the contacts with the analysts, the management team entered into brief negotiations. However, after a short period, Director of Human Resources Wallace joined the meeting in order to read a prepared statement. The statement began by reporting the communications from investment analysts indicating that a union representative had informed them, “among other things, that Dresser-Rand ‘volumes’ have declined by 50%.” (GC Exh. 31.) Wallace went on to assert that “giving material misinformation to individuals outside of the Company is a violation of Company policy.” (GC Exh. 31.) The Company advised that it would be conducting an investigation and formulating a response. With this, the negotiation session ended at approximately 12:30 p.m.

After the session, the management team retired to their caucus room. Once there, they were played the recording of the voice mail that had been provided to the Company by one of the investment analysts. As Meisner described, “it was Mr. Painter’s voice on the recording.” (Tr. 782.) Having learned who made at least one of the actual telephone calls, the managers addressed the question of “whether there were more folks in

that room that had knowledge and didn’t—just didn’t speak up for whatever reason, or was it a solo act.” (Tr. 783.) Meisner testified that, in order to determine the extent of involvement in the calls by union officials, it was decided:

to do the investigation simultaneously using multiple interviewers and note takers. So that we could segregate individuals so we’d understand what that person’s story was around these—around this issue and not actually have them be able to go straighten out their story with another person who was getting investigated.

(Tr. 784.)

While management met to chart their response to Painter’s contact with the analysts, Painter maintained his silence. At trial, counsel for the Employer probed Painter as to this. He noted that Painter had testified that he believed that his actions had not involved any misconduct and Painter confirmed that this was his state of mind. Counsel observed that he had pointedly raised the issue with the Union’s team at the session. He then asked Painter why he did not discuss his involvement with his teammates after the session concluded. In other words, given his belief that he had not done anything wrong, why did he not advise the team of his actions in advance of the Company’s investigation? To this series of logical questions, Painter could only reply, “I don’t know exactly why not, to be honest with you.” (Tr. 409.) The fact remains that Painter did not tell anyone about his involvement with the calls to the analysts at any time prior to the Company’s investigatory interviews of the members of the Union’s negotiating team.

On April 30, the Company conducted its investigation in the manner that had been formulated the previous afternoon. Management assigned a number of its officials to undertake simultaneous investigatory interviews with officers of the Union. Arrangements were made for each interviewer to be accompanied by a separate note taker. In addition, union stewards were designated to participate in each interview as the representative of the interviewee. Each interviewer was instructed to use the same script of questions. Copies of that 12-page script were introduced into the record, including General Counsel’s Exhibit 32.

The interview script contains questions directed toward a number of topics. It begins by advising the interviewee that the purpose of the interview is “to ask you some questions regarding the recent disclosures to securities analysts of misleading information relating to the Company made by a person who said he was a representative of our employees.” (GC Exh. 32, p. 1.)

The script goes on to note that the Employer has “asked” a named steward to “be present during this interview as your representative.” (GC Exh. 32, p.1.) The interviewee is asked whether he wishes to use the services of that representative or waive representation. Interestingly, the script contains a parenthetical aside containing advice for the interviewers in the event that an interviewee requests a representative who is “one of the other people being interviewed (or serving as a union rep in another interview).” (GC Exh. 32, p. 1.) In such a circumstance, the script instructs the interviewer to tell the subject that “this person is not available” and to again inquire as to whether

²² As Meisner recounted, DiLorenzo was “trying to get a reaction from the group and the room to see if anybody was going to own up to having called some analysts.” (Tr. 780.)

the subject wishes to use the services of the union representative that has been provided or wishes to waive representation.

After these preliminaries, the interview script poses a series of questions to determine whether the subject is a union officer and to define the duties and authority of any such officers within the Union. The next set of questions is designed to elicit an account of the events that occurred during the parties' negotiating sessions on April 28 and 29. This was followed by questions regarding internal Union discussions concerning those negotiations, including the formulation of "plans to provide information to the press, public and/or securities analysts." (GC Exh. 32, p. 6.) Finally, an extensive set of questions was posed regarding the calls that had been made to the analysts, including questions about the content of the calls and inquiries about the Union's sources of information regarding the factual statements that had been made in those calls.

Having completed these extensive preparations, management summoned the interviewees and the designated union representatives to the lobby of the facility's main building in the early afternoon of April 30. Coates testified that he was among those directed to report to this location. When he arrived, he observed a group of other union officials, including the members of the negotiating committee and a number of shop stewards. Coates reported that he made the following statement to the assembled union members:

[I]f this is an investigation about the, what had happened yesterday at the, on April 29th, at the negotiation session, I said "just tell them to refer all questions to our legal counsel."

(Tr. 153.)²³

In stark contrast to Coates' testimony that he clearly grasped the likely subject of the upcoming investigatory interviews, Painter contended that he was unable to anticipate the reason for the investigation by management. Painter testified that he was notified to report to the lobby where he observed a gathering of union officials. He described his purported reaction as, "I didn't know why we were there." (Tr. 348.) Of course, this strains credulity given that Painter was the one person most likely to comprehend the reason for the investigation since he had been the only individual involved in the contacts with the investment analysts.

Painter's testimony on this point became even more fantastic. Thus, he reported that on his arrival in the lobby, he heard Coates tell them, "that if this pertained to the statement made by Mr. Wallace earlier connected with the contact with the Stock Analyst, that we were to refer all questions to our Labor Attorney." (Tr. 348.) Despite this clear warning from Coates that the purpose of the interviews appeared to be an investigation of the contacts with the analysts, Painter continued to assert that he remained ignorant of what was about to occur. He reported that he entered an interview room and saw Meisner and another management official, Bill Vanderhoof present in the room. Also present was Shop Steward Paul Seager. Painter

testified that "[a]s it began, I looked at Mr. Seager and I thought that he was in trouble." (Tr. 348.)

It is evident that an assessment of Painter's credibility is crucial to the resolution of many of the issues involved in this case. It is impossible to ignore the impact of his testimony regarding his state of mind as his investigatory interview began. He had been present on the previous day when Wallace had read his written warning advising the Union that management would be investigating the calls to stock analysts. He was the only union official who knew the identity of the caller. Beyond this, he had just heard his union president counsel that, in the event the questions related to the topic raised by Wallace, he should refer all responses to their attorney. Yet, Painter would have one believe that he remained blissfully ignorant as to the reason he was being called in for an interview, even going so far as to claim that he believed that he was being summoned to serve as Seager's representative and wondering what offense management may have been accusing Seager of committing. None of this is credible and Painter's claims in this regard erode the reliability of any of his remaining accounts concerning the events of this case.

As planned, management conducted a series of simultaneous investigative interviews using the list of prepared questions. Among those subject to the interviews were three union officials who testified about them: Coates, Painter, and Union Vice President Schoonover.²⁴ Management participants also presented testimony about the content of these interviews.

Coates testified that his interview was conducted by McDonnell and that Julie Williams was present as the note taker. Also present was Jack Scranton, a shop steward. Although Coates had not selected Scranton to serve as his representative, he reported that he did not make any objection when McDonnell told him that Scranton was present in that capacity. Notes of this interview show that Coates answered all of the questions, including those directed toward internal union procedures and discussions, as well as, those addressing the contact with the investment analysts.

Painter was interviewed at the same time as Coates. As previously indicated, the interviewer was Meisner and the note taker was Vanderhoof. Shop Steward Seager had been selected to serve as Painter's union representative. At the beginning of the interview, Painter asked Meisner, "[a]re you choosing my steward?" (GC Exh. 33, p. 1.) Meisner replied, "No, [we are] offering you representation." (GC Exh. 33, p. 1.) Painter testified that he told Meisner, "that Paul Seager was not my representative and I requested that Steve Coates accompany me to represent me." (Tr. 349.) Meisner's testimony also noted Painter's request for Coates. In reply, Meisner reported that he explained that "Coates isn't available, because he was actually in another room being interviewed at the same time." (Tr. 795.) Vanderhoof's notes summarize the discussion with Meisner telling Painter that "Paul is available, Steve is not." (GC Exh. 33, p. 1.) According to the notes, Painter then says,

²³ Paradoxically, Coates testified that he failed to follow his own advice. Instead, he chose to answer the interview questions because he knew he had nothing to hide.

²⁴ The record contains management's notes from interviews with Coates, Painter, Schoonover, Chris Austin, Brian Scouten, George McNally, Gary Warner, and Jeff Ingersoll. See GC Exhs. 32 through 42.

“I disagree with this, but let’s go ahead.” (GC Exh. 33, p. 1.) The discussion ends with Meisner asking if Painter wanted Seager “to stay or go,” to which Painter responded, “[n]o, he’s fine.”²⁵ (GC Exh. 33, p. 1.) In his testimony, Painter confirmed that he did not request anybody apart from Coates.²⁶

Once this issue of representation had been resolved, Meisner proceeded to ask Painter the questions listed on the script and Painter responded to them. In reply to a direct question regarding his knowledge of the disclosure of information to a securities analyst on April 28, Painter reported that he was not aware of this and that his first knowledge regarding it came from DiLorenzo’s comments on the following day. Indeed, he went so far as to assert that DiLorenzo’s report struck him as “quite shocking.” (GC Exh. 33(a), p. 9.) When asked who made the calls, Painter said he had “no idea.” (GC Exh. 33(a), p. 10.)

In his trial testimony, Painter readily conceded that he had not been truthful in his responses to the interview questions. He explained that he prevaricated because he was afraid of losing his job since, “[w]e were told by Mr. Wallace on the 29th that the Company was going to follow up, do an investigation, have a lawsuit basically involved with it, and that whoever was responsible would be terminated.” (Tr. 351.)

The remaining union official who testified regarding his interview was Schoonover. After being summoned to the lobby, he joined his colleagues in discussing the reason for their presence. They concluded that the topic “must have been” the contact with the securities analysts. (Tr. 591.) He noted that Coates had advised them to refer such questions to the Union’s lawyer. On entering the interview room, Schoonover was met by the interviewer, Susan Blajewski, and note taker, Jim McPhail. The remaining person in the room was Tim Reed, a recently elected shop steward.

Schoonover testified that, “I wasn’t comfortable with Tim being my representative, because he’d only been a shop steward for a matter of a month or two.” (Tr. 574.) As a result, he stated that, “I would like to have the president of the union [Coates] or the chief plant steward [Painter], or somebody that I thought as as experienced, or had more experience.” (Tr. 574.) Blajewski left the room and returned a bit later. She told Schoonover that Reed “was the only one that I was going to be allowed to have.” (Tr. 576.) She advised him that he could waive representation or continue the interview with Reed as representative. He agreed to continue with Reed.

The notes of Schoonover’s interview report that he told management that he, “wants Union President or Chief Plant Stew-

²⁵ During cross-examination, Painter confirmed that he did make the statement about Seager that “he’s fine.” (Tr. 547.)

²⁶ In another example of the troubling nature of Painter’s trial testimony, he asserted that he sought to have Coates replace Seager because, “Seager was unaware of anything that was going on concerning the situation that we were going to talk about, concerning the cold calls to the analysts.” (Tr. 447.) This makes little sense since Painter was well aware that no other union official knew “anything that was going on concerning the situation” because he had failed to inform anybody regarding his activities. When confronted with this fact on cross-examination, he merely reported that he meant that Coates knew about the calls that had been made in the previous year under specific authorization of the Union. This explanation was unpersuasive.

ard.” (GC Exh. 37, p. 1.) They further reflect that after leaving the interview room, Blajewski returned and told Schoonover, “that Coates + Painter were unavailable and Tim Reed is assigned to represent you.” (GC Exh. 37, p. 1.)

On cross-examination, counsel for the Employer tied up a loose end presented by these two versions of what transpired regarding Schoonover’s request for different representation. Thus, Schoonover confirmed that Blajewski specifically denied his requests for Coates and Painter. He also reported that, “[s]he didn’t refer to anybody else that I’d asked for, I mean, because, I didn’t ask by name.”²⁷ (Tr. 586.)

Although they were not called to testify, evidence of record indicates that two other interviewees requested the presence of a different representative from the one designated to attend their investigatory interviews. Thus, the interview notes from Chris Austin’s meeting show that he requested that Coates serve as his representative. He was told, “No, it cannot be Steve—he is part of the investigation and he understands that.” (GC Exh. 35, p. 2.) Interview notes also indicate that Brian Scouten requested that Painter serve as his representative. The notes do not contain the response from the interviewer, but it is clear that the request was not granted. (See GC Exh. 39, p. 1.)

At the conclusion of this round of interviews, Meisner met with McDonnell to discuss what action to take next. As McDonnell explained:

[A]t that time we knew it was Glenn [Painter].²⁸ At least Glenn as a person that made the calls to the analysts. We [we]re still doing the investigation to see if there were others. And I felt that it was important, since my relationship with Glenn, to give him an opportunity to tell the truth.

(Tr. 685.) It was decided that they would conduct a second interview with Painter. Upon entering the interview room, they told Vanderhoof to leave. By the same token, Painter instructed Seager to leave the room.²⁹

As the second interview began, McDonnell told Painter that the Company had knowledge of his actions, adding, “Glenn, I need you to do one thing; tell the truth.” (Tr. 866.) Meisner testified that, at that point, “Glenn was—kind of hung his head

²⁷ At another point in his testimony, Schoonover again confirmed that he did not request anyone other than Coates or Painter by name. This is interesting since he also testified that, in the past when he had been the subject of investigatory interviews, he had been represented by other union officials, specifically Micky Keefer and Floyd Hilfinger. He did not explain why he refrained from requesting them or anyone else on this occasion.

²⁸ It will be recalled that management possessed a recording of Painter’s voice mail to one of the analysts. As a result, there was no doubt whatsoever that Painter had made this phone call, nor was there any doubt as to the contents of the call.

²⁹ It is relatively easy to understand that Painter would wish to avoid the embarrassment and humiliation involved in having Seager hear what was about to transpire. Despite the obvious reason for Painter’s decision to dismiss Seager, he felt it necessary to offer a different rationale in his testimony. Thus, he claimed that he told Seager to leave because he feared that Seager would learn that he was about to be fired and that he would alert the employees, possibly leading to, “employee workplace violence.” (Tr. 456.) In the circumstances of that difficult moment for Painter, this strikes me as a highly unlikely explanation.

a little bit and said, ‘well, whatever I got to do to keep my job, you know.’” (Tr. 802.) [Internal punctuation supplied for clarity.] McDonnell told him that he could not make any promises. Painter admitted making the calls, explaining that, “he was frustrated with how negotiations had gone the day before.” (Tr. 803.) He also informed the two interviewers that he had made the calls “on his own solely” and that he had done so “on his own accord.” (Tr. 803.)

There was some dispute among the three interview participants regarding the precise nature of Painter’s explanation of his actions. Meisner and McDonnell were both clear and consistent in reporting that Painter had told them that his calls to the analysts were a product of his frustration with the negotiations that had occurred on April 28. They both testified that he did not make any mention of any concern regarding workplace violence. On the other hand, in his testimony, Painter contended that he told the men that he was “frustrated, concerned about the employees in the facility.”³⁰ (Tr. 355.) Indeed, under cross-examination, he continued to assert that his primary reason for making the telephone calls was to prevent workplace violence by pressuring management to agree to a new collective-bargaining agreement.

In resolving this conflict, I credit the testimony of Meisner and McDonnell. In particular, their testimony is echoed in Painter’s own affidavit given to the Board Agent just weeks after the event, on May 21. In that account, Painter reports that he told Meisner and McDonnell that “it was an act of frustration. I’d lost control of my emotions and that while I normally think about the consequences of my actions + that I was pretty confident my actions weren’t unlawful.” (R. Exh. 2, p. 44.) While the second portion of this statement reflects Painter’s efforts to advance his interests in this lawsuit, the first portion confirms Meisner and McDonnell’s testimony. Indeed, it adds a significant fact—that Painter had conceded that he had “lost control” of his emotions.

At the conclusion of Painter’s second interview, McDonnell informed him that he was being suspended pending investigation. He was then escorted to retrieve some of his belongings and depart the facility.

On May 2, Painter wrote an email to his fellow union officials that sheds considerable light on his state of mind both on that day and at the time he contacted the stock analysts. In this letter, he stated:

I apologize to you all for my selfish actions . . . I know that this caught you off guard . . . I acted out of frustration after Wednesday’s negotiations session and I should have consulted with you before I acted out. [Punctuation in the original.]

(R. Exh. 2, p. 183.) After describing what he had told the analysts in his phone calls, Painter went on to offer this explanation of his motivations, “I went to the Company website . . . I looked at the analysts list on that site and started calling . . . I

³⁰ At another point in his trial testimony, Painter was again asked if he mentioned fear of violence as a rationale for making the calls. He replied that it was a “pretty emotional meeting,” and, “I don’t recall whether I did or not at that—at that time.” (Tr. 472.) This testimony reinforces my conclusion that McDonnell and Meisner’s accounts of the meeting are entitled to greater credence.

snapped.” (R. Exh. 2, p. 183.) [Punctuation in the original.] Using language similar to that in his affidavit given shortly thereafter, Painter explained that “[i]t was all frustration . . . I lost control.”³¹ (R. Exh. 2, p. 183.) [Punctuation in the original.]

McDonnell testified that, after the investigatory interviews, the decision was made to terminate Painter’s employment. Director of Operations Rich was the ultimate decisionmaker, although McDonnell reported that he agreed with Rich’s conclusion. McDonnell testified that Painter was terminated for “violation of the [Company’s] code of conduct.” (Tr. 870.) When pressed for a further explanation on cross-examination, he stated that the specific violation of the code of conduct that led to Painter’s firing was “[t]he information that he provided to the analysts.” (Tr. 874.)

On May 6, McDonnell sent Painter a very brief termination letter advising him that his employment was terminated “for violation of the Company’s Code-of-Conduct.” (GC Exh. 15.) At the same time, Rich addressed a memorandum to all employees. Meisner explained that the purpose of this was “to communicate the facts, defuse rumors and insure all employee[s] understood company expectations.” (Tr. 815.) In that memo, Rich asserted that Painter’s communications to the analysts were “intended to be damaging to the Company.” (GC Exh. 27, p. 1.) He went on to warn that:

All communications to Wall Street analysts about the state of the company are subject to Securities and Exchange and other federal laws. Anyone calling our analysts and giving information to them about the state of the Company can potentially create a very serious situation for our clients and investors, because they may make investment decisions and/or purchasing decisions based on this information. If false statements create mistrust by our customers, we all stand the risk of having less of their work to do here.

(GC Exh. 27, pp. 1–2.)

Also on this day, the Union filed the original charge in this matter, alleging that Painter’s termination violated the Act. Ultimately, this charge and subsequent charges formed the basis for the Regional Director’s filing the amended consolidated complaint on July 19, 2010. In the meantime, the Union and

³¹ Counsel for the Employer asked Painter why he wrote this apology to the Union. He explained, “It was selfish of me to go ahead and make the decision to make the calls to the stock analysts, because I normally would have discussed it with them prior to, but I was really concerned that once the knowledge of what the revised proposal was out on the floor, that employees were going to react to it and felt that the message needed to get out immediately.” (Tr. 473.) As with other aspects of Painter’s efforts to justify his actions, this explanation makes little sense. It is entirely unclear how a brief delay in making calls to investment analysts in order to seek authorization from the Union would have jeopardized efforts to defuse potential workplace violence by employees. In fact, the evidence suggests that the Union’s leadership did not harbor any great concern about defusing any potential violent reaction to management’s proposals on April 29. It will be recalled that, very shortly before Painter’s phone calls, the Union issued a strongly worded memo to bargaining unit members accusing the Company of taking “a drastic step backward” and having “no interest in reaching an agreement.” (GC Exh. 3.)

the Company were able to reach agreement on a new collective-bargaining agreement that was ratified on November 6, 2009. Lastly, the parties agree that since his suspension on April 30, 2009, Painter has not been employed by the Company.

III. LEGAL ANALYSIS

In the amended consolidated complaint, the Regional Director alleges that a variety of decisions and actions taken by the Company violated the Act. Central to the resolution of these contentions is the determination of whether Painter's contacts with investment analysts constituted protected concerted activity within the meaning of the Act. Because this is a key analytic factor, I will address it first. Thereafter, I will evaluate each of the specific alleged unfair labor practices in sequence.

A. Did Painter Engage in Protected Concerted Activity?

In assessing the legal status of Painter's communications to the investment analysts, the essential starting point must be the language of the Act itself. Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

These rights are enforced through the provisions of Section 8, which prohibits coercion, restraint, or interference with the exercise of these rights or discrimination against employees because of their participation in these protected activities.

Under the guidance of the Supreme Court, the Board has established standards for evaluation of employees' activities in order to determine the parameters of the statutory protections. Thus, in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962), the Court explained that "an employer is [not] at liberty to punish a man by discharging him for engaging in concerted activities which §7 of the Act protects." As this language indicates, the Board will intervene to remedy unfair labor practices committed against employees who engage in conduct that is both concerted in nature and protected by the statute.

In this case, the Employer forcefully contends that Painter's telephone messages to the investment analysts on April 28 were neither concerted nor protected within the meaning of Section 7. I will address each prong of the analytical standard in turn.

That the precise delineation of the nature of concerted activity within the meaning of Section 7 may be complex is well illustrated by the lengthy citation required to recount the procedural history of the Board's leading case on the topic: *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers I*, the Board cautioned that a pragmatic approach is required in order to properly assess the "myriad of factual situations that . . . will continue to arise in this area of law." 268 NLRB at 497. The key concept is that concerted action must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB

at 497. The Board refined this a bit in *Meyers II*, observing that the Act "requires some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7." 281 NLRB at 884.

It is uncontroverted that Painter acted entirely alone. He neither informed his coworkers of his plans, nor did he seek their authorization. Indeed, even after the Company announced its investigation, he chose to remain silent rather than informing his colleagues of his prior activities. It is clear, however, that the unilateral nature of his actions does not automatically disqualify them from classification as concerted activity. As Justice Brennan explained on behalf of the Court:

[I]t is evident that, in enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.

NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 835 (1984).

As is consistent with this analysis, the Board declines to require any proof of authorization in order to establish that a solitary individual engaged in concerted activity. As the Board explained in a case where the trial judge had ruled otherwise:

We disavow the judge's analysis to the extent that the judge's decision can be interpreted as requiring express authorization of [the employee] in order to find that he was engaged in concerted activity on the authority of other employees. We will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group. [Citations omitted.]

Amelio's, 301 NLRB 182 at fn. 4 (1991).³²

From this, it can be seen that an analysis of Painter's mindset and purposes is required in order to determine whether his calls to analysts constituted concerted activity. As is so often true in labor law and life, a realistic appraisal of Painter's thought process reveals mixed motivations. I agree with the Employer's assertion that Painter's unilateral action was, in very significant part, prompted by his anger at the Company's proposal to eliminate his pay for time spent on union business. This was a proposal clearly targeted at him due to management's unhappiness with what it perceived as his misbehavior. If adopted, it

³² As the Sixth Circuit has phrased it, "it is not necessary that an employee be appointed by his fellow employees in order to represent their interests. The relevant inquiry in determining whether an employee's action was concerted, therefore, is whether the employee acted with the purpose of furthering group goals." [Citations and internal punctuation omitted.] *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 539 (6th Cir. 2000).

would have resulted in a drastic and deleterious impact on the terms and conditions of his individual employment situation. The timing of his calls to the analysts on the heels of the issuance of this proposal is too patent to be ignored. See *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970) (timing of mass layoff closely following initiation of organizing campaign was “stunningly obvious”). To this degree, I agree with the Employer that Painter’s solo outreach to the investment analysts was an individual response to the Company’s proposal to alter his own working conditions.

In my view, however, this analysis of Painter’s intentions does not go far enough. There was more to it than that. In the first place, the Company’s proposal to eliminate paid time for union business also and equally affected Scouten and McNally. Furthermore, it is entirely logical to infer that the loss of paid time on the part of its officers while they conducted union business posed a detriment to the functioning of the Union as a whole. I readily conclude that these factors also played a part in Painter’s thinking. Indeed, such considerations go to the heart of concerted activity. For example, when workers go out on an economic strike, it is natural to believe that each striker is primarily focused on the effort to improve his or her own economic situation while, at the same time, recognizing that the outcome of the strike will powerfully affect the economic situations of his or her coworkers as well.

Using the gender-specific language fashionable during the bygone era of the Board’s infancy, Judge Learned Hand took notice of the same reality, observing that when employees “in a shop make common cause with a fellow workman over his separate grievance . . . they engage in a ‘concerted activity’ for ‘mutual aid or protection,’ although the aggrieved workman is the only one of them who has any immediate stake in the outcome . . . [T]he solidarity so established is ‘mutual aid’ in the most literal sense, as nobody doubts.” *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505 (2d Cir. 1942).

While I agree that Painter’s primary motivation was anger and frustration with the proposal to eliminate paid time for union business conducted by him, he also acted out of similar concerns regarding the proposed elimination of this practice for his two colleagues and the effect of this change on the Union’s overall ability to function. Furthermore, while I am highly skeptical as to the sincerity of Painter’s claim that he acted out of a desire to avert impending workplace violence by employees, I do credit his contention that he was motivated, in part, by a general desire to pressure the Company into reaching an agreement with the Union. In his newsletter article written shortly before the key events, he asserted that the “[f]irst and foremost” factor causing frustration among the employees was “the fact that we still do not have a Contract.” (GC Exh. 21, p. 3.) Given Painter’s role as a top union leader and a member of the negotiating team, his focus on the importance of obtaining a new collective-bargaining agreement is natural.

With these considerations in mind, I conclude that, as is commonly the case in such circumstances, Painter’s motivations were a mixture of highly individual grievances and general and collective concerns about the terms and conditions of employment for his fellow union officers and the entire bargaining unit. Because Painter’s telephone calls to the invest-

ment analysts were designed to apply pressure to the Employer in order to ameliorate his own terms and conditions of employment and the terms and conditions of employment of his coworkers, they contained sufficient lineage to group action in order to have constituted concerted activity within the *Meyers II* framework.

The more difficult question presented in this case is whether Painter’s concerted activity was conducted in such a manner as to lose the protection of the Act. In the first place, Painter’s concerted activity involved communication to persons outside the employment relationship. The Supreme Court has held that such efforts to secure the aid of outside sources capable of applying pressure on the employer may typically fall within the Act’s ambit of protection. For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), the Court approved the Board’s view that the “mutual aid or protection” language of Section 7 was broad enough to protect employees when they attempt to improve their working conditions “through channels outside the immediate employee-employer relationship.”

While the Court has authorized outreach to third parties, it has also held that there are limits on the protection afforded to such communications based on their content, timing, and motivation. For example, in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), employees of a broadcasting company were in the midst of a labor dispute with the employer. In the hope of exerting “financial pressure” in order to “extract from the company some future concession,” union members picketed and distributed leaflets to the public. 346 U.S. at 477. The leaflets contained what the Court characterized as, “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” 346 U.S. at 471.

In finding the union’s leafletting to be unprotected by Section 7, the Court articulated its policy determination in this area of labor law. Noting that Section 10(c) of the Act specifically grants employers the right to discharge employees “for cause,” the Court went on to observe that “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer.” 346 U.S. at 472. Taking the Act’s language as a whole, the Court held that the enactment of Section 7 was not intended to “weaken the underlying bonds and loyalties of employer and employees.” 346 U.S. at 473.

In applying the Supreme Court’s assessment of the Act’s language and goals, the Board has enumerated a number of behaviors that, while concerted, fail to gain the protection of Section 7. Relatively recently, in *Valley Hospital Medical Center*, 351 NLRB 1250 (2007), enf. sub. nom. *Service Employee Local 1107*, 358 Fed. Appx. 783 (9th Cir. 2009), it provided a comprehensive list of these types of unprotected activity. Because of its crucial relevance to this case, the Board’s discussion bears citation at some length:

[F]inding that employees’ communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise-protected communications with third parties may be so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.

Statements have been found to be unprotected as disloyal where they are made at a critical time in the initiation of the company's business and where they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income. The Board is careful, however, to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive.

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. The mere fact that statements are false, misleading, or inaccurate is insufficient to demonstrate that they are maliciously untrue. Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act. In addition, in the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected. [Citations and internal punctuation omitted.]

351 NLRB at 1252–1253. Virtually every aspect of this formulation of the Board's standards is at issue in this case. I have given careful thought to the proper assessment and balancing of interests required by the quoted language.

Before reaching conclusions as to the ultimate issues, it is necessary to examine Painter's statements, both individually and as a whole. Fortunately, there is no dispute among the parties regarding what he actually said. Indeed, there cannot be any such dispute as Painter's words are preserved in the record exactly as they were spoken.

Painter began his communication with each analyst by identifying the speaker as follows: "This is a representative of union employees at the Dresser-Rand Company." (GC Exh. 8(a).) I find this introduction to be troubling on several levels. In the first place, it is anonymous. This stands in contrast to Painter's earlier outreach to the analysts. It is clear that he made no previous effort to camouflage his identity since he engaged in email communication with Analyst Read and discussed his contacts with both his union colleagues and top members of management.

Painter's deliberate decision to withhold his identity during the calls, coupled with his failure to report his authorship of the calls to his colleagues and his dishonest denial of such authorship when questioned by management all point to a certain state of mind. It is common human understanding to recognize that an identified speaker is placing his credibility and reputation on the line when making assertions. A caller who hides behind the cloak of anonymity is psychologically freed from the need to behave in a manner that protects his or her reputation. Painter's unprecedented decision to proceed anonymously suggests a greater willingness to make statements that were malicious or reckless.

Beyond the fact that Painter's introduction concealed his identity, it poses two additional problems. By claiming to be a "representative of union employees," Painter was creating an impression that his contact with the investment analysts was authorized by the Union. The strength of this impression was increased by the fact that Painter had made prior authorized contacts with the same analysts. While those analysts may not have known the identity of the current anonymous caller, they knew that Local 313 had engaged in such outreach in the past. Painter's choice of language was designed to foster a false impression that the Union was behind the contacts and endorsed the statements and assertions being made in those contacts. Of course, such an impression was entirely false, a fact well known to Painter, but unknown to his listeners.

Finally, there is an even more troubling aspect to the misleading manner in which Painter chose to identify the caller. He told the analysts that the speaker was a representative of "union employees at the Dresser-Rand Company." (GC Exh. 8(a).) Given that his target audience was intimately familiar with the Company's far flung operations and relationships with a variety of labor organizations, this choice of language was highly misleading. By not referencing Local 313 or at least the Painted Post facility, Painter was leaving the false impression that the caller represented employees beyond those at Painted Post. This impression was soon strongly reinforced when Painter made his series of assertions about all three plants in New York State. By claiming that he was a representative of union employees in general, he left the distinct sense that his statements about Olean and Wellsville were those of a representative of the employees at the two other plants. It also follows that the listeners would be likely to conclude that a speaker who represented those employees would be a knowledgeable informant about the Company's operations in Olean and Wellsville.

Based on these conclusions, I find that Painter's initial identifying remark provides a probative insight into his state of mind. The content of the statement is consistent with a mindset that is prepared to engage in deceptive, reckless, and malicious misconduct. In setting the stage for his communication to the analysts, Painter made false and misleading statements specifically designed to enhance the credibility of his assertions in an untruthful way.

Painter's next statements constituted his first report about the Company. He informed the analysts that negotiations between the Company and Local 313 took a turn for the worst on April 28. This portion of Painter's remarks is completely free of problems. The sentence contains a statement of fact and an opinion. There can be no dispute that the parties conducted negotiations on April 28. Painter's opinion that the session had gone poorly in terms of the hope of reaching any agreement was well supported by the events on that day. Even more importantly, his choice of language made it clear that he was expressing an opinion about the course of the negotiations, not making a statement of objective fact. Standing alone, this statement would certainly constitute protected activity within the meaning of the Act.

Painter continued his remarks by adding another report regarding conditions at Painted Post, the facility about which he

was best informed. He told the analysts that “[t]he workload and backlog at Painted Post had fallen off dramatically.” (GC Exh. 8(a).) Here, his choice of adverb informs the listener that he is giving a subjective opinion or assessment. It may be that, as the Company contends, Painter’s opinion was unjustified given the actual state of the workload at Painted Post. Nevertheless, as the Board explained in *Valley Hospital Medical Center*, supra, merely biased or hyperbolic statements do not forfeit the speaker’s protection under the Act. Here, Painter testified that his union duties caused him to travel around the plant. During the course of these travels, he observed, “a number of departments where people had nothing to do.” (Tr. 326.) In addition, it is undisputed that the Employer had just warned the Union that there was some possibility of layoffs in the next few months. If Painter’s claim that there had been a dramatic loss of work was an exaggeration, it was not so extreme as to justify a finding of malice or recklessness. Once again, standing alone, Painter’s claim about the volume of work at Painted Post would constitute protected activity.

Painter made another statement that also concerned Painted Post, although he did not specifically tell the listeners that this was the location to which he referred. He informed the analysts that “[t]he company has proposed a possible 32-hour work week.” (GC Exh. 8(a).) On balance, coming immediately after his two prior statements about Painted Post, I do not find it particularly troubling that he failed to state that the management proposal for a reduced workweek did not involve any other plants. It is clear that Painter was referring to the topic raised by management at the April 28 session. Once again, Painter engaged in a certain degree of exaggeration. Apart from not making it explicit that the proposal was limited to Painted Post, Painter also failed to reveal that the proposal was further limited to the Parts Focus factory portion of that facility. Nor did he report management’s statements that the layoff would affect approximately 20 workers out of the more than 300 employed at Painted Post. Once again, I am not concerned about the exaggeration or puffery designed to make the employment situation at Painted Post look as bad as possible. The fact remains that Painter’s statement was at least grounded in some objective reality. Furthermore, Painter took the trouble to inform the analysts that the Company’s proposal was for a “possible” reduction in the work week. (GC Exh. 8(a).) I do not conclude that this statement or the combination of statements about conditions at Painted Post were of a type that would forfeit protection.

Unfortunately, after making lawful statements about the subject that he knew the most about, Painter chose to make assertions about two other facilities, topics on which he lacked firsthand knowledge. While one of these statements is phrased in a manner that retains its protected character, I find that the other is clearly unprotected.

The first statement addresses the labor situation at the Wellsville operation. After noting that collective-bargaining talks would be “forthcoming” at that plant, Painter reported that, “it’s not looking good at this time than an agreement will be reached by August 15, 2009.” (GC Exh. 8(a).) The August 15 date is significant since that was the expiration date for the existing Wellsville contract.

By way of pertinent background information, it is useful to examine the course of the Wellsville negotiations. The Steelworkers and the Employer engaged in early contract talks from November 12 through 26, 2008. They were unable to reach agreement and did not resume negotiations until July 14, 2009. Those negotiations were fruitful and a new collective-bargaining agreement was reached in time for a seamless transition on August 15, 2009. At no time did the parties to the Wellsville talks engage in a strike or lockout.

It will be readily observed that Painter’s forecast for Wellsville was unduly pessimistic. Of course, this is an easy conclusion to reach given the benefit of perfect hindsight, something Painter obviously lacked. Painter testified that he based his negative assessment on statements made by the president of the Steelworkers local, Austin. These statements were made at a quarterly meeting of the officials of the three Southern Tier locals in the first week of March 2009 and at a meeting held by those officials on an occasion when they were all together attending a safety summit on April 22.

Painter reported that, at the quarterly meeting, Austin informed them that, if the Company insisted on terms such as those proposed during early negotiations, “they would probably not come to an agreement.” (Tr. 327.) In explaining the basis for his forecast regarding the course of labor negotiations at Wellsville, Painter placed greater reliance on statements made at the time of the safety summit. This meeting of the union chiefs was held on April 22, very shortly before Painter’s calls to the analysts. Coates testified that Austin reported that, “things weren’t looking good” and that the Company was demanding “more restrictive language.” (Tr. 178, 262.) Schoonover also attended this meeting and testified that Austin told them that, based on the results of early negotiations, “things weren’t looking up.” (Tr. 579.) While Painter did not attend this meeting, he reported that his colleagues informed him of Austin’s views.

In evaluating the legal status of Painter’s representations regarding the Wellsville negotiations, I am troubled by his intentional effort to misrepresent the likelihood that the statements were based on solid information. By claiming that he was an anonymous representative of Dresser-Rand’s union employees, Painter left the impression that he would be in a position to speak authoritatively regarding the course of negotiations for those unionized employees. Of course, in actuality, he lacked any personal knowledge whatsoever regarding the status of the bargaining talks. His only basis for the assertions that he chose to make consisted of hearsay and double hearsay reports from Austin, Coates, and Schoonover.

Painter’s decision to make claims to the analysts about labor conditions at a plant where he held no union office and had no personal knowledge bespeaks a mindset that was prepared to convey significant negative information about his Employer without regard to any consideration of whether he possessed adequate knowledge as to the veracity of that information. Despite these concerns on my part, I must conclude that Painter’s choice of wording was sufficiently vague to preserve his protection under the Act. By telling the analysts that the labor situation at Wellsville was “not looking good at this time,” he was implicitly informing the analysts that this was simply a

forecast of future events. By its nature, such a prediction represents an opinion rather than a statement of fact. While I conclude that Painter's basis for his opinion was recklessly weak, I also find that Section 7 permits him to offer such an opinion so long as it is clearly couched in language that conveys to the listener that it is a mere forecast of future events. Because Painter's remarks about Wellsville referred to the Employer's labor relations and were couched as predictions of the future course of such relations, I conclude that they were protected within the Board standards as summarized in *Valley Hospital Medical Center*, supra, 351 NLRB at 1252–1253.

It is now necessary to examine Painter's final two assertions. This brings us to the crux of this case. Having warned the analysts that the Company faced an unfavorable labor relations situation at Wellsville, Painter turned his attention to the Employer's remaining operation in New York State. However, in sharp contrast to his choice of topics about Wellsville, when discussing the Olean plant, Painter did not address labor relations. Instead, he chose to make representations to the analysts regarding Olean's production. He reported to those analysts that, "Olean's work has also dropped off by 50 percent." (GC Exh. 8(a).) This statement was qualitatively different from all of Painter's prior assertions to the analysts. It neither discussed labor relations nor did it offer an opinion or prediction. Instead, it purported to inform the analysts of a specific fact regarding the state of Olean's workload.

In evaluating Painter's Olean statement, I was first struck by the fact that the Employer immediately focused on this portion of Painter's recorded remarks. Thus, Derrico testified that, after watching the market value of the Company's stock decline sharply, managers concluded that Painter's communication with the analysts must have been transmitted to their clients and was affecting their decisions. I pursued this as follows:

JUDGE: Did you have a sense as to what particular information would account for that?

DERRICO: Well we believed the fact that certain information was being misrepresented, including a statement that the workload at Olean was down 50%. That was not consistent with our own communications or what expectations we believe were in the marketplace.³³

(Tr. 635–636.)

Derrico's account of the significance to management of the Olean representation was compellingly confirmed by DiLorenzo's statement to the Union's negotiating committee on that date. It will be recalled that he began the negotiating session by telling the Union that "somebody has been getting good at this game." (Tr. 347.) After reporting that the analysts had been contacted, DiLorenzo pointedly asked the Union's attorney whether anyone from management had previously "mentioned anything about a 50% reduction in work." (Tr. 780.) Counsel for the Union examined his bargaining notes and confirmed that no such statement had been made "about a 50% reduction in backlog." (Tr. 781.) I find it highly significant that the Employer's labor relations attorney would immediately

focus his attention on Painter's specific factual assertion regarding workload at Olean.

The evidence contains additional confirmation that the comment about Olean was the subject of immediate concern among members of management. At the session that began with DiLorenzo's query regarding the 50-percent reduction in work, Director of Human Resources Wallace read a prepared statement warning the Union that the Employer was going to investigate "material misinformation" that had been provided to the analysts. (GC Exh. 31.) Wallace described what had been conveyed to the analysts as, "among other things, that Dresser-Rand 'volumes' have declined by 50%." (GC Exh. 31.) Once again, it is apparent that the assertion regarding Olean was very much on management's mind in the immediate wake of the discovery of Painter's calls.

It is clear to me that management had genuinely and reasonably concluded that Painter's specific factual assertion regarding the situation at Olean was particularly damaging to the value of the Company's stock and to the credibility of the statements made by the Company's managers. I further note that Painter's decision to misrepresent himself as a representative of union employees without limiting his designation to Painted Post served to enhance the damaging nature of his representations regarding the workload at Olean. Given the intentionally vague description of the anonymous caller's position and authority, the analysts were misled into a logical assumption that the caller would have direct knowledge of the workload at Olean since he was a representative of the Company's union employees, a category that included those employees engaged in production at Olean.

Central to the Employer's decision to terminate Painter is the contention that Painter's factual assertion about the workload at Olean was of a character that deprived him of protection under the Act. In order to assess this claim, I will first examine the sources upon which Painter based his statement. I will then compare Painter's statement to the evidence presented by the Company regarding the actual workload situation at Olean.

Painter provided detailed testimony as to his reasoning in making the claim to the analysts that Olean's workload had declined by 50 percent, a percentage that certainly represented a calamitous drop in production. He reported that he based his conclusion on two pieces of evidence. As he explained.

That was from John Baglione who is President of the Olean Union and it was made in a—one of the quarterly meetings that we had talked about when the three Unions got together and it was also based on e-mail correspondence that I had with a friend of mine that lived in the area and had worked for the Company previously, Larry Dominski.

(Tr. 329.)

Under close examination, these items of evidence regarding Olean are far less substantial than they may appear at first blush. For example, it would certainly be significant if Painter were claiming that Baglione told the Painted Post union officials that Olean's workload had dropped by half.³⁴ When asked

³³ Derrico went on to observe that management was also concerned about the representations regarding the labor situation at Wellsville.

³⁴ Thus, in *Valley Hospital Medical Center*, supra, the Board indicated that when an employee, acting in good faith, relayed incorrect in-

if Baglione used the 50 percent figure, Painter conceded that he did not. It turned out that Baglione had merely told them that “there was a lot of people standing around with nothing to do.” (Tr. 329.) On cross-examination, Painter was probed further about Baglione’s statements. He testified that:

[Baglione] described similar conditions to what was going on in Painted Post, where in some areas of the plant, there was a good amount of activity. In other areas in the plant, there was very little activity. There was people on overtime with nothing to do, which was very similar to Painted Post conditions.

(Tr. 436.)

Having explained the nature of the information provided by Baglione, Painter also reported on the scope of the information provided by his friend, Dominski. If the information from Baglione was vague, that from Dominski was positively evanescent. It turned out that Dominski lived in Olean, but had never worked at the Olean plant. His past work for Dresser-Rand had been at Painted Post and Wellsville. Moreover, he last worked for the Company in 2003.³⁵ Beyond even this, Painter conceded that, like Baglione, Dominski never mentioned the 50-percent figure. In fact, Dominski’s email was 6 months old. It was sent to Painter on October 20, 2008. In it, Dominski told Painter that he had been hunting with “a guy whose son works at D-R.” (GC Exh. 24.) That fellow told Dominski that his son told him that “D-R Olean sales orders are being cancelled big time.”³⁶ (GC Exh. 24.) Examination of the email clearly shows that it never mentioned any specific amount or percentage of drop in the workload at Olean. Painter confirmed that Dominski never used the 50-percent figure.

formation received from another employee believing the information to be accurate, the conduct may remain protected. If Baglione had incorrectly stated that production was down by half at Olean, this would potentially shield Painter’s conduct in passing the false information along to the analysts. However, as I am about to describe, Baglione made no such statement.

³⁵ The fact that Dominski has not been employed by the Company for years is significant. Counsel for the General Counsel argues that Painter was entitled to rely on Dominski’s information because the Board holds that good-faith reliance on statements of a coworker confers protected status. See fn. 34, above, and *KBO, Inc.*, 315 NLRB 570, 571 (1994), enf. mem. 96 F.3d 1448 (6th Cir. 1996). It is clear that the Board’s rationale for this doctrine is that information from a fellow employee may legitimately be assumed to consist of direct personal knowledge about conditions at the plant. Painter was well aware that Dominski had no current, or even recent, personal knowledge.

³⁶ The Company asserts that Painter should have known that Dominski, himself, was an unreliable source regarding Dresser-Rand. It points to an email in July 2007 from Painter to Rich in which Painter tells Rich that Dominski “worked for this company and may be a little [j]aded by the way he was treated at Wellsville.” (R. Exh. 15.) I do not place great weight on this comment since it is clear that Painter believed that Dominski was a reliable informant. For example, in an email sent by Painter to Meisner in June 2007, he described Dominski as “a [m]entor of mine . . . Always tells me the Truth . . . good source of information.” (R. Exh. 14(a).) The real difficulty with Painter’s reliance on Dominski’s email is not Dominski’s possible bias against the Company, but rather the fact that he was simply passing on third-hand gossip.

It is undisputed that Painter relied on information from Baglione and Dominski as the evidentiary foundation for his claim that the workload at Olean had dropped in half. It is equally undisputed that neither source had actually made such a representation. Naturally, on the witness stand Painter was asked to explain how he arrived at this 50-percent number. He testified that he came up with this “[e]stimate” or “[c]alculation” by considering what he had been told about Baglione’s comments and learned from Dominski’s email, combined with his own observations gleaned from walking around the Painted Post plant. (Tr. 432.) His observations at Painted Post led him to divine that, because half of the work force did not appear to be busy, the volume of work must have dropped by 50 percent. Assuming that similar conditions existed at Olean, he decided to report to the analysts that Olean’s workload had declined by that same percentage.

There are numerous difficulties with Painter’s self-reported reasoning. Of course, in the first place, a reasonable person would not find that the information he possessed was sufficiently reliable to convey to financial analysts who possessed the power to dramatically affect the value of the Employer’s stock. That information was limited to hearsay reports about a vague overall impression of the status of the workload by Baglione, virtually worthless hearsay thrice removed related by Dominski, and his own rough conclusions based on his observations at Painted Post. A reasonable person would have concluded that this level of knowledge was clearly insufficient to support an assertion that the workload had declined by half at Olean. At best, Painter’s level of information would have impelled a reasonable observer to have sought more facts before taking action that could have a grave impact on the Company and its employees, including union employees at Olean and Painted Post. To give a simple example, it would have been easy for Painter to have contacted Baglione to secure better information. The two locals maintained cooperative relations and regularly exchanged information.

Beyond the inexplicable failure to seek any verification of the state of Olean’s workload from those who might have possessed first-hand knowledge, Painter’s account of his reasoning lacks logic and common sense. His basic claim was that he came up with the 50-percent figure by extrapolating it from his own personal observation at Painted Post. The difficulty with this claim is that he did not report to the analysts that the production at Painted Post had declined by such a percentage. His lame response to counsel’s confrontation of him on this point was merely that “I didn’t know whether it was relevant.” (Tr. 435.) Of course, if he deemed a 50-percent decline at Olean to be relevant, surely his opinion would have to be that a similar decline at Painted Post was equally pertinent. In fact, I conclude that his decision to make this bald assertion about Olean but not about Painted Post reflected a psychological factor that I have already noted. It was simply much easier to make bald-faced claims about Olean than to make up such a claim about the location where he worked and where he had actual knowledge of the conditions. I conclude that Painter’s failure to cite the 50-percent figure at Painted Post demonstrates his malice, recklessness, and consciousness that he lacked any good-faith basis for reaching such a conclusion at either plant.

Painter's credibility on this subject was further eroded by his response to another question from counsel for the Company. When asked if he thought that, by telling the analysts that production at Olean had dropped by 50 percent, he would hurt the Employer, Painter responded, "Oh, absolutely not." (Tr. 444.) This is absurd. No reasonable person could conclude that information regarding a 50-percent drop in production conveyed to the investment analysts would not harm the Company. Indeed, it is evident that the entire purpose of the statement was to harm the Company with the goal of pressuring management to make concessions in labor negotiations, including negotiations about Painter's personal situation at the plant. By claiming otherwise, Painter demonstrates his unreliability as a witness.

Painter's lack of credibility on this topic is further illustrated by his prior testimony during a state administrative proceeding relating to his claim for unemployment benefits. In that testimony, he told the state administrative law judge that the union officials at Painted Post and Olean had a discussion and that "it was stated in this conversation that the workload appeared to be slow and dropping off by as much as 50% of the normal level of production activity at those facilities." (R. Exh. 2, p. 121.) Before me, Painter was clear in explaining that nobody at Olean ever said that there was a 50-percent drop in production. By inaccurately claiming that this figure was mentioned, Painter attempted to bolster his claim for benefits.³⁷ The fact that he presented two contradictory accounts as to a key item of evidence in his sworn testimony is highly damaging to his credibility.

In assessing Painter's mindset, I have also considered his asserted rationale for taking the unauthorized action of contacting the investment analysts. In his testimony, he emphatically contended that his primary consideration in undertaking this unilateral enterprise was to help prevent any incidents of workplace violence arising from the parties' labor dispute. As he explained,

I was concerned that there was going to be an upris[ing] from the employees themselves having knowledge that we had thought we were close to an agreement and we actually had

³⁷ The General Counsel contends that Painter's success in that proceeding should influence the outcome in this case as well. The Board does permit consideration of state administrative findings in appropriate circumstances. See *Whitesville Mill Service Co.*, 307 NLRB 937, 945 at fn. 6 (1992) (unemployment decision considered but rejected due to incomplete record in that proceeding). Such circumstances are not present here. Apart from the fact that the judge may have relied on Painter's inaccurate and self-serving testimony as described above, it is also evident that she based her decision on the unique terms of the state statute. As she explained, "Although it may have been the Employer's prerogative to discharge the Claimant for his actions, nonetheless under the circumstances I hold that his actions amounted to an incident of poor judgment, only, and do not rise to the level of misconduct under the Unemployment insurance law." (GC Exh. 26, p. 5.) I have already noted that Sec. 10(c) of the NLRA specifically authorizes employers to discharge employees for cause. Thus, if it was the Company's "prerogative to discharge" Painter for his conduct, the Company's action cannot be found to violate the Act.

taken a step backwards with the revised proposal and I decided to employ the strategy of calling the Stock Analysts.

(Tr. 322.)

I have already observed that this purported concern stands in sharp contrast to Local 313's actual views regarding the danger of inflaming the situation in the workplace. Far from attempting to tamp down any hostile reaction by bargaining unit members to the Employer's revised proposals, the Union issued a rather inflammatory memo to the employees characterizing the revised proposal as "drastic" and asserting that the Company "has no interest in reaching an agreement." (GC Exh. 3.)

More pointedly, Painter was totally unable to explain the relationship between his calls to the analysts and his supposed goal of preventing workplace violence. In particular, he was confronted by the peculiar fact that his communication to those analysts utterly failed to make any mention of the potential for such workplace violence. When asked why he omitted this allegedly critical information from his script, he explained:

I felt that if I talked about that particular subject, that it would be damaging information to the public. I did not want to open the door to having the company portrayed in the public that way, in order to damage them.

(Tr. 482.)

In fact, this explains nothing. Painter had no scruples whatsoever about providing the public with "damaging information" regarding his employer. Every talking point in his script was directly and obviously damaging to the employer. His failure to include any reference to the potential for workplace violence is telling evidence that such concerns did not serve to motivate his conduct in any significant way.

Finally, I will make one additional assessment that sheds light on the nature of Painter's conduct in claiming that Olean had lost fully half of its volume of production. It would, of course, give one pause if Painter had somehow managed to make an accurate guess as to Olean's loss of production. The evidence demonstrates that he was not so fortunate. McDonnell testified that Olean's production had been, "off a little but certainly not of the magnitude anywhere near 50%." (Tr. 875.) As he characterized it, Painter's assertion, "wasn't close to being accurate." (Tr. 877.) In order to substantiate McDonnell's claim, the Employer presented the testimony of Edward Wilber, a manager at Olean who has worked at that facility for 30 years. He testified that, during the period at issue, he was responsible for evaluating the workload at Olean. The methodology used to do this was based on calculating the usage of "man hours" by the Employer's 500 bargaining unit workers at the facility. (Tr. 700, 703.) He testified that an examination of this figure at any two moments in time would provide information as to the comparative level of workload.

The Employer produced Wilber's spreadsheet that compared the workload at Olean for each of the months of 2008 and 2009. (R. Exh. 11.) An examination of that document for the 3-month period prior to Painter's telephone calls to the analysts with the same 3-month period in the preceding year demonstrates that workload declined by the following percentages:

From February 2008 to February 2009:	-19.4%
From March 2008 to March 2009:	-6.0%
From April 2008 to April 2009:	<u>-11.5%</u>
Three-month average decline in workload:	-12.3%

Thus, it will be seen that Painter's claim represents a more than four-fold exaggeration of the true loss in workload at Olean. The actual amount of the decline is relatively consistent with overall economic conditions in the midst of a severe economic recession. By contrast, Painter's asserted level of decline would be disastrous. I have no doubt that investment analysts would find it to be a material factor in making decisions regarding the Company's stock.

Based on all of these varied considerations, I conclude that Painter's unsubstantiated claim that production at Olean had declined by half was made with a malicious frame of mind and a clear intent to damage the value of his employer's stock. The Board holds that the Act does not protect a statement made with "reckless disregard for its truth." *TNT Logistics North America*, 347 NLRB 568, 569 (2006), revd. on factual grounds sub nom. *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). This is consistent with the Supreme Court's own definition of malice in its famous case of *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (actual malice is proven when a statement is made with knowledge that it is false or "with reckless disregard of whether it was false or not"). I find that Painter's report to the analysts that Olean's production was down 50 percent was made with precisely such a reckless disregard of whether this was actually true. Indeed, in comments made shortly after he engaged in this misconduct, he came perilously close to admitting as much. It will be recalled that he wrote an apology to the Union in which he explained that, in making the communication to the analysts, he had "lost control" and "snapped." (R. Exh. 2, p. 183.) This description of his own state of mind is entirely consistent with that of a person who is recklessly unconcerned with the truth or falsity of his statements.

One remaining portion of his communication must be assessed. Painter concluded his remarks to the analysts by observing that "Mr. Volpe stated in his year-end conference call that employment levels would be maintained." (GC Exh. 8(a).) Painter testified regarding his rationale for including this statement. He conceded that he had never heard CEO Volpe use these exact words. Instead, he based his assertion on Volpe's comments during earnings conference calls. As Painter described, Volpe was, "talking about the stability of the Company and the fact that—looking at the economic conditions, it shouldn't affect the Company. Exactly word for word, I don't know what he exactly said." (Tr. 332.) Painter testified that he felt that Volpe's predictions were "misleading" given that layoffs were being anticipated. (Tr. 333.) His intent was to point this out to the investment analysts.

Standing alone, Painter's final comment would be protected activity as it does not contain any demonstrably false or disparaging content. Taken in context with the remainder of his message, the sentence takes on a different cast. It clearly invites the analysts to make a comparison between the claimed dramatic loss of workload volume at Painted Post and the 50-

percent loss of workload at Olean with Volpe's optimistic forecast that the Company would be able to avoid layoffs. As such, the statement constitutes a pointed and highly derogatory attack on Volpe's credibility, specifically, on the reliability of his statements to the investment community. By calling Volpe's truthfulness into doubt through comparison of Volpe's forecast with his own reckless and false claim about Olean, Painter engaged in a misleading, malicious, and intentionally damaging attack on the veracity of his employer's CEO.

The parties in this case paint strikingly different pictures regarding the motives behind Painter's calls. The General Counsel believes that Painter's conduct merely consisted of outreach to third parties regarding the labor dispute between the Employer and the Union. The Company insists that Painter's real motivation was to retaliate against his Employer for proposing the elimination of his paid time to perform union duties. Without doubt, some of Painter's statement directly, or at least tangentially, concerned the labor dispute. By this, I am referring to Painter's comments regarding the negotiations at Painted Post and Wellsville and the Company's proposal of a reduced workweek at Painted Post. Informing the analysts of these matters may well have served the Union's interests by placing pressure on the Company to reach a contract with the Union.

The difficulty here is with the remaining statements made by Painter. Those statements do nothing to advance the Union's bargaining position. Indeed, many of them would only serve to undermine that position. A key theme of Painter's message was that the Company's workload at both Painted Post and Olean was in a state of dramatic decline. There can be no doubt that this would be of great interest to investors. I can, however, see no way in which the imparting of this information to the analysts would reasonably be expected to advance the interests of the bargaining unit employees. It is entirely incomprehensible to me how this knowledge would impel the investment community to put pressure on the Employer to conclude a favorable labor contract with the Union. To the contrary, it seems to me that reasonable analysts would conclude that the Employer's drastic loss of workload would necessitate pressure from shareholders on management to take a negotiating stance toward the Union that would hold the line on labor costs as a means to cushion the Company from at least a portion of the anticipated impact of the loss of workload on its future profitability.

I find it probative that neither Painter in his testimony nor the Charging Party or the General Counsel has offered any explanation of how the purported information regarding workload at Painted Post and Olean would serve the Union's interest in obtaining a labor agreement with terms acceptable to the bargaining unit members. To the contrary, I concur in counsel for the Employer's analysis of what these statements reveal regarding Painter's actual frame of mind. As counsel put it:

Painter's statements, their truth aside, spoke at best to the potential concerns of shareholders, not employees, and any benefit Painter hoped to gain for unionized employees was left a mystery. Painter wanted to strike out at the Company—he

did not request sympathy or help. In fact, he made no requests at all. It was just one false haymaker after the other.³⁸

(R. Br., at p. 47.)

Considering the entire transcript of Painter's statements to the financial analysts, I conclude that Painter went beyond the boundaries of the protections afforded to employees by Section 7. In reaching that determination, I have carefully considered the Board's precedents involving analogous conduct by employees. Several examples appear particularly probative.

In *Stanley Furniture Co.*, 271 NLRB 702 (1984), the employer and union were engaged in what the Board characterized as "protracted and difficult" contract negotiations. The union dispatched members to attend a meeting of the local city council and present its view that the company's low wage rate was harming the community. One of those members told the council that the low wages forced employees to depend on welfare programs. He then added that the employer also depleted the town's coffers by calling the fire department to bring equipment to the plant "almost daily and nightly." 271 NLRB at 703. The company discharged this employee and the union filed an unfair labor practice charge. At trial, the evidence showed that the company had actually called the fire department only six times in the preceding 5 months.

In finding the discharge to be lawful, the Board noted that the claim regarding calls to the fire department was both "blatantly false" and "only indirectly related to the subjects about which the Union and the Respondent were bargaining." 271 NLRB at 703. In addition, those statements went beyond the employee's mandate from the Union and were "of such a nature as to be obviously damaging to the Respondent's reputation in the community." 271 NLRB at 703. In consequence, the Board concluded that the employee's remarks were "made maliciously, with deliberate intention to damage the Respondent or with reckless disregard for the truth." 271 NLRB at 703. I find the facts described to be strikingly similar to those presented in this case. Like the discharged employee in *Stanley Furniture*, Painter went beyond any authorization from his union, attacked his employer on matters not directly related to the labor dispute, and chose to make recklessly false and damaging claims designed to harm his employer.³⁹ The fact that the employee in *Stanley* also made remarks that were related to the labor dispute did not alter the outcome. Even if those statements were deemed protected, the remaining false assertion regarding the misuse of the town's emergency services rendered the employee's conduct unprotected and subject to disciplinary action. The parallel to Painter's situation is clear and compelling.

A few years later, the Board reached a similar result in *Sahara Datsun*, 278 NLRB 1044 (1986), enf. 811 F.2d 1317 (9th Cir. 1987). In that case, an employee of an auto dealership met

³⁸ Counsel's final sentence is a bit of hyperbole. Not all of Painter's assertions were false. Nevertheless, I conclude that counsel's viewpoint is accurate so far as it addresses Painter's statements regarding the Employer's loss of workload.

³⁹ While *Stanley Furniture* is now more than a quarter century old, it has been cited authoritatively by the Board relatively recently. See *Kvaerner Philadelphia Shipyard*, 347 NLRB 390, 393 (2006).

with a loan officer whose company had a longstanding business relationship with his employer. He told that loan officer that the employer falsified the income information of car buyers in order to secure financing for them. While the Board observed that "arguably," the employee's actions were "related to issues in the campaign for union representation," there was "little or no factual basis for his accusations." 278 NLRB at 1046. Finding that the employee had "crossed th[e] line" separating protected from unprotected activity by "his attempt to undermine the Respondent's business," the Board found "ample" cause to support a decision to discharge him. 278 NLRB at 1046.

In *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 (1995), a case that is similar to both *Stanley Furniture*, supra, and the current controversy, an employee made defamatory statements regarding her supervisor to other employees and was discharged as a result. The Board noted that the employee had been motivated by general concerns about the supervisor's management style toward all of the staff and a specific concern about the supervisor's conduct toward her directly. Characterizing these mixed motivations as constituting concerted activity, the Board nevertheless upheld the lawfulness of the discharge because of the unprotected nature of the statements.

The final precedent that I find highly informative also presents an interesting historical perspective. As this decision is being written, we are at the end of the first decade of the new century. That decade was marked by catastrophic events at its opening and at its close. Of course, the first set of such events to which I refer were the terrorist attacks in September 2001, both the infamous airplane assaults and the now sometimes overlooked fatal anthrax attacks. In 2003, the Board decided a case set against the background of those tragic events. In *Sprint/United Management Co.*, 339 NLRB 1012 (2003), an employee was discharged for sending an email to coworkers that claimed that "Anthrax has been confirmed in the [Company's] Warehouse." 339 NLRB at 1015. In reality, there was no anthrax. However, the judge correctly observed that "the truth or falsity of a communication is not the determinant of whether the activity is protected." 339 NLRB at 1017. Instead, the judge found the employee's action to be unprotected because she had made her communication based on "overheard parts of conversations and based her email on these bits and pieces of conversation without bothering to corroborate essential details." 339 NLRB at 1018. Because the judge found that parts of the employee's email were deliberately false, while other parts were sent "without regard for the truth or falsity" of the assertions, the employee's actions "were removed from the protection of the Act." 339 NLRB at 1019.

On review, the Board upheld the judge's conclusions. Taking note that the employee's warning regarding anthrax contamination was made "at a time of national alarm concerning such chemicals," and contained "information that was false and was uttered with reckless disregard for truth or falsity," it upheld the determination that the employee's discharge was lawful. 339 NLRB 1012 fn. 2.

While the terrorist assault at the beginning of this decade was certainly more dramatic and caused much loss of life, the economic collapse as the decade drew to its close perhaps has

had even more widespread effects on the lives of our citizens. Against that backdrop, Painter made his reckless and maliciously false statements to the financial community. Coming during the devastating economic downturn, Painter's fictitious claim that the Olean workload had dropped in half was surely calculated to cause fear and consternation among those who owned the Company's stock or were considering such ownership. By the same token, Painter's assault on the credibility of the representations of the Company's top management would have been particularly damaging in the context of the financial misrepresentations by corporate officers of major companies that contributed to the dire economic conditions affecting the country at the time. These factors would also have been enhanced by Painter's choice of timing. He deliberately chose to make his allegations immediately prior to the release of the Company's quarterly earnings report and the accompanying earnings conference call. His conduct reveals a depraved state of mind consistent with actual malice. It does not merit protection under the Act. See *Valley Hospital Medical Center*, supra, 351 NLRB at 1252, citing *Emarco, Inc.*, 284 NLRB 832, 833 (1987) (statements that are "disloyal, reckless, or maliciously untrue" are unprotected).

B. Did the Employer Violate the Act by Coercively Interrogating Employees?

The General Counsel contends that the Employer's reactions to Painter's contacts with the investment analysts violated the Act in various ways. Initially, he asserts that the Employer conducted a series of coercive interrogations of employees in the course of its investigation of these contacts.

It will be recalled that, immediately after learning of the calls to the analysts on April 29, the Employer began formulating its response. Management decided to conduct an investigation in order to determine who among its employees had been involved in the outreach to the financial analysts. A crucial component of this investigation was the conduct of investigatory interviews of local union officials. These interviews were to be held simultaneously. Each interview would be conducted by a member of management, accompanied by a separate note taker. In addition, a union official would be designated to be present as the interviewee's representative. Significantly, the interviews would be conducted using a written script of questions. Presumably, the use of this methodology would assure that the interviews were both uniform and comprehensive.

On April 29, the parties were scheduled to engage in contract negotiations. At the conclusion of a brief negotiating session, Director of Human Resources Wallace entered the room and read a prepared statement to the Union's team. He made reference to the fact that someone has contacted financial analysts and told them that, among other things, workload at the Company had "declined by 50%." (GC Exh. 31.) He went on to advise them that "giving material misinformation to individuals outside of the Company is a violation of Company policy," and that management would be conducting an investigation of the matter. (GC Exh. 31.) As he put it, "[w]e will be investigating what was stated on the voice message, to whom the messages were sent, and who made the messages." (GC Exh. 31.) Underscoring the seriousness of the situation, he told the Union

negotiators that, "[t]his action is irresponsible and reckless and will not be tolerate[d]." (GC Exh. 31.)

On the afternoon of the next day, April 30, the simultaneous interviews were conducted in the manner planned by management. Documentary evidence indicates that at least eight employees were subject to these interviews. (See GC Exhs. 32 through 42 and fn. 21 of this decision.) As intended, each interview consisted of the same series of previously prepared written questions. An example of the interview questionnaire is found at General Counsel's Exhibit 32. It is now necessary to examine the content of the questionnaire to determine whether the nature of the interrogations constituted unlawful interference with the employees' statutory rights.

The Board's evaluative criteria with regard to interrogations are particularly clear. They derive from its leading case on the topic, *Rossmore House*, 269 NLRB 1176 (1984), aff'd. 760 F.2d 1006 (9th Cir. 1985), and are summarized as follows:

Under Board law, it is [well-established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. [Internal punctuation and footnote omitted.]

Norton Audubon Hospital, 338 NLRB 320, 320-321 (2002). In addition, it is important to note that the Board has expressed particular concern regarding interrogations that constitute "a pointed attempt to ascertain the extent of the employees' union activities." *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001).

Turning now to the content of the interrogations in this case, unsurprisingly, many of the questions were directly related to the telephone calls to financial analysts. These questions were designed to determine whether the individual employee had made any such calls, participated in any collective decision to make the calls, or had any knowledge regarding the identity of the callers. In addition, questions were posed regarding the evidence relied on by the caller in making the specific representations to the analysts. This entire line of questioning is not problematic. It must be recalled that, "[e]mployer interrogation of an employee violates Section 8(a)(1) if, under all the circumstances, it reasonably tends to restrain, coerce, or interfere with rights guaranteed under the Act." *Rossmore House*, supra at 1177. [Internal punctuation omitted.] The key concept is that, in order to be unlawful, the interrogation must be directed toward learning about activity that is protected by the Act.

To the considerable extent that the Company's questions sought information about the calls to the analysts, they do not implicate the statutory protection of union activity. For reasons I have discussed in detail earlier in this decision, Painter's contact with the financial analysts was of a nature that took it outside the Act's ambit of protection. As a consequence, the Employer was privileged to conduct an investigation regarding

such unprotected conduct. Questioning the employees about the reckless and malicious statements made with an intent to harm the Company's financial standing is no different from questioning employees about stealing company property or abusing illegal drugs at the workplace.

Unfortunately, in its zeal to learn as much as possible about the events at issue, the Employer went beyond the permissible bounds by widening the scope of its inquiry to include prohibited topics. In particular, it posed a series of detailed questions regarding internal union procedures and policies. For example, employees were asked about the procedures "employed by IUE Local 313 prior to permitting a communication to go out to the press, public or a [s]ecurities analyst." (GC Exh. 32, p. 4.) Beyond this, the Employer sought to learn whether the local union contacted the international union prior to communicating with outside entities.

Even more intrusively, the script of questions demanded to learn about the Union's internal deliberations regarding the events at the negotiating session on April 28. Thus, employees were asked whether there was "a discussion of the public reaction the Union should have in response to the Company's changes [in negotiating position on April 28]." (GC Exh. 32, p. 6.) As if this were not clear enough, another question was asked that honed in on the topic as follows: "[D]id the union bargaining committee make plans to provide information to the press, public and/or securities analysts relating to the Company's changes? What was that plan?"⁴⁰ (GC Exh. 32, p. 6.)

This series of questions went to the heart of the protections afforded by Section 7. They sought to uncover detailed information regarding internal union methods. Even more troubling, they sought to learn the contents of internal union discussions directly related to the ongoing collective-bargaining talks. To underscore the impermissible scope of these questions, I note that they also went far beyond an effort to learn about the contacts with financial analysts. They also addressed contacts with the press and with the general public. None of this bore any appropriate relationship to the matter under investigation. The Board holds that, under normal circumstances, an employee engages in protected concerted activity by providing information about an employer's operations to outsiders in the course of a union campaign. Interrogation about such activity is unlawful. See *C.S. Telecom, Inc.*, 336 NLRB 1193 (2001) (interrogation of employee about his having provided worksite locations to a union was unlawful).

Beyond the content of these interview questions, the other evaluative criteria also support a finding of coercion. The background included Wallace's sharp warning read to the interviewees on the preceding day indicating that the Employer clearly contemplated adverse action against individuals deemed to have violated the Company's policies regarding outside contacts. The questioning was conducted by high company offi-

cial rather than the immediate supervisors of the interview subjects. The place and method of questioning were such as to heighten the coercive atmosphere. The location was away from the shop floor and the use of a written script was a dramatic illustration of the seriousness of the situation.⁴¹

To be clear, I am not suggesting that the manner of interrogation would have been unlawful if the content had been appropriately limited. However, the use of these methods in conjunction with the highly intrusive questioning regarding internal union deliberations and procedures constituted unlawful interference, restraint, and coercion of the interview subjects. The Board has called particular attention to the "substantial" importance of the right of employees "to keep confidential their union activities." *Guess?, Inc.*, 339 NLRB 432, 434 (2003). The Company's conduct in seeking to invade the confidentiality of employees' participation in lawful union activities violated Section 8(a)(1) of the Act.⁴²

C. Did the Employer Violate Employees' Rights to Representation?

There is no dispute that the Employer made arrangements for every union member who was interviewed on April 30 to have the assistance of a union representative during their interview. Nevertheless, the General Counsel contends that the Employer violated Section 8(a)(1) by failing to honor the requests of certain interviewees who wished to be represented by other union officials.

It will be recalled that the interviews were conducted simultaneously through the use of a written script. The script specifically dealt with the issue of representation. It directed each interviewer to inform the subject of the interview that "[w]e have asked union shop steward, _____ to be present during this interview as your representative." (GC Exh. 32, p. 1.) The interviewer was instructed to ask the subject whether he wished the representative to remain or whether he desired to waive representation. The script also advised the interviewers that "[i]f the employee requests that one of the other people being interviewed (or serving as a union rep in another interview) serve as their union representative, advise that this person is not available." (GC Exh. 32, p. 1.)

The evidence demonstrates that the situation anticipated in the script did arise in four interviews. Upon being told by Meisner that Seager was present in order to represent him, Painter retorted, "[a]re you choosing my steward?" (GC Exh. 33, p. 1.) He went on to request that Seager be replaced by Coates. Meisner explained that, "Coates isn't available, because he was actually in another room being interviewed at the same time." (Tr. 795.) The discussion ended with Painter stating, "I disagree with this, but let's go ahead." (GC Exh. 33, p. 1.) Painter testified that he did not request anyone other than

⁴⁰ Examination of the actual interview script demonstrates that counsel for the Employer is not accurate when he asserts that his client "narrowly tailored its inquiry to those questions relevant to the misleading statements and to determining who was involved in the scheme to publish those misleading statements." (R. Br. at p. 81.) Had that actually been the case, there would have been no unfair labor practice.

⁴¹ The only evaluative criterion that cuts against a finding of unlawful intimidation was the fact that all of the interviewees were open and active union supporters.

⁴² Again, I wish to emphasize that there would have been nothing improper about the Company's methods had they been limited to uncovering the subjects' involvement in the unprotected contacts with the investment analysts. It is the over breadth of the interview script that runs afoul of the statute.

Coates. Ultimately, the interview proceeded with Seager acting as Painter's representative.

Schoonover also reported that he was dissatisfied with Reed, the steward who had been assigned to represent him at his interview. Instead, Schoonover requested representation by Coates or Painter. In his testimony, he twice confirmed that, even though he had been represented by other union officials in the past, he did not seek representation by any other union official on this occasion. Faced with Schoonover's request for Coates or Painter, his interviewer, Blajewski, left the room to seek guidance. On her return, she informed Schoonover that "Coates + Painter were unavailable and Tim Reed is assigned to represent you." (GC Exh. 37, p. 1.) The interview then proceeded.

In addition to the testimony from Painter and Schoonover, the interview forms reveal that two other employees raised this issue. Those employees were not called to testify. Chris Austin requested that Coates serve as his representative. The interviewer explained, "No, it cannot be Steve—he is part of the investigation." (GC Exh. 35, p. 2.) Austin expressed his understanding and the interview proceeded with the designated representative. Similarly, interview notes indicate that Scouten requested Painter to act as his representative. While the notes do not elaborate, it is clear that his request was not granted. His interview also proceeded with his previously designated representative.

Turning to the legal analysis of the General Counsel's claim that the Employer's conduct in refusing to accede to the requests that Coates and Painter substitute for the assigned representatives of certain interviewees constituted a violation of the Act, the starting point is clearly the Supreme Court's decision to uphold the Board's policy judgment that the Act requires the presence of union representation when it is requested during an investigatory interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). As with many sweeping policy judgments, the proverbial "devil" is in the details. This was clearly acknowledged by the Court in *Weingarten*, where it was observed that the Board itself had held that the exercise of the representation right "may not interfere with legitimate employer prerogatives." 420 U.S. at 258.

The circumstances of this case present a stark example of potential conflict between the robust exercise of the right to representation and the prerogative of an employer to control the course of its investigation of serious misconduct by one or more of its employees. It is evident that the four interviewees did not receive the aid of the union representatives that they specifically requested. It is equally clear that the Employer's rationale for refusing these requests was its belief that its chosen method of conducting its interviews was an essential element of an effective investigation. As a result, it is necessary to balance the legitimate interests of the parties within the framework of the Act and the controlling precedents.

The Board has had occasion to examine this issue in circumstances where the desired representative is not immediately available for other reasons. Two years after *Weingarten*, the issue arose in *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977). An employee summoned to an investigatory interview demanded the presence of his shop steward. The

request was denied because the steward was on vacation and would not be returning to work for several days. The interview proceeded without the provision of any union representation to the employee. A complaint alleging the commission of an unfair labor practice ensued. The Board dismissed the complaint, observing that "[c]ertainly the right to hold interviews of this type without delay is a legitimate employer prerogative." 227 NLRB at 1276. Interestingly, the Board went beyond this to further hold that it was not troubled by the failure of the employer to afford any alternative representation to the interview subject. It observed that the employee "could have requested and obtained the assistance of any union representative who was available." 227 NLRB at 1276 fn. 6. Ultimately, the Board concluded that "[w]e see nothing in *Weingarten* which implies that it is the employer's obligation to suggest and/or secure alternative representation where the representative originally requested by the employee is unavailable." 227 NLRB at 1276.

Two years later, the Board reinforced the policy judgment in *Coca-Cola*, emphasizing that, "[n]owhere in *Weingarten* does the Court state or suggest that an employee's interest can only be safeguarded by the presence of a *specific* representative sought by the employee, as opposed to being accompanied by *any* union representative." [Emphasis in the original.] *Roadway Express*, 246 NLRB 1127, 1129 (1979).

In a case that speaks quite directly to the situation I must resolve, the Board sanctioned an employer's refusal to honor an employee's request for a steward who was located at a second company facility that was 20 minutes away by car. The company had provided representation by another steward who worked in the same facility as the employee. The Board strongly rejected that contention that this conduct violated the Act. It held:

Our interpretation of *Weingarten* must be tempered by a sense of industrial reality. We do not advance the effectuation of employee rights, or contribute to the stability of industrial relations, if we complicate the already complex scheme of *Weingarten* by introducing the notion that an employee may request this union representative instead of that one, perhaps from a far corner of the plant, and, perhaps, in certain instances, contrary to the union's wishes. In the instant case, a duly designated union representative was ready, willing, able, and present. We would inquire no further.

Pacific Gas & Electric Co., 253 NLRB 1143, 114 (1981).

Interestingly, the dissenting member in *Pacific Gas & Electric* contended that the Board was permitting the employer to "dictate" the choice of representative. 253 NLRB at 1144. A similar claim is advanced in the case before me. The Board majority's response to this manner of framing of the issue bears full quotation:

The contention in the dissent that our decision here sanctions Respondent's attempt to control [the employee's] choice of a representative is predicated upon a misperception of fact. Plainly, it was the Union and not Respondent that selected [the] shop steward and thereby designated him as the individual responsible for representing employees in situations such as that presented here. Thus, rather than seeking to control

[the employee's] choice, Respondent merely acted in conformity with the Union's directions.

253 NLRB at 1144 fn. 3. By the same token, Coates testified that all of the shop stewards had been duly selected by the Union and that he had informed the Company that they were authorized to act for the Union. Every person interviewed on April 30 was represented by an authorized Union representative.

The limits to the Board's willingness to permit some degree of restraint on the employees' choice of representative were clearly exceeded in *Consolidation Coal Co.*, 307 NLRB 976 (1992). In that case, the Board affirmed the trial judge's finding of an unfair labor practice where the employer insisted that the interview subject use the services of one representative despite the fact that the alternate representative requested by the employee was present and immediately available. The judge noted that the result would have been different if granting the request would have "force[d] postponement of the investigatory interview." 307 NLRB at 978.

An interesting fact pattern was presented in *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992). The employer provided a representative for an investigatory interview but refused to agree to substitute an alternative union official at the interviewee's request. It based its refusal on disruptive conduct by the desired representative in the immediate past. The Board stated its general governing principle as being that "when two union officials are equally available to serve as a *Weingarten* representative . . . the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances that would warrant precluding one of the two officials from serving as representative."⁴³ 308 NLRB at 282. Because the Board agreed with the employer's characterization of the desired representative's past conduct, it declined to find a violation of the Act.

Finally, in *Anheuser-Busch*, 337 NLRB 3 (2001), enf. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004), the Board agreed with the trial judge's finding that the employer violated the Act by refusing an employee's request for an alternate representative because that person was on his lunch break. The evidence showed that the desired representative was due to

⁴³ This language from *New Jersey Bell Telephone* highlights yet another tension involved in the policy determinations flowing from *Weingarten*. Is it the right of the employee being subject to interview to choose the representative or does that right belong to the union that represents the bargaining unit? For example, in contrast to the language just quoted, in *Anheuser-Busch*, 337 NLRB 3, 11 (2001), enf. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004), the trial judge's opinion which was adopted by the Board expressed essentially the same concept with this language: "The law appears to me to be that in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." A bit amusingly, the Board fudged the potential issue in *Barnard College*, 340 NLRB 934, 935 (2003), observing that, "[t]he selection of an employee's representative belongs to the employee *and* the union, in the absence of some extenuating circumstances, and as long as the selected representative is available at the time of the meeting." (Emphasis added.) Fortunately, the issue is not present in this case.

return to work in 15 minutes and "there was nothing about the allegations . . . that demanded instant attention." 337 NLRB at 11.

Turning now to the application of these precedents to the facts presented, it is clear that the Employer bases the legality of its refusal to provide Coates and Painter to those who requested their services as representative is premised on the extenuating circumstance that it desired to conduct simultaneous interviews so as to avoid one person being investigated for the commission of misconduct to hear the interview questions while serving as representative for another person similarly under investigation for the same misconduct.

In a slightly different context, the Board has deferred to an employer's citation of this rationale for its behavior. In *Desert Palace, Inc.*, 336 NLRB 271 (2001), the employer was investigating illegal drug use among its employees. It conducted a series of investigatory interviews. At the conclusion of each interview, the subject was instructed "not to discuss anything related to the investigation with anybody at any time or in any way, shape or form in or out of the work place." [Internal punctuation omitted.] 336 NLRB at 271. The General Counsel contended that this instruction was a violation of Section 8(a)(1).

Noting that the facts of the case presented a conflict between legitimate policy interests of the parties, the Board observed:

We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications [W]e find that it does not. [Citation and footnote omitted.]

336 NLRB at 272. The Board found that the employer's substantial need to protect witnesses, prevent destruction of evidence, and preclude fabrication of testimony justified the resulting infringement on the rights of the employees. With this precedent in mind, it is clear that the rationale asserted by the Company to support its denial of the services of Coates and Painter as representative for other interviewees has been deemed to be both legitimate and substantial.

The parties have not cited, and I have not found, a case precisely addressing the issue before me. Interestingly, however, counsel for the Employer quite properly draws attention to a case in which the Board acknowledged that the issue before me could arise in the future and discussed some of the considerations that would be involved in that event. Needless to say, I have given these remarks great weight in reaching my decision.

In that case, *IBM Corp.*, 341 NLRB 1288 (2004), the Board was concerned with the policy determination of whether to continue extending *Weingarten* representation rights to workplaces that did not have union representation. In making its ultimately successful argument against continuation of that

practice, the employer argued that representation impeded its efforts to investigate disciplinary problems in a number of ways. The Board's majority accepted this argument and cited several examples. Among those examples was the following:

[A]n employee being interviewed may request as his representative a coworker who may, in fact, be a participant in the incident requiring the investigation, as a "coconspirator." It can hardly be gainsaid that it is more difficult to arrive at the truth when employees involved in the same incident represent each other. [Footnote omitted.]

341 NLRB at 1292.

Interestingly, the dissenting Board members agreed that this hypothetical situation raised genuine and legitimate concerns for managers seeking to uncover the facts about alleged employee misconduct. They parted company with the majority as to this issue only to the extent that they viewed the problem as one more susceptible to individualized adjudication rather than sweeping policy pronouncement. As they put it:

If and when the right to representation raises legitimate concerns, they can and should be addressed by refining the right, case-by-case. For example, our colleagues have suggested that an investigation could be impeded if the employer were compelled to permit representation by a coworker involved in the same incident being investigated (a so-called "coconspirator"). That concern could be addressed specifically, by permitting an employer to deny an employee's request for representation by a possible coconspirator, under appropriate circumstances.

341 NLRB at 1310.

Taking these views expressed by both majority and dissent into account, I conclude that the best way to resolve the issue before me, absent any broad policy judgment from the Board, is to engage in the case-by-case analysis proposed by the dissent. In the first instance, it must be recognized that there were no actual coconspirators in this matter. The evidence is clear that Painter acted unilaterally. Nevertheless, it will almost always be the case that an employer is not entirely aware of who has engaged in the conduct being examined and whether they did so in concert. Here, the employer knew to a certainty that Painter made calls to financial analysts that contained recklessly false and highly damaging representations. Management also knew that, in the past, Local 313 had authorized Painter to make contact with the same analysts. On this record, I find it entirely legitimate for management to harbor a reasonable suspicion that other officials of the Union were involved in Painter's misconduct.

In order to avoid compromising an investigation of serious misconduct, I find that the Employer was justified in taking the position that Coates and Painter were unavailable to act as representatives for the other employees who requested their services. Their unavailability in the first instance stemmed from the Employer's legitimate need to conduct simultaneous interviews. Beyond that, it was also justified by the inappropriateness of permitting Painter to act as a representative for this investigation under any circumstances. Again, it must be recalled that the Company knew to a certainty that he had made

unprotected and damaging contact with the analysts. Other interviewees, all of whom were innocent of the misconduct under scrutiny, would surely be loath to discuss any matter involving Painter while in his presence. It is easy to imagine the impact of Painter's presence in the interview room when one of his coworkers was asked about whether the Union had authorized anyone to contact financial analysts in the past.⁴⁴ I have no doubt that his presence as representative would have impeded the Employer's investigation to the degree that it rendered him "unavailable" to serve as such a representative within the meaning of the Board's precedents regarding unavailability.⁴⁵

Each bargaining unit member who was subject to investigatory interview was afforded representation by a duly authorized union official. The Employer has demonstrated legitimate grounds to establish that Coates and Painter were unavailable to serve in that capacity. No interviewee requested any alternate representative apart from Coates and Painter. Management had no duty to propose any such alternative representatives. As a result, on the particular facts presented, I find that the Employer did not violate the Act in the manner in which it handled the issue of representation during its investigatory interviews.

D. Did the Employer Violate the Act by Suspending and Discharging Painter?

The General Counsel asserts that the Employer violated Section 8(a)(3) and (1) of the Act by suspending Painter on April 30 and discharging him on May 5. Specifically, the General Counsel contends that the adverse actions taken against Painter were the Employer's unlawful response to Painter's "appeal to third parties concerning a labor dispute between the Union and Respondent." (GC Exh. 1(m), p. 5.) In sharp contrast, the Employer views the matter through a much different lens. As counsel describes in his brief:

Deliberately tearing down the value of the Company's goodwill with investors serves no "protected" labor function: it neither aids negotiations nor furthers any legitimate labor goal—any more than tearing down or damaging one of Dresser-Rand's facilities would. It was not a "public appeal" of any kind. It served no legitimate bargaining objective. Like throwing a brick through a window, it was purely an act of malice and retribution.

(R. Br. at p. 6.)

As has just been noted, the General Counsel alleges that Painter was disciplined due to his outreach to the financial analysts. The Employer agrees. As its counsel put it, "had he not made the phone calls, he wouldn't have been fired." (Tr. 110.)

⁴⁴ This is not a theoretical point. One of the questions contained in the interview script was, "Is there an officer in IUE Local 313 who is responsible for speaking to . . . securities analysts regarding matters of interest to the Union?" (GC Exh. 32, p. 4.) Of course, the correct answer to this query is that Painter had been the one individual so authorized in the past.

⁴⁵ While Coates was an innocent party, the Employer acted reasonably in concluding that the likelihood of his involvement as a coconspirator was sufficiently great so as to render him unavailable for service as a representative in this investigation.

As a result, this is a so-called single-motive case.⁴⁶ The Board's analytical methodology for single-motive cases of this sort is well described in *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001), revd. on factual grounds 78 Fed. Appx. 469 (6th Cir. 2003):

The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on the authority of other employees and not solely on [his] own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected activity.

Applying this test, it must first be noted that I have already described in detail my reasons for concluding that Painter was engaged in concerted activity as that concept has been defined by the Supreme Court and the Board. There can be no doubt that the Employer was aware of the concerted activity. To cite only the most obvious evidence on this point, the Employer possessed the recording of Painter telling the analysts that he was calling them as "a representative of union employees working at the Dresser-Rand Company." (GC Exh. 8(a).) As also just discussed, there is no dispute that Painter's suspension and discharge were entirely motivated by the Employer's response to Painter's activity in calling the analysts.⁴⁷ This leaves the issue of whether Painter's activity constituted protected behavior within the meaning of Section 7 of the Act. I have previously explained my reasons for concluding that, while many of Painter's comments could have retained their protected character, his misrepresentation regarding his identity and authority coupled with his recklessly and maliciously false assertion regarding the workload at Olean and his pointed effort to undermine the credibility of the Company's CEO with the investment community based on this false information served to render his conduct outside the ambit of protection afforded by the Act.

Because Painter engaged in conduct that was not protected, his Employer was legally privileged to suspend and

⁴⁶ Because this is a single-motive case, it would be inappropriate to examine the facts of the case using the Board's dual-motive criteria as outlined in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (judge erred in applying dual-motive analysis where there was a "causal connection" between alleged protected activity and resulting discipline).

⁴⁷ It is necessary to draw one additional distinction as to the Employer's motivation. In the letter terminating Painter, McDonnell advises him that his discharge is "for violation of the Company's Code-of-Conduct." (GC Exh. 15.) At trial, the Company presented the opinion of an expert in securities laws and regulations. He opined that Painter's conduct violated those securities laws and regulations. While he persuasively explained his rationale for reaching this conclusion, the conclusion itself is immaterial. There is no evidence that the Employer premised its decision to fire Painter on his supposed violation of securities laws or regulations. As the Board has observed, "it is not enough for the Respondent to advance a legitimate justification for its action—the Respondent must have actually relied on that reason." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 (2007).

discharge him for it.⁴⁸ As a result, I will recommend that this allegation of the complaint be dismissed.

E. Do Portions of the Company's Insider Trading and Fair Disclosure Policies Violate the Act?

In a demand with potentially sweeping implications for all publicly-held corporations, the Amended Consolidated Complaint asserts that certain portions of the Employer's policies on fair disclosure and insider trading have been applied unlawfully and, in consequence, the Employer must be ordered to "rescind" those portions of the policies.⁴⁹ (GC Exh. 1(m), p. 9.)

In order to analyze this allegation, it is first necessary to set forth the language of the portions of the two policies that are under legal assault. The first policy that must be examined is the Employer's Insider Trading Policy. This document begins with a statement of its "Purpose and Scope." (GC Exh. 29, p. 1.) The scope includes regulation of the conduct of all employees. The purpose is to ensure that "the Company complies with all federal and state securities laws and regulations applicable to the purchase and sale of the Company's Securities." (GC Exh. 29, p. 1.) The policy lists eight restrictions on the conduct of the employees. The General Counsel contends that the fourth such restriction must be rescinded. It provides in its entirety:

Consistent with the foregoing, directors and employees should not discuss any significant internal matters or developments with anyone outside of the Company (including family members), except as required in the performance of his or her regular duties. This prohibition applies specifically (but

⁴⁸ Having found that Painter engaged in unprotected conduct, there is nothing in the Act that would preclude his Employer from discharging him for that conduct. Thus, the Employer's motivation for terminating Painter is essentially immaterial. Nevertheless, in the interest of decisional completeness, I find that the Employer discharged Painter for the specific reason stated in its termination letter addressed to him on May 6. (GC Exh. 15.) Painter violated the Code of Conduct requirement that prohibited employees from, "exaggeration, derogatory remarks, guesswork, or inappropriate characterizations of people and companies in our business records and communications." (GC Exh. 30, p. 8.) Painter also violated the Insider Trading Policy's prohibition on "tipping," and the Fair Disclosure Policy's requirement that, with certain exceptions that do not apply here, employees "not communicate on substantive matters with analysts and investors." (GC Exhs. 29, p. 2 & 28, p. 1.) His discharge was based on genuine and legitimate business grounds and was thus for "cause" within the meaning of Sec. 10(c) of the Act.

⁴⁹ Actually, the complaint is somewhat unclear. It alleges that the Employer "applied the rules" unlawfully. (GC Exh. 1(m), p. 6.) Logically, given the nature of this contention, the complaint seeks an order requiring the Company to "cease and desist from interpreting the rules . . . in an unlawful manner." (GC Exh. 1(m), p. 9.) For reasons that are not explained, the demand for relief goes beyond this to also demand rescission of the rules. Absent a claim that each of the policy provisions is unlawful as written, rescission would appear unjustified. I will assume that the General Counsel does implicitly seek a finding that the policies are unlawful since that would be consistent with the demand for their rescission. This is in line with counsel for the General Counsel's contention that one of the issues in this case is "[w]hether Respondent has maintained certain rules that unlawfully prohibit employees from engaging in Section 7 activity." (GC Br. at p. 4.)

not exclusively) to inquiries about the Company that may be made by the financial press, investment analysts or others in the financial community. Unless an individual is expressly authorized to respond to inquiries of this nature, such inquiries should be referred to the Company's Chief Financial Officer or General Counsel.

(GC Exh. 29, p. 2.)

The Company also maintains a Policy on Fair Disclosure. As with the Insider Trading Policy, this document begins with a statement of its purposes. Although that preliminary statement is not challenged by the General Counsel, it bears full quotation because of its importance to the analysis that follows:

Dresser-Rand Group Inc. is committed to fair disclosure of information about Dresser-Rand Group Inc. and its subsidiaries ("Dresser-Rand" or the "Company") without advantage to any particular analyst, investor or other constituency, consistent with the Securities and Exchange Commission's ("SEC") Fair Disclosure Regulation ("Regulation FD"). The board of directors of Dresser-Rand and the Company's management are committed to providing timely, orderly, consistent, and credible dissemination of information, consistent with legal and regulatory requirements, to enable orderly behavior in the market for its securities. The goal of this policy is to develop and maintain realistic investor expectations by making all required disclosures in a timely manner, on a broadly disseminated basis and without undue optimism or pessimism. [All punctuation and italics in the original.]

(GC Exh. 28, p. 1.)

The General Counsel seeks rescission of one portion of the guidelines contained in the body of the Policy on Fair Disclosure. The guidelines begin with two paragraphs, (a) and (b), that list the authorized persons who may communicate on the Company's behalf. These individuals are limited to top management officials and employees who are assigned to the Company's investor relations program.⁵⁰ It is the next paragraph that is asserted to require rescission. That provision states in its entirety:

(c) Employees are notified that, except as specified under (a) and (b) above, they should not communicate on substantive matters with analysts and investors, and refer all questions to the Chief Financial Officer, or in his or her absence, another Authorized Representative.

(GC Exh. 28, pp. 1–2.)

In assessing these policy provisions, I must apply the Board's standards for evaluation of employers' work rules. Because the policies have very significant implications relating to the Federal securities laws and regulations, I must also con-

⁵⁰ Guideline (b) includes the following statement: "No employee is authorized to communicate business or financial information about the Company that is non-public, material information, except through Company-sanctioned public disclosure." (GC Exh. 28, p. 1.) Given his theory regarding the rescission of other portions of the Policy, it is curious that the General Counsel does not object to this very broad restriction on disclosures. In any event, for the reasons I will present in my analysis of the portion of the Policy that is specifically under attack, I conclude that the cited language, taken in context, is lawful.

sider the Board's standards for the resolution of potential conflicts between the Act and other Federal legislation.

The Board has a well-defined framework for the assessment of the legality of an employer's work rules. That framework is comprehensively described in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004):

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following:

employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

[Italics in the original. Citations and footnote omitted.]

In the first place, it is clear that the two rules under examination do not explicitly restrict protected activities. Rather, it is evident from both the language of the provisions and the stated policy goals expressed in the preambles to those provisions that the purpose of the provisions is the prevention of insider trading or other related violations of the securities laws and regulations.⁵¹ Indeed, it seems apparent from a reasonable review of the entire policies in their proper context that any relationship to protected concerted activity was not intended or even considered.

Since the policies do not explicitly restrict union activities, it is necessary to apply the three-pronged evaluation described above. As to the first such prong, I conclude that employees would not reasonably construe the language of the policies as prohibiting their Section 7 activities. In fact, I see the situation as essentially identical to that encountered by the Board in *Lutheran Heritage Village-Livonia*, supra. In that case, one of the challenged rules prohibited the use of abusive or profane language. In finding the rule to be lawful, the Board took careful note of its intended purpose, while recognizing that it could be read as imposing some restriction on protected organizing activity. The same applies to this Employer's policies. Their intended purpose has nothing whatsoever to do with union activity. Despite this, it is accurate to say that one could conceivably read the policies as prohibiting union members from contacting the financial community to inform that community of

⁵¹ This point is conceded by counsel for the General Counsel, who candidly states that, "[o]n their face, Respondent's policies do not restrict Section 7 activity." (GC Br., at p. 58.) Counsel for the General Counsel further concedes that "Respondent promulgated the rules consistent with SEC regulations." (GC Br. at p. 59.)

their views regarding a labor dispute with management or their dissatisfaction with the terms and conditions of their employment. The Board's resolution of this problem in *Lutheran Heritage Village-Livonia* speaks compellingly to the situation before me:

Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach. [Emphasis in the original. Footnote omitted.]

343 NLRB at 647. I find that reasonable employees would not conclude that the two policies under review would preclude their protected outreach to the investment community to air their concerns regarding labor-management relations at the Company.⁵²

The second analytical prong bears little discussion. There is no evidence whatsoever that the two policies were promulgated in response to union activity. They were in existence prior to the events in this case and it is evident that they were promulgated in response to the requirements of Federal securities laws and regulations. Counsel for the General Counsel acknowledged as much in his opening statement where he posed the following rhetorical question and response: "Can an employer have policies on fair disclosure and insider trading? Sure, in fact they have to." (Tr. 116.)

Finally, assessment of the facts regarding the third prong strongly supports the Company's position that the policies are lawful both as written and as applied. In the first place, there is no evidence that the Employer has ever applied either policy in order to restrict the exercise of Section 7 rights. The only time the policy has been applied in circumstances that implicate the Company's labor relations is in the discharge of Painter. I have carefully considered that action and concluded that it was lawful. Because Painter chose to cross the line and engage in communications that were recklessly and maliciously false, his telephone calls to the analysts did not constitute protected activity within the meaning of Section 7. See *River's Bend Health & Rehabilitation Service*, 350 NLRB 184, 187 (2007) (work rule upheld despite employer's imposition of discipline under that rule in response to employee's unprotected conduct).

⁵² In support of my conclusion in this regard, it is worth noting that the Union itself did not hesitate to authorize an investor outreach program designed to inform the investment community regarding its labor dispute with the Employer. It is fair to infer that their officials at both the international and local levels, quite reasonably, concluded that such a program would not run afoul of the Company's policies. Painter, himself, was so confident that his outreach to Analyst Read would not invite disciplinary action that he discussed the matter with Rich in an email. His assumption that his contact with this analyst to discuss the Union's negotiating position in the labor dispute was not in violation of any company policy was compellingly confirmed by Rich's reply in which he did not criticize Painter's outreach. On the contrary, Rich's response complimented Painter as being "the only [Union] committee member who gets the need for change." (GC Exh. 19.)

Beyond this, I place great weight on another facet of the evidence in this case. It is undisputed that the Union did authorize contacts with the investment analysts in order to convey to them certain information regarding its labor dispute with management. For example, the Union informed the analysts that it believed the Company's claims regarding the costs of the strike were incorrect. As the International's representative explained, the investment analysts were told that, "the true costs of the strike were—far exceeded the cost that CEO Volpe referred to in his public disclosure." (Tr. 24.) It is clear that the Company's top officials were well aware of these contacts with the investment community. Obviously, the nature of the communications would have displeased management. Despite this, no action was ever taken against Painter or any other union official due to their participation in this investor outreach program.⁵³ It was only when Painter made an unauthorized series of calls to analysts that included reckless and maliciously false information regarding matters outside the labor dispute that the Company took action under its policies.⁵⁴

On the record before me, one does not need to indulge in speculation as to whether the Company would attempt to use the language of the policies to interfere with its employees' rights under the Act. The Company's leadership was well-aware of the Union's communications to investment analysts. An employer bent on unlawful interference could certainly have contended that this outreach violated the literal terms of the two policies. The fact that this Employer refrained from any such unlawful behavior fatally undermines the General Counsel's claim that the policies must be rescinded in order to protect workers' rights.

In order to complete the evaluation of the two policies, it is necessary to consider the implications of a rescission order on other Federal legislative and regulatory activity. In this connection, the Employer presented the testimony and report of an expert witness, Donald C. Langevoort, Esq., Thomas Aquinas Reynolds Professor of Law at the Georgetown University Law Center. While there was no challenge to Professor Langevoort's qualifications as an expert witness regarding the regulatory environment created by the nation's securities laws and regulations, the General Counsel and Charging Party did file motions seeking to bar his testimony in its entirety. The Board holds that "[w]hether to permit expert testimony is a question that is

⁵³ Painter made this point very clear. He reported that he "fully disclosed" his earlier authorized contacts with the analysts to Rich, Wallace, and Meisner. (R. Exh. 2, p. 123.) Despite this, "Mr. Rich did not advise [sic] me at this early date that I would be in violation of any Company policy pertaining to this type of activity." (R. Exh. 2, p. 123.) Of course, the point is that the Employer did not provide such a warning because it did not consider those contacts to violate any rule or policy because the content of the contacts was confined to information regarding the parties' labor dispute.

⁵⁴ In this regard, I note that it is true that CEO Volpe gently chided Painter regarding his earlier authorized calls, telling him that, "the Stock Analysts are not your friends." (Tr. 312, 402.) It is not contended that this comment was unlawful. A fair interpretation of Volpe's remark is that, if one were to consider the allocation of the Company's income as a zero-sum game, then the investment community would hardly be likely to support the Union's call for increased compensation for the work force.

committed to the discretion of the trial judge.” *California Gas Transport*, 355 NLRB 465 fn. 1 (2010). By order dated, October 20, 2010, I exercised that discretion by denying the motions, finding that the proffered expert testimony would be useful to elucidate the issues and enable the Board to better perform its policymaking and adjudicatory functions in this case.⁵⁵

The expert offered opinions on a variety of matters, many of which are not material to the resolution of this case under the terms of the Act and the Board’s precedents. (For example, see fn. 41, *supra*.)⁵⁶ However, I did find the expert’s testimony and report to be useful in evaluating the manner in which the Board should harmonize the relationship between labor law and securities regulation. To use the parlance of the Wild West, I concluded that, while he was clearly a “hired gun,” Professor Langevoort was also a “straight shooter.” Based on the content of his analysis and his demeanor and presentation as a witness, I deem it to be unlikely that he shaded his viewpoint to suit his client. His testimony and report provide probative information regarding the policy considerations involved in this aspect of the case.

In particular, I found Professor Langevoort’s description of the legal aspects of the regulation of the securities markets to be of particular importance. Naturally, the parties to this case

⁵⁵ After the expert testified, counsel for the General Counsel made another unusual request. He asked that the record be held open after the conclusion of the trial testimony so that the General Counsel could decide whether to produce its own expert. Under this proposal, in the event that he decided to do so, an appropriate expert would be located and a further hearing date would be scheduled. I found this proposal to be quite troubling as it clearly departs from the norms of the litigation process. Such a ruling would set a precedent permitting the Board’s litigants to await the conclusion of their adversaries’ presentation of evidence before deciding on their own final witness list. That the request came from the prosecution makes it even more perplexing. The final charge in this case was filed by the Union on October 26, 2009. Trial commenced on August 2, 2010. It cannot be contended that any party was deprived of the time needed to prepare its case, including its witness list. The Board “accords judges significant discretion in controlling the hearing and directing the creation of the record.” *Oaktree Capital Management, LLC*, 353 NLRB 1242 fn. 2 (2009). Exercising that discretion and taking cognizance of the state of the fully developed evidentiary record and the parties’ need for resolution of this protracted dispute, I denied the request and closed the record.

⁵⁶ Counsel for the Charging Party addressed the expert’s report in his posttrial brief. In particular, he took issue with the expert’s conclusions regarding Painter’s violation of the securities laws and regulations. While the expert’s conclusion in this regard is not material to the matters before me, I must note that I disagree with certain key characterizations in counsel’s brief. Counsel contends that Painter did not derive the information he conveyed to the analysts from his employment relationship with the Company. This is belied by Painter’s own testimony in which he explained that part of the basis for his conclusions concerning workload were his own observations regarding activity on the shop floor. Counsel also asserts that Painter did not have any motivation to “receive a personal gain or benefit” from his communication to the analysts. (CP Br., at p. 6.) While Painter did not trade any stock, he clearly expected benefits to flow from his communications in the form of a favorable labor contract, perhaps including continuing authorization for him to receive compensation for performing union business on company time.

have focused on their own legitimate and significant interests, including the interests protected by the Act. Clearly, those concerns will be of the highest importance to the Board.⁵⁷ Nevertheless, there are other interests involved in this situation. I refer here to the interests of the millions of citizens who invest in publicly-traded stocks and the national interest in the transparency and fairness of the markets that deal in those stocks. For this reason, it is not enough to attempt to excuse Painter’s conduct by acknowledging that he did not purchase or sell any of the Company’s shares. As the expert observed:

[I]t’s not a question of whether the speaker was buying or selling stock, it’s a question of whether the potential victims were buyers or sellers of stock. That’s what makes the fraud in connection with the purchase or sale of a security.

(Tr. 1034.)

In this case, the evidence shows that Painter’s comments had a brief, but dramatic, effect on the Company’s stock price. By obtaining the New York Stock Exchange’s permission to make an immediate response to Painter’s statements, the Company managed to avoid much damage to its stock value. Thus, by the end of the busy trading day, that value had largely rebounded. That is not the end of the story, however. As the expert noted, there were other “victims” of Painter’s misconduct. The individual investors who sold the Company’s stock based on their belief in the accuracy of Painter’s assertions were clearly losers that day. While those citizens were technically “owners” of the Employer, the reality of the situation is that they were largely innocent bystanders to the parties’ dispute. The harm that they suffered through Painter’s manipulation of the market represents an example of the significant societal interests involved in the regulation of the stock markets in order to protect the public and foster the nation’s economic well-being. Thus, by its own terms, this case illustrates the importance of the policy concerns underlying the regulatory requirements involving both fair disclosure of information and insider trading.

With this in mind, it is necessary to examine the reasons that the Employer created the two policies under challenge by the General Counsel. As the Professor explained:

⁵⁷ On the other hand, the importance of careful integration of regulatory administration has just been subject to emphasis by the President. In an Executive Order entitled, “Improving Regulation and Regulatory Review,” dated January 18, 2011, he issued the following commentary and directive to executive branch officials, “Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.” (Sec. 3.) While this Order is not binding due to the Board’s independent status, the Office of Management and Budget has “encouraged” independent agencies to “give consideration to all of its provisions, consistent with their legal authority.” OMB Memorandum M-11-10, p. 6 (February 2, 2011). In my view, the principles enunciated are persuasive in guiding the analysis of the interplay between the securities regulations and labor law.

Nearly all publicly traded companies in the United States have policies comparable to [the Insider Trading Policy and the Fair Disclosure Policy] The Dresser-Rand policy is similar to those found elsewhere, and contains nothing of substance that would not be found in the policies of other public companies.

[C]ompanies must as a practical matter proscribe the kinds of disclosures that could possibly be viewed as unlawful, and do so through prophylactic rules that are readily understandable and easy to apply Thus, it is sensible and commonplace simply to prohibit the conveyance of any significant nonpublic information to others outside the company, unless specifically authorized. The Dresser-Rand Insider Trading Policy does precisely this, and nothing more.

(R. Exh. 18, pp. 9–10.)

Turning specifically to the Fair Disclosure Policy, Professor Langevoort described the background and policy considerations as follows:

[T]he Dresser-Rand Fair Disclosure Policy explicitly responds to the SEC’s Regulation FD [17 C.F.R. § 243.100 (2000)]. . . . By prohibiting all employees from communicating material, nonpublic information outside the company unless specifically authorized, the company eliminates the risk of liability. The SEC has made clear that there is no company liability under Regulation FD if any employee acted contrary to company policy in making the selective disclosure. Dresser-Rand’s policy, once again, is reasonable, commonplace, and consistent with the best practices in establishing such a rule.

(R. Exh. 18, p. 10.)

Finally, it is noteworthy that the expert discoursed on the issue that most troubles me about the demand for rescission of the Employer’s “commonplace” policies—the potential effect on the fair and transparent operation of the nation’s securities exchanges. As he put it:

[E]ven apart from any issue of employee or company liability, the damage to the company’s *shareholders* from any misleading information—reckless, careless, or innocent—is severe. Accordingly, banning all employee disclosures of material, nonpublic information unless specifically authorized is a necessary and appropriate way of addressing all of these very real threats. Banning all such employee disclosures *to investment analysts*—the sole application of the Dresser-Rand policy at issue here—is all the more compelling because analysts are a direct link between information and stock prices; indeed, they have no function except to influence investor decisions and stock prices. [Italics in the original.]

(R. Exh. 18, pp. 10–11.)

I find it telling that Daley, the official of the International Union who testified at the behest of the General Counsel, reported that the Union clearly understands the importance of proper restrictions on the nature of information that it may provide to the investment community regarding its relationships with employers. Thus, counsel for the Employer asked him whether, “the CWA was very clear that driving the stock price

down could never be a goal of the contacts [with analysts], because that could jeopardize the security of the members. Do you agree with that statement?” To which Daley, who is employed by the International as a research economist, replied, “I agree.” (Tr. 40–41.) He later added that “[w]e counseled participants about not talking the stock price down.” (Tr. 44.)

Turning now to the legal analysis, while addressing the interaction of the Act with other legislation, the Board has long ago noted that “[t]he question, of course, is the purpose of Congress.” *American News Co.*, 55 NLRB 1302, 1309 (1944). Unsurprisingly, this analytical task is often easier said than done. In attempting to guide the Board’s efforts, the Supreme Court has warned the Board to refrain “from effectuat[ing] the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). On the other hand, the Court has also cautioned that “the Board should [not] abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.” *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 111 (1958).⁵⁸

In making the required judgment in this case, I think it is instructive to identify and allocate the relative risks of harm. Under the General Counsel’s approach, the benefit to be anticipated is the articulation of a message that employees’ protected communications are of such importance under the Act that employers must craft any work rules intended to comport with the securities laws and regulations but potentially affecting those communications in a manner that explicitly shields them from disciplinary action. The worth of such a policy is proportional to the actual existence of the degree of harm it is designed to prevent.

The parties have not cited, and I have not found, any prior case that raises the issue of a conflict between an employer’s efforts to meet its obligations as a publicly-traded corporation and the protected communications by its employees. From this, it may be inferred that the private parties in our system of labor relations have been able to avoid controversy in this area. As illustrated by Daley’s testimony in this case, labor organizations may reasonably be expected to comprehend that an em-

⁵⁸ It is fair to observe that the Board has been subject to criticism from appellate authorities for the manner in which it has attempted to thread this needle. Most notable recently was the Supreme Court’s observation that the Board had “trivialize[ed]” and “subvert[ed]” the nation’s immigration laws in awarding backpay to persons who were working in this country in violation of those laws. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002). In a case that bears some significant similarities to the matter under examination, the D.C. Circuit chided the Board for what it deemed a “preposterous” decision to find a work rule prohibiting abusive and threatening language to be a violation of the Act. *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001). Instead, the court held that the employer’s “zero-tolerance policy” was “commonplace” and appropriate. 253 F.3d at 27. The Board’s contrary ruling placed employers in a “catch 22” by preventing efforts to insulate themselves from legal liability under other Federal laws that prohibited racial, sexual, or other forms of harassment in the workplace. 253 F.3d at 27.

ployer's rules about insider trading and fair disclosure are designed to protect the employer from liability under the securities laws and regulations and are not intended to be "construed as restricting discussion or disclosure of employees' own terms and conditions of employment." *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003) (rule regarding confidentiality of employer's proprietary information does not violate the Act).

In assessing the anticipated impact of a decision requiring rescission of the Employer's policies, it must be recalled that the expert provided credible testimony demonstrating that those policies are typical throughout the ranks of publicly traded corporations. The sweeping precedential effect of such an order would reverberate throughout the economy and inject uncertainty into the markets during a highly sensitive period of economic history. As counsel for the Employer notes, the General Counsel is not in the business of rewriting work rules. It would be left to individual corporations to attempt to draft language that would satisfy the General Counsel and the Board in the event of future disputes. Of course, the adequacy of such newly drafted rules in fulfilling the goal of limitation of liability under the securities regulations would also be subject to future test in the appropriate forums for those matters.⁵⁹ The creation of this degree of uncertainty may only be justified by clear evidence of harm under the current language in use throughout the nation.

In resolving that question, I conclude that the events of this case provide the answer. Management at all levels has been well aware of the Union's outreach program designed to convey its views regarding the parties' labor dispute to members of the investment community. The Company has never sought to discipline any bargaining unit member for any protected communication with investment analysts. The only application of the policies in the context of labor relations has been their citation as justification for Painter's discharge arising from his unprotected communication of recklessly false information.⁶⁰ There is simply no evidence that this employer, or any other employer, has ever violated the Act by sanctioning protected communications through application of policies designed to prevent insider trading or unfair disclosures of information. In the absence of any evidence of such harm, the disruption

⁵⁹ This reality is acknowledged by counsel for the General Counsel who observes that, "Respondent would only be required to modify its rules so as to accommodate Section 7 rights, the federal policies underlying securities law, and its own legitimate interests. It is not for the Acting General Counsel to dictate the language." (GC Br. at p. 61.)

⁶⁰ Indeed, while the Employer relies, in part, on the Insider Trading and Fair Disclosure Policies in justifying its termination of Painter, such reliance is really not essential to its case. It must be recalled that the Code of Conduct, a separate document, specifically prohibits "exaggeration, derogatory remarks, guesswork, or inappropriate characterizations of people and companies in our business records and communications." (GC Exh. 30, p. 8.) Painter's communication clearly violated the terms of this work rule. Interestingly, the General Counsel does not challenge the validity of the rule. McDonnell's termination letter to Painter informed him that he was being fired for "violation of the Company's Code-of-Conduct." (GC Exh. 15.) Thus, whatever the validity of the Insider Trading and Fair Disclosure policies, Painter's termination was adequately justified by his unprotected violation of the Code of Conduct.

caused by rescission cannot be justified. Any conflict between the Act and those policies is merely apparent, not real. See *Lutheran Heritage Village-Livonia*, supra., 343 NLRB at 646-647. (work rules must be given a "reasonable reading" that does not "presume improper interference with employee rights").

In conclusion, the General Counsel has not met his burden of proving that the Employer's Insider Trading and Fair Disclosure Policies are unlawful on their face or have been applied unlawfully to restrict the protected activities of its employees. I will recommend that these complaint allegations be dismissed.

F. Did the Employer Unlawfully Threaten Reprisals for Violations of its Insider Trading and Fair Disclosure Policies?

Chronologically, the General Counsel's final allegation of wrongdoing involves a memorandum sent by Rich to all employees on May 6. The letter begins by characterizing Painter's⁶¹ conduct as involving "misleading" statements to analysts about "the Company's operations and our current and future workload in New York." (GC Exh. 27, p. 1.) Rich advises the employees that, because Painter had made "misleading" statements to the analysts, he was being terminated. Rich then reminded the work force of the Company's rules and the rationale supporting those policies. As he put it, "any act that damages the Company damages our employees, because it can and will affect our clients' and our investors' trust in the Company." (GC Exh. 27, p. 2.) He warned the employees that violations of the Code of Conduct and other company rules would result in disciplinary action, including termination of employment. The General Counsel argues that the memorandum constituted an unlawful threat of reprisal against employees due to their participation in protected activities.

In *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009), the Board described its standard for assessment of these situations:

An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activities, and employer statements protected by Section 8(c). [Citations and certain internal punctuation omitted.]

With regard to Section 8(c), the Board has noted that, "[i]t gives employers the right to express their opinions about union matters, provided such expressions do not contain any threat of reprisal or force or promise of benefit." *Children's Center for Behavioral Development*, 347 NLRB 35 (2006).

The key factor in the assessment of Rich's memo is the determination that Painter engaged in conduct that was outside the Act's ambit of protection. Thus, when Rich warned the work force that disciplinary action could result from similar conduct,

⁶¹ Painter's name is not mentioned in the memorandum. Given his discharge and the Union's response to it, I have no doubt that most of the work force knew that the memorandum was referring to Painter.

he was not uttering any threat against protected union activity. An employer's warning that disciplinary consequences could follow from the commission of unprotected activity clearly falls within the employer's free speech right as articulated in Section 8(c). No reasonable employee would have interpreted Rich's point as constituting a threat of punishment for communications about terms and conditions of employment directed toward outside parties. The employer had tolerated such communications throughout the course of the parties' labor dispute. Rich's memo makes clear that the Company's focus was on the prevention of securities violations, not the restraint of protected union activity. Viewed in its totality and in its context as described throughout this decision, I do not find that the memorandum had any effect of interfering with, restraining, or coercing employees in their protected union activities. I will recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By interrogating its employees about the internal practices and procedures of their union and by interrogating them about the internal deliberations of their union officials regarding collective-bargaining negotiations, the Employer unlawfully interfered with, restrained, and coerced those employees in violation of Section 8(a)(1) of the Act.

2. The Employer did not violate the Act in any other manner alleged in the amended consolidated complaint.

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 to take affirmative action designed to effectuate the policies of the Act by posting an appropriate notice. The notice posting shall be in the manner described in *J. Picini Flooring*, 356 NLRB 11 (2010).

Since I did not find the commission of any unfair labor practice related to Painter's discharge, I am not authorized to order any relief for him. This does not mean, however, that I am precluded from making certain observations regarding his situation. I hope that a reader of this decision will have concluded that I carefully examined the record and the conduct of the parties. Certainly, the outcome of that examination demonstrates that I bear no ill will toward the management of the Company. Nothing I am about to say should be interpreted as expressing any doubt as to the lawfulness of the Company's decision to terminate Painter's employment. Beyond this, I am mindful that, "it is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is lawful." *Framan Mechanical, Inc.*, 343 NLRB 408, 412 (2004). Having acknowledged all this, I remain convinced that it is worthwhile and appropriate to put Painter's situation in its complete and current context.

It will be recalled that the events of this case formed a part of a long and contentious labor dispute between the Employer and the Union. The dispute began during the negotiations for a successor agreement to the contract that expired August 3, 2007. The conflict did not end until a new agreement was ratified on November 6, 2009. During this period of strife of more

than 2 years' duration, it is fair to say that the parties wielded virtually every economic weapon against each other. The Union went on strike. It sent pickets to demonstrate against the Company's CEO when he made an appearance at a local college where he serves as a trustee. It criticized the Company's behavior in the media, complained to local politicians, and, of course, expressed its views about the labor dispute to the investment analysts. By the same token, the Employer locked out the bargaining unit members, hired permanent replacements, and imposed its final offer.

As the parties deployed their arsenals of economic weapons, it appears that each side went beyond the confines of our labor laws. In his own words, Painter "snapped" and "lost control." (R. Exh. 2, p. 183.) He called the investment analysts and made reckless, false, and malicious statements about subjects unrelated to the labor dispute. However, I am equally mindful that, in a decision of comparable scope to this one, Judge Rubin found that the management of the Company also transgressed the labor laws in a number of significant ways. Among the unfair labor practices found by Judge Rubin were the unlawful discharge of an employee, discrimination against strikers, and bargaining violations consisting of the imposition of unlawful unilateral changes in the terms and conditions of employment.⁶² See, *Dresser-Rand Co.*, JD-04-10 (Jan. 29, 2010), slip op. at 60-61, 2010 WL 341549.

Remarkably, given all that went before, these parties found it in their hearts (and in their economic interests) to reach an agreement with each other. The labor dispute is over and the economic life of the plant must go forward. In my view, this is the time for a gesture of forgiveness and reconciliation. I respectfully suggest that an offer to rehire Painter would send such a message. It would recognize his more than 30 years of service to this Company. (Indeed, his family's association with Dresser-Rand goes back to 1966, when his father was the chief of security at Painted Post.) It would also show a compassionate appreciation of Painter's likely dire economic circumstances given his age, background, and the general economic conditions of our time.

Of course, I understand that the Employer would not want to send any message to its employees that could be construed as tolerating unprotected misconduct or as suggesting weakness in its resolve to punish such activities. However, no reasonable employee would draw such a conclusion from this act of reconciliation, given that it would still leave Painter in the position of having suffered an unpaid suspension for a period approaching 2 years in length.

On the findings of fact (not including the remarks contained in the Remedy discussion directly above), conclusions of law and on the entire record, I issue the following recommended⁶³

⁶² Of course, both Judge Rubin's and my decision are subject to review by the Board.

⁶³ 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.

ORDER

The Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its bargaining unit employees regarding the internal policies and procedures of their union, the internal deliberations of their union officials regarding collective-bargaining negotiations, or their other protected union activities.

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

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

(a) Within 14 days after service by the Region, post at its facility in Painted Post, New York, copies of the attached notice marked "Appendix."⁶⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and

⁶⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

former employees employed by the Respondent at any time since April 30, 2009.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively question our bargaining unit employees regarding the internal policies and procedures of their union, the internal deliberations of their union officials regarding collective-bargaining negotiations, or their other protected union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our bargaining unit employees in the exercise of the rights guaranteed them by Federal labor law.

DRESSER-RAND COMPANY