

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

OVATIONS FOOD SERVICES, L.P.

and

NADINE WEAVER, AN INDIVIDUAL

Case 9-CA-046264

AFFIDAVIT OF DAVID K. MONTGOMERY

STATE OF OHIO

COUNTY OF HAMILTON

NOW, comes the Affiant, David K. Montgomery, attorney for Oventions Food Services, L.P., being first duly sworn under oath, and states as follows:

1. I have personal knowledge concerning all of the facts contained herein.
2. I am the attorney of record for Respondent Oventions Food Services, L.P. ("Oventions") in the above-captioned matter.
3. A true and accurate copy of the letter received by Oventions from the National Labor Relations Board on or about April 26, 2011, in which the NLRB stated that the Region had decided to defer to arbitration with respect to the unfair labor practice charge filed by Nadine Weaver, is attached as Exhibit A to this Affidavit.
4. A true and accurate copy of the arbitration award issued by Arbitrator Stephen L. Hayford on February 5, 2012 is attached as Exhibit B to this Affidavit.
5. A true and accurate copy of the email exchange between Board Agent Julius Emetu and me, in which Board Agent Emetu explained the Region's reasons for declining to defer to the arbitration award, is attached as Exhibit C to this Affidavit.

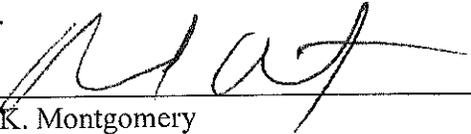
EXHIBIT

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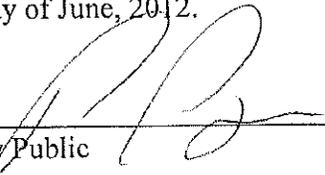
The above statement is true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.



David K. Montgomery

Sworn and subscribed before me this 1 day of June, 2012.



Notary Public

Patricia Anderson Poyar, Attorney at Law
NOTARY PUBLIC, STATE OF OHIO
My Commission has no expiration
~~date. Section 147.05 O.R.C.~~

My Commission Expires: _____

CERTIFICATE OF SERVICE

This is to certify that on June 1, 2012, a copy of the foregoing Affidavit of David K. Montgomery was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

Gary W. Muffley
Regional Director
National Labor Relations Board
Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202
Via regular mail and electronic case filing at:
www.nlr.gov

Julius U. Emetu
Board Agent
National Labor Relations Board
Region 9
550 Main Street – Room 3003
Cincinnati, Ohio 45202
Julius.Emetu@nlrb.gov

/s/ David K. Montgomery
David K. Montgomery



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 9

3003 John Weld Peck Federal Building

550 Main Street

Cincinnati, Ohio 45202-3271

Telephone: (513) 684-3686

Facsimile: (513) 684-3946

April 26, 2011

Ms. Nadine Weaver
223 Albion Place
Cincinnati, OH 45219

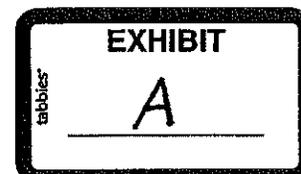
Ms. Karen Muros
Ovations Food Services, L.P.
18228 US Highway 41 North
Lutz, FL 33549

Re: Ovations Food Services, L.P.
Case 9-CA-46264

Dear Ms. Weaver and Ms. Muros:

The Region has carefully considered the charge filed against Ovations Food Services, L.P. alleging it violated the National Labor Relations Act. As explained below, I have decided that further proceedings on that charge should be handled in accordance with the Board's deferral policy.

Deferral Policy: The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). This policy is based, in part, on the preference that the parties should resolve certain issues through their contractual grievance procedure in order to achieve a prompt, fair and effective settlement of their dispute. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Regional Office will defer the charge. However, this policy requires that a charge be dismissed if the charging party thereafter fails to promptly file and attempt to process a grievance on the subject matter of the charge.



(over)

Decision to Defer: Based on our investigation, I am deferring further proceedings on the charge to the grievance/arbitration process for the following reasons:

1. The charge alleges: The Employer violated Section 8(a)(1) and (3) of the Act about February 17, 2011, by terminating Nadine Weaver in retaliation for her union activities.
2. The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.
3. The Employer is willing to process a grievance concerning the above allegations in the charge and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is likely that such allegations may be resolved through the grievance/arbitration procedure.

Further Processing of the Charge: As explained below, while the charge is deferred, the Region will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

Charging Party's Obligation: Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

Union/Employer Conduct: If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and Charging Party, I may revoke deferral and resume processing of the charge.

Charged Party's Conduct: If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

Inquiries and Requests for Further Processing: Approximately every 90 days, the Regional Office will ask the parties about the status of this dispute to determine if the dispute has been resolved and whether continued deferral is appropriate. Failure to respond to the Region's inquiries may result in dismissal of the charge. I will accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of the charge or for issuance of a complaint.

Notice to Arbitrator Form: If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the award is sent to the parties.

Review of Arbitrator's Award: If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is clearly repugnant to the Act. Further guidance on the nature of this review is provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

Charging Party's Right to Appeal: The National Labor Relations Board Rules and Regulations permit the Charging Party to obtain a review of this action by filing an appeal with the ACTING GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, the Charging Party is encouraged to submit a complete statement setting forth the facts and reasons why the Charging Party believes that the decision to defer the charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. *To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.* To file an appeal by mail or delivery service, address the appeal to the Acting General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date and Time: The appeal is due on May 10, 2011. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Acting General Counsel in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than **one day before the due date set forth above**.

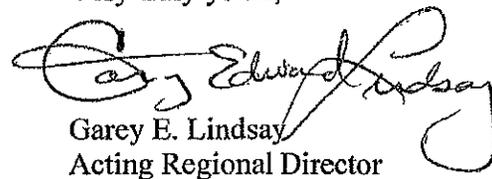
Extension of Time to File Appeal: Upon good cause shown, the Acting General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. *To file electronically, go to www.nlr.gov, click on File Case Documents, enter the NLRB Case Number and follow the detailed instructions.* The fax number is (202) 273-4283. A request for an extension of time to file an appeal **must be received on or before the original appeal due date**. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held

before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(d), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Notice to Other Parties of the Appeal: The Charging Party should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the Acting General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,



Garey E. Lindsay
Acting Regional Director

GEL/JUE/md

Enclosures (5)

cc: Ms. Teresa Perrult, Human Resources Manager, Ovations Food Services, L.P.,
The Duke Energy Convention Center, 525 Elm Street, Cincinnati, OH 45202

Chicago and Midwest Joint Board UNITE HERE and its affiliated Local 12,
35 East 7th Street, Suite 500, Cincinnati, OH 45202

Mr. Ronald Willis, Attorney at Law, Doud, Bloch & Bennett,
8 South Michigan Avenue, 19th Floor, Chicago, IL 60603

Mr. Gary W. Muffley, Regional Director, National Labor Relations Board, Region 9,
3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, OH 45202

Acting General Counsel, National Labor Relations Board, 1099 - 14th Street, N.W.,
Washington, D.C. 20570

Form NLRB-5433
(7-89)

United States of America
NATIONAL LABOR RELATIONS BOARD

NOTICE TO ARBITRATOR

TO: _____
(Arbitrator)

(Address)

NLRB Case Number
9-CA-46264

NLRB Case Name
Ovations Food Services LP

A determination has been made by the Regional Director of Region 9 of the National Labor Relations Board to administratively defer to arbitration the further processing of the NLRB charge in the above-named matter. Further, both parties to the NLRB case have agreed to proceed to arbitration before you in order to resolve the dispute underlying the NLRB charge. So that the Regional Director can be promptly informed of the status of the arbitration, the undersigned hereby requests that a copy of the arbitration award be forwarded to the Regional Director at 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271 at the same time that it is sent to the parties to the arbitration.

(Name)

(Title)

Arbitration in the Matter Between OVATIONS FOOD SERVICES And CHICAGO & MIDWEST REGIONAL JOINT BOARD, LOCAL 12	FMCS Case No. 11011-55634-6 Issue: Discharge Grievant: Nadine Weaver Arbitrator: Stephen L. Hayford
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PRELIMINARY STATEMENT

This Matter was presented to the Arbitrator at hearings held on October 13 and December 6, 2011, in Cincinnati, Ohio. The exchange of post-hearing briefs was completed on January 11, 2012.

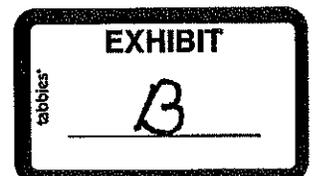
APPEARANCES

For the Company:

David Montgomery	Attorney and Spokesperson
Purvill Chaney	Chef and Witness
Pam Zdzenski	Regional General Manager and Witness
Margaret Rose Wheeler	Director of Catering Sales and Witness
Karen Muros	Vice President, Corporate Human Resources, and Witness

For the Union:

Ronald M. Willis	Attorney and Spokesperson
Nadine Weaver	Grievant and Witness
Bishaara Clark	Business Representative and Witness
Mike Kelow	Witness
Letricia Rice	Witness
Jessica Carroll	Witness
Velma K. Smith	Witness



I. BACKGROUND AND FACTS

The Grievant, Nadine Weaver, was hired by the Company on March 28, 2009. At the time of her discharge in February 2011 she was employed as a Cook A working at the Company's Duke Energy Convention Center (DECC) facility in Cincinnati, Ohio. The facility's Kitchen Department is operated under the supervision of Chef Purvill Chaney.

The written weekly work schedules for DECC Kitchen employees (Union Exhibit Nos. 1 and 2) are prepared two weeks in advance by Chef Chaney. Employees are scheduled to begin work on the hour. Employees clock-in for work on the second floor of the DECC and then proceed to the third floor, where the Kitchen is located. When employees arrive in the Kitchen they report to a supervisor and receive their work assignments for the day.

Each day, a Kitchen supervisor prepares a Daily Time Sheet document (Union Exhibit No. 7) whereupon he/she enters times in boxes labeled "Arrival Time At Work Location" and "Departure Time" for each scheduled employee. The supervisor also enters times in boxes titled "Meal Break Out" and "Meal Break In" for each scheduled employee. In addition, an Employee Timecard Report is computer generated for each employee on a bi-weekly basis. That Timecard Report (Company Exhibit Nos. 5 and 8; Union Exhibit Nos. 5, 6, 8, and 9) shows the punch-in and punch-out time for each day on which an employee actually works.

The Payroll provision at page 6 of the Company's Part-Time Employee Guidebook states that "No one is permitted to clock-in more than five (5) minutes prior to their scheduled shift." The evidence in the record indicates that the Company's *de facto* early clock-in policy permits Kitchen Department employees to clock in up to ten minutes before their scheduled on-the-hour start time. The purpose of that five- or ten-minute grace period is to permit employees the time necessary to travel from the second-floor location of the time clock to the third-floor location of the Kitchen. The Disciplinary Policy set out at page 11 of the Part-Time Employee Guidebook provides for a four-step progressive discipline procedure applicable to most acts of misconduct (documented verbal warning, documented written warning, documented final written warning and/or suspension, termination of employment) and states further in relevant part as below:

The following list displays infractions that will result in immediate termination.

.....

3. Demonstrating insubordination, including but not limited to:

.....

h. Having time card violations

On or about December 2, 2010, Chef Chaney held a meeting with the Kitchen Department staff. He testified that the primary purpose of that meeting was to clarify the Company's expectation for Kitchen staff concerning the clock-in/clock-out procedures and policies. The Company asserts that at the meeting Chef Chaney advised all Kitchen staff that they were to comply with the Company's clock-in policy, which prohibits employees from clocking in more than ten minutes prior to the start of their shift without management's approval, and made clear that an employee who fails to comply with

those clock-in policies would be subject to termination. Chef Chaney testified further that during that meeting he told his subordinates, "If you clock-in more than ten minutes early, it is falsifying time."

Subsequently, from January 9 through January 23, 2011, Nadine Weaver clocked in more than ten minutes early on seven of the ten days she was scheduled to work. The evidence shows those clock-ins to have occurred as follows:

Scheduled Date for Work	Scheduled Start Time	Actual Clock-In Time	Minutes Clocked-In Prior to Shift
January 9, 2011	8:00 a.m.	6:43 a.m.	77 Minutes
January 11, 2011	7:00 a.m.	6:43 a.m.	17 Minutes
January 13, 2011	8:00 a.m.	7:20 a.m.	40 Minutes
January 14, 2011	8:00 a.m.	7:43 a.m.	17 Minutes
January 16, 2011	9:00 a.m.	8:41 a.m.	19 Minutes
January 22, 2011	8:00 a.m.	7:47 a.m.	13 Minutes
January 23, 2011	9:00 a.m.	8:48 a.m.	12 Minutes

The record indicates that Chef Chaney was out of town on four of the above days, from January 8-14, 2011, working at the Company's General Managers meeting in West Palm Beach, Florida.

Regional General Manager Pam Zdzenski testified on direct examination that during the mid-January 2011 General Managers meeting in Florida, it was announced that time card audits were going to be initiated corporation-wide. As a result, Ms. Zdzenski, upon her return to Cincinnati, directed that the January 9-23, 2011, time records for bargaining unit employees in the Kitchen, Warehouse and Beverage/Bar Departments be pulled and examined.¹ Spreadsheets showing early clock-ins were created based on the information revealed by a review of the relevant Employee Timecard Reports and weekly work schedules. The Company's review of those employee time card spreadsheets for the Kitchen Department (Company Exhibit No. 4) revealed the above-summarized early check-ins by Ms. Weaver during the January 9-23, 2011, period.

The Company's investigation of Ms. Weaver's January 2011 early clock-ins was completed on or about January 26, 2011. Thereafter, Ms. Zdzenski began attempting to schedule a meeting with Union Business Agent Bishaara Clark and the Grievant to discuss the finding of her investigation. After Mr. Clark postponed the original meeting

¹ Ms. Zdzenski testified that the Catering Department time records were not examined in January 2011.

scheduled for early February, Ms. Zdzenski was eventually able to reschedule the meeting on or about February 17, 2011. That meeting was attended by Ms. Zdzenski, Ms. Clark, Chef Chaney, Ms. Weaver, and bargaining unit employee Kay Smith. During the meeting, Ms. Weaver was given an opportunity to explain her early clock-ins. Because the Company believed the Grievant did not explain her early clock-ins, at the close of the meeting Zdzenski handed Weaver a letter informing her that her employment was terminated. That letter (Joint Exhibit No. 3) states as follows:

Ovations Food Services, L.P. is terminating your employment for cause, effective today.

In accordance with the employer's Management Rights (Article 11 – Section 11.1) the Company has the right to discharge an employee for just cause. Just cause, in this case, is predicated on two equally egregious and willful examples of ongoing gross misconduct.

1. Willful and egregious abuse of time-reporting

Between January 9, 2011 and January 23, 2011, you clocked-in early for 7 shifts. The employer made allowances for making sure you were in proper uniform and work-ready by allowing a five-minute variance. Similarly, we gave you the benefit of the doubt by not considering a shift for which you clocked in 5 hours early, but were given permission to remain after the fact. Even allowing for these generous exceptions, the difference between when you clocked-in and when you were scheduled ranged between 12 minutes and 1 hour and 17 minutes for 70% of shifts worked in a payroll period. In addition, there were 4 more shifts that you clocked in early, outside of the 5 minute policy. These blatant violations of the time reporting policy resulted in the Company paying you for unapproved/unauthorized work time.

As a Union Steward, you were well-aware of Company policy and work rules, and your responsibility to adhere to them per the terms and conditions stipulated in your Collective Bargaining Agreement. You signed the CBA, and you signed an acknowledgment contained in the Employee Handbook.

In January, 2010 you were present, and compensated, for attending a department meeting wherein Chef Purvill Chaney reiterated Company policy regarding clocking-in and out-, and time and attendance compliance. Following this meeting, notifications were (again) posted next to all time clocks within our operation. It has been the Company's long-standing practice to reinforce work rules regarding time reporting with all employees.

Based upon a recent internal audit of our venue's time and attendance reporting mandated by the corporate office, we were alerted to the excessive number of times you clocked-in earlier than scheduled. The number of shifts for which you clocked-in early was 80% more than any other hourly employee within the 3 departments audited. The fact that you did this 10 times during 3 weeks clearly demonstrates a blatant, willful and

egregious disregard of policy, and unequivocally supports termination for cause.

Committing one type of serious work rule/policy violation repeatedly and intentionally is enough to support discharge for just cause. However, because of the extreme disharmony and hostility caused by your actions, we are including a second egregious, willful and repeated work rule/policy violation:

2. Egregious gross misconduct due to creating a hostile and disharmonious work environment; spreading false rumors and gossip; making inflammatory and disparaging remarks; attempting to harm the employer's reputation by offering to collude with another employee in proposing to bring forward a lawsuit based on false information.

The following are just four examples of your propensity for intentionally creating disharmony in the workplace by failing to adhere to the employer's Code of Conduct. You were counseled on refraining from engaging in disrespectful, malicious behavior in the workplace.

- At the end of December, you shared confidential personal information regarding another union member's terminated pregnancy (abortion) with other employees. This was private medical information shared publicly. [sic] You shared this information in your capacity as union steward while trying to get more hours for another employee. You were counseled on your actions by Pam Zdazenski and directed to refrain from sharing private and/or incorrect information.
- In January 2011, former Ovation's Assistant General Manager, Kevin Dolphin, complained that while he was working out one of the last shifts of his notice period, you pulled him aside and said "What they [Ovation's] are doing is wrong and I can help you get a lot of money from them." Despite the fact that Dolphin was being discharged without contest (for reasons other than cause), he questioned your motivation and fixation on "getting money." You have openly stated to co-workers that you would "bring down" the employer on several occasions.
- Your propensity for spreading disharmony is not limited to sharing private information you learned of in the scope of your role as shop steward, you also spread unfounded rumors that were entirely fabricated. For example, you let it be known that Alma Diaz, another union member who filed a harassment grievance in December, had "been fired from every job she's ever had in Cincinnati." This statement is unequivocally false and served to damage Diaz's reputation in the workplace.
- The week of February 11th-15th, you also telephoned an Ovation's supervisor stating that you wanted to "get rid of" Simery Lopez, David Cook and Chef Purvill Chaney. You stated that you wanted to bring down the Company once again. You also stated that you were encouraging Union members to not come in for their shifts so the Company fails. You also approached this individual to ask why he was speaking with Pam

Zdzenski, which again speaks to your motive and character to keep division between the Company and the employees.

Ovations is committed to assuring a respectful and compliant workplace for all employees. Your pervasive and blatant disregard for the employer's code of conduct, respectful workplace, time reporting and harassment policies, is unacceptable. Despite the Union's and the employer's diligent attempts to work with you to improve this situation, your volatility and erratic behavior have escalated. All remedies for corrective action laid out in the CBA, as well as in Ovations' policies and procedures, have been exhausted.

In accordance with Ohio wage and hour laws, final pay will be made no later than the next regularly scheduled pay day.

As a result of the Company's decision to terminate her employment, on or about February 22, 2011, Ms. Weaver had filed an unfair labor practice charge against the Company with the National Labor Relations Board (NLRB).² On or about February 23, the Grievant filed an unfair labor practice charge against the Union.³ Weaver filed a Grievance on February 24, 2011, taking issue with her discharge. That Grievance (Joint Exhibit No. 2) states in relevant part as follows:

STATEMENT OF GRIEVANCE:

.

I am filing a grievance against Ovations for unfair termination.

The Grievance progressed through the contractual procedure without resolution and was advanced to arbitration before the undersigned in the manner described above.

II. THE ISSUES

At the hearing, the Parties stipulated the Issues before the Arbitrator to be:

Did the Company discharge the Grievant, Nadine Weaver, for just cause? And was the discharge in violation of the National Labor Relations Act (NLRA)? If the discharge was not for just cause or in violation of the NLRA, what is the proper remedy?

² A copy of this Unfair Labor Practice charge was not entered into the hearing record. Presumably, the charge asserts a violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA), as amended.

³ A copy of this Unfair Labor Practice charge was not entered into the hearing record. Presumably, the charge asserts a violation of Section 8(b)(1)(a) of the NLRA, as amended. Union Business Representative Bishaara Clark testified on cross examination that the unfair labor practice charge Ms. Weaver filed against the Union has been withdrawn.

III. RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

A. ARTICLE 3 – GRIEVANCE PROCEDURE

Section 3.1. Grievance Procedure...

Step 3. Failing satisfactory agreement in Step 2, the Union (not the individual employee) may file a request for arbitration in writing with the Company. Said request shall be filed within thirty (30) calendar days of the decision in Step 2. The grievance shall then be referred to arbitration for disposition.

The arbitrator shall be mutually agreed to by a Company Representative and a Union Representative. If the parties cannot agree to an arbitrator, the arbitrator shall be selected from a list of seven (7) arbitrators provided by the Federal Mediation and Conciliation Service (FMCS). The parties shall strike names alternately and the party seeking arbitration shall strike first. Each party shall have the right to strike the entire panel of arbitrators once. The parties shall follow the rules of FMCS. The decision of the arbitrator, if within the limits of this Agreement, shall be borne equally by the parties.

In rendering his decision, the arbitrator shall not add to, subtract from, modify, or amend any provisions of this Agreement. The arbitrator shall render a written decision within 30 days after receipt of the parties' briefs or 30 days from the conclusion of the hearing if no briefs are filed by the parties. Past practice may only be used by the arbitrator to interpret a vague or ambiguous provision of this Agreement. The arbitrator's decision is to be based solely on the evidence and arguments presented by the parties. Disputes arising or grievances filed before the execution or after the expiration of this Agreement or not within the time limits in Step 2 or 3 of the grievance procedure are not subject to arbitration.

B. ARTICLE 11 - MANAGEMENT RIGHTS

Section 11.1. Rights Reserved to Management. The Company has the right to hire, layoff, recall, evaluate, promote and demote employees; to discipline and discharge for just cause; to determine the duties to be performed by each classification; to establish or amend the qualifications necessary for each classification or job; to abolish classifications (with 10 calendar days advanced [sic] notice to the union); to establish or modify job descriptions; to establish the wage rate for any classification (the wage rate will be subject to bargaining with the Union); to assign work and duties; to establish, amend and enforce reasonable rules, policies and regulations; to schedule the hours of work and days of the work week; to subcontract work so long as the subcontracting does not cause the layoff of a current bargaining unit employee; to determine when overtime will be worked; to set or change the starting and quitting times; to establish or amend the number of hours and shifts to be worked subject to the provisions of this Agreement; to determine the manner, means, methods, and equipment used, the services provided

and the location of the operations; and to introduce new or improved methods of service.

IV. POSITION OF THE COMPANY

The Company asserts that Nadine Weaver was discharged for just cause, and contends that its decision to terminate her employment was not motivated by her Union activities. The Grievant was terminated after she clocked in early for work on repeated occasions without approval from management, acts the Company's characterizes as "stealing time" – a serious offense warranting summary discharge.

The Company characterizes this as a "simple case." In that regard it notes as follows:

- Ms. Weaver and all Kitchen Department staff were made aware of the time card and clocking-in policies, both in writing and at the early December 2010, meeting held by Chef Chaney with the Kitchen staff. The Company avers it is indisputable that early and unapproved clock-ins are prohibited.
- The Company contends that at the hearing Ms. Weaver acknowledged that early and unauthorized clock-ins constitute "stealing time" from the Company and are grounds for immediate termination.
- Approximately one month after the early December 2010, meeting convened by Chef Chaney and Executive Sous-Chef Sheila Brown where it was clarified that, pursuant to the Company's early check-in policy, employees were prohibited from clocking-in more than ten minutes before the beginning of their scheduled shifts, Ms. Weaver clocked in for work more than ten minutes early on seven occasions over ten scheduled work days in a fourteen calendar days period.
- The Company conducted a complete investigation to determine whether Ms. Weaver had received approval to clock-in earlier than ten minutes on those seven days and discovered that she had not.
- At the February 17, 2011, meeting called to discuss the Grievant's timeclock violations, Ms. Weaver failed to present any facts suggesting she did not violate the policy. The investigation further revealed that she had never obtained the permission of any management official to clock-in early on the seven days at issue.
- Even though Chef Chaney signed Ms. Weaver's Employee Timecard Reports (Union Exhibit No. 5), he testified that his signatures on those documents was to authorize payment of wages to employees, and did not constitute an after-the-fact approval of the Grievant's improper early clock-ins.
- The Company terminated Ms. Weaver for stealing time in the same manner it had terminated bargaining unit employee Hassan Neal in October 2010 for the same offense.

The Company believes the above-listed facts prove that it had just cause to terminate Ms. Weaver's employment. The Grievant was aware of the early check-in policy and she violated it. Another employee was previously discharged for time clock violations, and Weaver could be treated no differently from that employee.

The Company acknowledges that the August 2011 audit of its Duke Energy Center Catering Department revealed that Catering Department employee Patricia Sofer clocked in early on nine days from January 13 through January 25, 2011 and was not disciplined. It explains the omission to discipline Ms. Sofer by the fact that her early clock-ins were not discovered until some seven months after they transpired, making it too late to take disciplinary action against her. The Company also points out that, unlike Ms. Weaver, who had attended the early December 2010 meeting where Kitchen Department employees were expressly admonished regarding the ten-minute early clock-in policy, Sofer was not expressly reminded that violations of that policy would result in her being terminated. For these reasons the Company avers that its failure to discipline Ms. Sofer does not prove that the Grievant was the subject of unequal treatment warranting a reversal of her termination.

The Company contends there is no evidence to support Ms. Weaver's claim that she was terminated because she filed grievances on behalf of the Union in her role as Union Steward. The Company points out that the Grievant and the Union appropriately bear the burden of proving that its actions in terminating Weaver's employment resulted in a violation of the NLRA. It insists that the Union has presented no such evidence.

The Company maintains that in order to establish a *prima facie* case of discrimination under Sections 8(a)(1) and 8(a)(3) of the NLRA, Ms. Weaver must show the following:

1. that she was engaged in Union or other protected concerted activities;
2. the Company knew about that activity;
3. the Company took an adverse employment action against her; and
4. there is a nexus between the protected activity and the adverse employment action.⁴

The Company concedes that the Grievant can satisfy the first three elements of a Section 8(a)(3) unfair labor practice violation. However, it insists there is absolutely no evidence linking Ms. Weaver's union activities to the decision to terminate her employment. Instead, the Company urges that the motivating force behind the decision to terminate the Grievant was her actions in stealing time. Because it believes that Ms. Weaver and the Union have failed to adduce evidence sufficient to support an inference that her protected activity as a Union steward was a substantial or motivating factor in the decision to terminate her employment, the Company submits that no violation of the NLRA has been made out here.

⁴ *Pacific Design Center*, 339 NLRB No. 57 (2003), *Wright Line*, 251 NLRB 1083 (1980).

Conclusion

Based on the arguments summarized above, the Company takes the position that the termination of Nadine Weaver was for just cause and did not result in a violation of her protected statutory rights under the National Labor Relations Act. Accordingly, it asks that the instant Grievance be denied, and that the Arbitrator find that no NLRA violation has been made out.

V. POSITION OF THE UNION

The Union contends the Company has failed to meet its burden of proving just cause for Ms. Weaver's discharge. First, it submits that the Company did not afford the Grievant adequate procedural due process because it did not interview her before deciding to terminate her employment. The Union is convinced that the Company's failure to conduct such an interview before the February 17, 2011, meeting at which it handed Weaver a previously-typed termination letter (Joint Exhibit No. 3), and the absence of any proof that it interviewed any other employees with knowledge of the circumstances surrounding her early clock-ins in January 2011, warrant reversal of Ms. Weaver's discharge and an order that she be reinstated to her job.

The Union asserts further that the Company has failed to adequately prove that Ms. Weaver engaged in the alleged misconduct that resulted in her termination. It notes that the first act of misconduct the Company claims Ms. Weaver engaged in was "willful and egregious abuse of time-reporting." Because the Grievant was not disciplined in incremental steps, as the events of January 9-23, 2011, unfolded, the Union reasons she must have been terminated because of the cumulative total of hours worked that resulted from her purported clocking-in more than ten minutes before the start of her scheduled shift on the seven days in question.

The Union contends the evidence shows that on at least three occasions management officials were aware of, approved, and authorized the Grievant's early clock-ins. By its test, Ms. Weaver's uncontradicted hearing testimony establishes that she was asked to come into work early on January 9 and 13, 2011, and that she did so; an action confirmed by the signatures of Kitchen management officials on the Daily Timesheets.

The January 16, 2011, event occurred when Ms. Weaver gave fellow bargaining unit employee Letricia Rice a ride in to work. The Union avers that the credible evidence does not establish that her early clock-in was unauthorized, especially given the fact that the Company claims Ms. Rice was authorized to clock-in early while Ms. Weaver was not. It urges that if the Company acknowledges that Rice's early clock-in was approved, it cannot escape the conclusion that necessarily follows, i.e., that Ms. Weaver's early clock-in also was approved. Because the Union is convinced that the incidents of January 9, 13, and 16, 2011, did not result in improper early clock-ins by Ms. Weaver in violation of Company policy, it urges that the quantum of unscheduled hours allegedly worked by the Grievant is substantially reduced.

The Union contends further that the Company has not adduced any evidence to disprove what it describes as the claims of its several witnesses that employees routinely arrive early at work, clock-in earlier than permitted by the relevant Company policy, and are allowed to begin work before the starting time of their scheduled shifts. In

the Union's view, the one exception to this well-established practice was Ms. Weaver. It claims that the credible evidence does not support the conclusion that the Grievant willfully violated the early clock-in policy.

The Union next argues that the Company has failed to prove that it consistently enforces the early clock-in policy across all Departments and among all bargaining unit employees. In this regard, the Union first claims that the Company did not clearly communicate to all employees the ten-minute maximum early clock-in rule that Ms. Weaver is alleged to have violated. It notes in that regard the hearing testimony of Chef Chaney, who conceded that during the early December 2010, Kitchen staff meeting he was not aware of the written five-minute early clock-in policy having been modified to a ten-minute policy.

Assuming, *arguendo*, that Executive Sous-Chef Brown did in fact correct Chef Chaney at the early December 2010 meeting and went on to inform employees that the actual maximum for early clock-ins was ten minutes, the Union notes that following that meeting the Company allowed the notice confirming the written five-minute early clock-in rule (Company Exhibit No. 2) to remain posted next to the Kitchen time clock. The Union also points to the reference to the five-minute early clock-in rule in the Joint Exhibit No. 3 termination letter issued to the Grievant on February 17, 2011.

In addition to what it sees as the Company's failure to clearly communicate the terms of the early clock-in rule, the Union also contends that the rule has been enforced unevenly among bargaining unit employees, with Ms. Weaver being treated more harshly than her fellow employees. The Union notes that in January 2011 the Company chose only to analyze the early clock-in data for the Kitchen Department, the Bar and Beverage Department and the Warehouse Department.

Union Exhibit No. 10 shows that numerous employees in the Kitchen, Catering, Utility, and Warehouse Departments and Bartenders clocked-in more than ten minutes early at various times in January 2011 and were not disciplined. Most particularly, between January 13 and January 25, 2011, Catering Department employee Patricia Sofer clocked-in more than ten minutes early on nine occasions, seven of which involved early clock-ins of twenty minutes or more. Because none of those other bargaining unit employees, particularly Ms. Sofer, were disciplined, the Union submits that Ms. Weaver was the subject of improper, unequal treatment.

The Union notes further that during the course of the fourteen-day period in January 2011 at issue here, no one in management warned Ms. Weaver that her early clock-ins were a problem. It also maintains that by filling in and signing the Daily Timesheets documenting the Grievant's problematic early check-ins various Kitchen management officials effectively approved her early clock-in times. As further evidence that management was aware of Ms. Weaver's early clock-ins as they were occurring, the Union points to the Employee Timecard Reports (Union Exhibit Nos. 5, 6, 8, and 9), which are regularly reviewed and then signed off on by various Kitchen Department management officials, actions the Union contends meant that those management officials confirmed that the clock-in and clock-out times shown on those reports were accurate.

In the final dimension of its substantive argument, the Union asserts that the Company's action in terminating the Grievant resulted in Sections 8(a)(1) and 8(a)(3)

unfair labor practices as proscribed by the NLRA, as amended. The Union notes that pursuant to the analytical framework set out by the National Labor Relations Board's 1980 Decision in *Wright Line*, once a union proves that a terminated employee was taking part in union activities and that the employer was aware of those activities, an inference arises that the employee's union activities played a role in the discharge decision.

At that point, the Union contends that the burden of moving forward with the evidence shifts to the employer to demonstrate that the employee's union activities were not a factor in the decision to discharge her, and that the discharge would have occurred regardless of the employee's union activities. The Union observes that among the factors considered by the NLRB in applying the *Wright Line* test in order to determine if an employee's union activities were in fact the cause of his or her termination are: (i) a failure to warn the employee; (ii) a failure to take timely action against the employee; (iii) disparate treatment of the employee; and (iv) the timing of the discharge in relation to the employee's union activities.

The Union asserts there can be no question that the Company was aware of Ms. Weaver's Union activities as a Union Steward and it believes the record establishes that management took exception to her consistent challenges of management's actions toward bargaining unit employees. In December 2010, Ms. Weaver filed three grievances that were answered in a letter from the Company dated December 6, 2010 (Union Exhibit No. 11). Page 2, paragraph 2, of that letter states, "The Employer has grave concern with Weaver's approach to bring complaints forward. Not only were her actions disruptive but taking a combative stance with staff before learning all the facts is unacceptable." The Second full paragraph on page 4 of the letter went on to state as follows.

We recognize that Nadine Weaver is passionate about her Union duties, and we were delighted when she initially stepped into her role as Steward. She was very candid about her lack of experience and familiarity with protocol, and that was fine Weaver is necessarily more agitated and disruptive, her demeanor does not encourage positive and respectful interaction, or expeditious resolution of day-to-day workplace challenges. Unfortunately, it is not only the employer's management team that holds this opinion, but many of the Union members who work with Nadine Weaver.

After the above-quoted December 6, 2010, answer to the three December 2010 grievances, Ms. Weaver continued to file other grievances challenging management actions (Union Exhibit Nos. 12-16).

In the Union's view this evidence shows that the Company was in fact frustrated with Weaver and the manner in which she performed her duties as a Union Steward. It urges the evidence does not establish that the Grievant would have been terminated had she not been an active Union Steward who zealously represented bargaining unit employees who believed that their contractual rights had been violated. For that reason, the Union maintains that a violation of Sections 8(a)(1) and 8(a)(3) of the NLRA has been made out.

Conclusion

Based on the arguments summarized above, the Union takes the position that the Company did not discharge Nadine Weaver for just cause. Accordingly, it asks that the instant Grievance be sustained. As a remedy, the Union requests that Ms. Weaver be reinstated to her job and made whole, including receiving back pay and restoration of all benefits and seniority. Finally, the Union requests that the Arbitrator retain jurisdiction over this Matter to resolve any disagreements that may arise between the Parties over any remedy he may direct, or the implementation of any such remedy.

VI. DISCUSSION

Because this controversy concerns a challenged discharge, the Company must bear the burden of proof with regard to the contractual Issue. The instant Grievance will be denied only if the Company has proven that Nadine Weaver was discharged for just cause. As the charging party in the unfair labor practice matter, Ms. Weaver and the Union must bear the burden of proving that the Grievant's termination resulted in an unfair labor practice in violation of the National Labor Relations Act.

The Focus of the Arbitrator's Analysis

The February 17, 2011, letter effecting Ms. Weaver's termination (Joint Exhibit No. 3) shows that she was discharged for "[w]illful and egregious abuse of time reporting" and "[e]gregious gross misconduct due to creating a hostile and disharmonious work environment; spreading false rumors and gossip; making inflammatory and disparaging remarks; attempting to harm the employer's reputation by offering to collude with another employee in proposing to bring forward a lawsuit based on false information." At the hearing the proof of misconduct adduced by the Company centered almost exclusively on the first, "time reporting" offense. In its post-hearing brief the Company did not address the second "creating a hostile and disharmonious work environment" offense.

Given the above-described state of the record, the Arbitrator finds that the Company has failed to prove, and in fact has abandoned the second charge of misconduct asserted in the February 17, 2011, termination letter. As a result, the analysis and decision of the stipulated just cause and unfair labor practice Issues will center on Ms. Weaver's alleged time reporting/time card violation misconduct. In the first step of that analysis the undersigned will determine whether and if so to what extent, Ms. Weaver violated the Company's early clock-in policy.

The Company's Policy Regarding Unauthorized Early Clock-Ins

There is some dispute between the Parties regarding as to the exact nature of the Company's early clock-in policy. It is true that the "Payroll" policy set out at page 6 of the Company-promulgated Part-Time Employee Guidebook states "No one is permitted to clock-in more than five (5) minutes prior to their scheduled shift." Chef Chaney testified that the same page 6 Guidebook excerpt is posted by the time clock that Ms. Weaver used to clock-in and clock-out from work each day. The "Disciplinary Policy" articulated at page 11 of the Guidebook lists "[h]aving time card violations" as one of the acts of demonstrated insubordination "that will result in immediate termination."

Chef Chaney testified that during the early December 2010 Kitchen Department staff meeting called to discuss the upcoming "Reds Fest" and time and attendance matters he told employees that clocking in more than ten minutes before the start of their scheduled shift was falsifying time and was a terminable offense. That testimony was credible and consistent with the fact that Chef Chaney had been disciplined on December 1, 2010, for not properly monitoring the Daily Timesheet break logs. Further support for the Company's contention that the *de facto* early clock-in policy allowed employees to clock in up to ten minutes before the start of their scheduled shift without being called to task is revealed by an examination of the Company Exhibit No. 4 audit of early clock-ins by Kitchen Department employees in January 2011. That document shows that only early clock-ins more than ten minutes before an employee's scheduled shift start time were deemed problematical by the Company. Early clock-ins of ten minutes or less were not investigated further by the Company in the course of conducting that audit.

In light of the above findings the Arbitrator has determined that Kitchen Department employees at the Company's Duke Energy Convention Center are permitted to clock in up to ten minutes early without being subject to discipline. Employees who clock in more than ten minutes early without first securing approval from a management official to do so are charged with an unapproved early clock-in and are subject to discipline. Ms. Weaver was present at the early December 2010 Kitchen staff meeting when the ten-minute early clock-in policy was clarified. For that reason and because of her role as a Union Steward the Grievant can be charged with knowledge of the policy from early December 2010 forward.

The Nature and Extent of Ms. Weaver's Alleged Misconduct

It is undisputed that on seven of the ten days Ms. Weaver was scheduled to work from January 9 through January 23, 2011, she clocked in more than ten minutes before the start of her scheduled shift. There is no evidence that the Grievant falsified her time card record, or sought or received any pay for time she did not work. For this reason, the Company's attempt to label her early clocks-in as "stealing time" is not well taken. Instead, on the occasions when Weaver did clock in more than ten minutes early without securing approval from a Kitchen Department management official, her offense was something more akin to padding her work schedule in order to earn more pay by working more hours than the Company had scheduled her to work.⁵

If they were not approved by someone in management, each of Ms. Weaver's unapproved early clocks-in must be deemed a time card violation that bargaining unit employees have been advised will result in immediate termination. If not approved by management the Grievant's repeated clock-ins more than ten minutes early can rationally be categorized as insubordination because in doing so she ignored the directives of the posted work schedules that established her shift start times. That

⁵ Bargaining unit employee Hassan Neal who signed out for break ten minutes after he started a break and signed back in sixteen minutes before he actually returned to work received twenty-six minutes of pay that he did not earn by working. Thus it is conceivable that the Company would consider Neal's actions to be tantamount to an act of theft. Ms. Weaver's purported time card violations can be distinguished from Neal's misconduct. She did in fact earn a few hours wages that she was not scheduled to earn by clocking in more than ten minutes early. However, there is no evidence to show that the Grievant ever failed to work those extra minutes that she was not scheduled to work.

misconduct can also be deemed dishonesty because, if proven, it resulted in Weaver realizing pay that she was not entitled to receive.

It is difficult to infer that a single act of clocking in early by several minutes without approval would warrant summary discharge. However, in light of the clear proscription of clocking in more than ten minutes early, the rational business justification for the policy, and the harsh penalty for that act of misconduct stipulated by the Company's Disciplinary Policy, the multiple acts of insubordination with which Ms. Weaver is charged could under appropriate circumstances constitute just cause for termination. The Arbitrator's next task in deciding the stipulated just cause Issue is to determine if any of the Grievant's seven charged acts of time clock-related insubordination were in fact approved by management.

The seven early clock-ins that prompted Ms. Weaver's termination were discovered when management decided to review Employee Timecard Reports for January 2011 in three Departments at the DECC venue, in anticipation of a corporate-wide audit of time records that had been announced at the January 2011 General Managers meeting in West Palm Beach, Florida. Regional General Manager Pam Zdzenski testified when that examination of the Employee Timecard Reports revealed an early clock-in of more than ten minutes, Department Heads were contacted to ascertain if the early clock-in had been approved by management. If an early clock-in was not authorized by management, it was recorded as an "Unapproved Early Clock In." That process resulted in Ms. Weaver being charged with unapproved early clock ins on January 9, 11, 13, 14, 16, 22, and 23; that were of 77, 17, 40, 17, 19, 13, and 12 minutes duration respectively. Those facially unapproved minutes worked by the Grievant (net of the generally-permitted ten-minute early clock-in on each day) totaled 125.

Ms. Weaver offered no explanations for the early clock-ins on January 11, 14, 22 and 23, 2011. On direct examination the Grievant asserted that the 77 minute early clock-in of January 9 had been approved by Executive Sous Chef Sheila Brown, and she claimed that the 40 minute early clock-in of January 13 had been approved by Assistant Kitchen Manager Rachine Thorton. The Union contends that those two approvals are evidenced by the fact that Ms. Brown signed the Daily Timesheet (break log) for January 9 (Union Exhibit No. 7, page 1) showing an "Arrival Time at Work Location" some 70 minutes earlier than Weaver's 9:00 a.m. scheduled shift start time (at 6:50 a.m.); and by the fact that Mr. Thorton signed the January 13 Daily Timesheet (Union Exhibit No. 7, page 3) showing what Weaver identified as a 7:20 a.m. "Arrival Time at Work Location" – some 40 minutes before the start of her scheduled shift.⁶

For several reasons, Ms. Weaver's attempt to explain her early clock-ins on January 9 and 13, 2011, is not persuasive. First, Regional General Manager Zdzenski and Chef Chaney both testified that the Daily Timesheets the Union cites as proof that those two most extreme early clock-ins were approved are not used to track employee clock-in times. Instead, those "break logs" as they are commonly called in the Kitchen Department are used to track employee break times.

Ms. Zdzenski testified further that the signatures of Ms. Brown and Mr. Thorton on the two subject break logs did not indicate that they had authorized or approved the

⁶ The actual Arrival Time at Work Location recorded for Ms. Weaver on the January 13, 2011, Daily Timesheet is illegible.

times at which Weaver clocked in on January 9 and 13, 2011. Zdzenski testified that Kitchen managers do not see the Daily Timesheet break logs until one or two days after they are filled in and signed by Kitchen employees. That the Daily Timesheets prove nothing relevant here is further indicated by Zdzenski's testimony that bargaining unit Kitchen Department employees often write in their clock-in times on the break logs even though she has instructed them not to do so.

Ms. Zdzenski testified that the Company's investigation of the Grievant's seven January 9-23, 2011, early clock-ins included asking the Kitchen Department managers if they had approved the early clock-ins. Following those inquiries the Company concluded that none of the Grievant's absences had been approved by management. The record also shows that Weaver did not claim that Ms. Brown and Mr. Thorton had authorized her early clock-ins on January 9 and January 13 when she was asked to explain her behavior during the February 17, 2011, meeting that resulted in her discharge. In light of these facts, the Arbitrator finds Ms. Weaver's uncorroborated hearing testimony asserting that the January 9 and January 13, 2011, early clock-ins were authorized by Brown and Thorton to not be credible.⁷

The Union's theory as to why Ms. Weaver's January 16, 2011, 19 minute early clock-in must have been approved by management is equally unpersuasive. The fact that Letricia Rice, who had ridden to work with the Grievant on January 16, secured the approval of a manager to clock in early that day proves nothing about whether the Grievant did the same. There is no probative evidence to show that Weaver's January 16, 2011, early clock-in was approved by management.

The preceding analysis and findings establish that on seven of the ten days Ms. Weaver was scheduled to work during the period from January 9 to January 23, 2011, she clocked in more ten minutes early on seven occasions, without approval from management. The seven early clock-ins resulted in the Grievant earning pay for some 125 minutes (net of the allowed ten-minute grace period for early clock-ins) that she was not entitled to earn because she was not scheduled to work those 125 minutes. Weaver's actions were intentional and she had full knowledge of the wrongful nature and the seriousness of her serial violations of the Company's early clock-in policy. The question of whether the Grievant's misconduct warranted her termination is addressed in the analysis below.

Did Ms. Weaver's Misconduct Give the Company
Just Cause for Her Discharge?

In most circumstances, application of the arbitral principle of just cause for discipline embraced by Article 11, Section 11.1 of the Parties' Collective Bargaining Agreement requires that for all but the most serious acts of misconduct, employers must utilize progressive discipline in order to allow an employee who engages in work-related

⁷ It warrants mention that if were assumed, *arguendo*, that Executive Sous Chef Sheila Brown requested Ms. Weaver to report for work at 7:00 a.m. on January 9, 2011, the record shows that she clocked in at 6:43 a.m., 17 minutes before that purported verbally-directed shift start time. Thus, even when the evidence is viewed in this light most favorable to the Grievant, she would still be charged with an early clock-in on January 9, 2011.

misconduct an opportunity to correct her unacceptable behavior and demonstrate that she is worthy of retention by the employer. At the same time however, the just cause principle also contemplates that acts of serious, intentional misconduct (often referred to as "capital offenses"), particularly ones involving moral turpitude, dishonesty, insubordination or violent behavior, can warrant summary termination without resort to progressive discipline.

During the period from January 9 to January 23, 2012, Ms. Weaver engaged in a pattern of repeated time card violations that were both insubordinate (in that she refused to work the hours she was scheduled to work) and dishonest (in that she enabled herself to earn wages to which she was not entitled). The Grievant's misconduct was intentional and transpired despite Weaver's full knowledge of the serious nature of her offenses and the fact that relevant Company policy provides that time card violations will result in immediate termination. Weaver's record of early clock-ins was far more extensive than any other employee in the DECC Kitchen Department.

The gravity of Ms. Weaver's misconduct is exacerbated by the fact that she was a Union Steward and therefore was well aware of the ten-minute early clock-in rule, knew that what she was doing was wrong, and understood that it constituted grave misconduct. Her behavior was inexcusable. Further aggravating the seriousness of her misconduct is the fact that the first four, and two most extreme time card violations the Grievant committed occurred when Chef Chaney was out of town – from January 8 to January 14, 2011.

That the Company representatives came to the February 17, 2011, meeting with a previously-prepared termination letter, written before Ms. Weaver was given an opportunity to explain her behavior does raise a procedural due process concern. However, the record shows that when the Grievant was given that opportunity on February 17 she offered no plausible explanation of her behavior and instead asked for another chance.⁸ Given that omission by the Grievant and in light of the abundant proof that Weaver in fact committed the seven time card violations with which she is charged, the Arbitrator is not convinced that the Company's failure to afford Ms. Weaver full procedural due process in the course of investigating her repeated acts of misconduct substantially prejudiced her contractual right to be discharged only for just cause. Therefore, he finds that the procedural due process concern raised by the Union does not vitiate the Company's Case of just cause for discharge.

The final consideration the Arbitrator must weigh is the Union's contention that Ms. Weaver was subjected to unequal treatment. The proof it cites in support of that claim is the fact that from January 13 to January 25, 2011, Catering Department employee Patricia Sofer clocked-in more than ten minutes early on nine occasions and was not disciplined in any manner. When questioned on cross examination about the Company's failure to discipline Ms. Sofer, Regional General Manager Zdzenski stated that Sofer's early clock-ins were not discovered until an audit of the Catering Department Employee Timecard Records was completed in August 2011, at which time it was too late to take action against Sofer for misconduct that had occurred some seven months earlier. The

⁸ Regional General Manager Zdzenski testified that at the February 17, 2011, meeting Ms. Weaver said that Chef Chaney had approved her early clock-in of January 9, 2011, which prompted Chef Chaney to remind the Grievant that he had been out of town on that day.

Company also notes that unlike the Grievant, Ms. Sofer was never expressly reminded in December 2010 that violation of the ten minute early clock-in policy would result in her termination.

The Company's failure to discipline Ms. Sofer for the nine early clock-ins that she accrued in January 2011 is troubling. However, because Ms. Zdzenski's assertion that Sofer's early clock-ins were not discovered until the Catering Department Employee Timecard Records were audited in August 2011 was not challenged or contravened by the Union, it must be accepted as true. Zdzenski's explanation that it was too late to discipline Sofer for misconduct that occurred more than seven months before it was discovered is plausible. Ms. Sofer should have been disciplined, perhaps even discharged, for her January 2011 time card violations and the Company erred in not timely discovering and promptly acting on the evidence of that misconduct. However, the fact that Sofer was not disciplined does not prove that the February 17, 2011, decision to terminate Ms. Weaver was the result of a knowing choice by the Company to treat her less favorably than other bargaining unit employees, and it does not sufficiently degrade the Company's Case to warrant a finding that there was not just cause for the Grievant's discharge.

Did Ms. Weaver's Termination Result in a Violation of
Sections 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act?

There is sparse evidence in the hearing record regarding this dimension of the Company's decision to terminate Ms. Weaver. The Parties both contend that the proper test for determining if a violation of Sections 8(a)(1) and 8(a)(3) is that first set out by the National Labor Relations Board in its Decision in *Wright Line*, 251 NLRB 1083. They disagree as to whether it is the Union and Ms. Weaver, or the Company that bears the burden of proof. Regardless, it is clear that the first three prerequisites to a finding that the Grievant's discharge resulted in a violation of Sections 8(a)(3) and 8(a)(1) of the NLRA are present here. That is so because: (i) as a Union Steward Weaver was engaged in union activities on a routine basis; (ii) the Company was aware of her union activities; and (iii) the Company took an adverse employment action against Weaver.

What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment. That the Grievant at times behaved in an aggressive or abrasive manner in the course of fulfilling her union duties, and occasionally filed grievances does not demonstrate that the Company's decision to terminate her for what has been determined to have been repeated intentional time card violations was somehow a result of her actions as a Union Steward.

Section 8(a)(3) of the NLRA is a shield, it is not a sword that can be used to excuse or mitigate otherwise improper and unacceptable workplace misconduct by a union representative. Because the Company has proven just cause for the Grievant's termination and because Ms. Weaver and the Union have not adduced concrete probative evidence demonstrating that her otherwise justified discharge resulted from or was linked to her union activities, the Arbitrator can only conclude that that the Company did not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged Nadine Weaver.

Conclusion

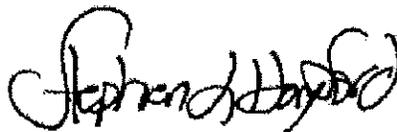
Based on the analysis and findings above the Arbitrator has determined that the Company discharged Nadine Weaver for just cause. He has further determined that Ms. Weaver's discharge was not in violation of the National Labor Relations Act. The Award below is framed in a manner consistent with these findings and conclusions.

VII. AWARD

The Company discharged Nadine Weaver for just cause and her discharge did not violate the National Labor Relations Act. Accordingly, the instant Grievance is denied.

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February 5, 2012
Bloomington, Indiana



Stephen L. Hayford, Arbitrator

Nenni, David A. (Cincinnati)

From: Buechter, Amy M. (Cincinnati) on behalf of Montgomery, David K. (Cincinnati)
Sent: Friday, May 11, 2012 2:05 PM
To: Emetu, Julius U.
Cc: Nenni, David A. (Cincinnati); Buechter, Amy M. (Cincinnati)
Subject: RE: CASE 9-CA-46264 OVATION FOOD SERVICES, LP

Julius,

I've reviewed the Arbitrator's decision in relation to your May 9, 2012 email concerning the Region's position that his decision is repugnant to the NLRA. The Region's position is based on a complete mischaracterization of the Arbitrator's decision.

You state that : "The arbitrator found that one of the primary reasons the Employer stated for Nadine Weaver's discharge was her activities as a union steward and that the Employer failed to prove that the alleged inappropriate steward conduct was just cause for her discharge." This is not accurate.

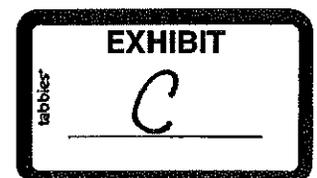
The Arbitrator's findings of fact and conclusions of law can be found at pages 13-19 of his Decision. He specifically found that there was no evidence to support Ms. Weaver's conclusion that Ovations' decision to terminate her had anything to do with her union activities. See Decision at p 18 ("What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment.").

The Arbitrator found that Ms. Weaver's "pattern of repeated time card violations that were both insubordinate (in that she refused to work the hours she was scheduled to work) and dishonest (in that she enabled herself to earn wages to which she was not entitled)" gave Ovations just cause to terminate her and that was the motivating factor behind Ovations' decision. See Decision at p 16-18.

The Region's claim that the Arbitrator failed to properly apply the *Wright Line* analysis is also refuted by the Arbitrator's decision.

In *Covenant Homecare*, Case 10-CA-31593, 331 NLRB No. 21, at 253-254 (May 23, 2000), the NLRB affirmed an ALJ's decision in which the ALJ articulated the NLRB's burden under *Wright Line* as follows: "At the first step, the government must show that the alleged discriminatees had engaged in Union or other concerted activities protected by the Act. . . . Next, the General Counsel must show that Respondent was aware of the employees' protected activities. . . . The Government must also show that Respondent took an adverse employment action. . . . Finally, the General Counsel must demonstrate a connection between the protected activity of the employees and the adverse employment action taken against them." See also *National Security Technologies, LLC*, Case 28-CA-22999, 356 NLRB No. 183 (Jun. 21, 2011) ("Under the *Wright Line* framework, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action.")

The Arbitrator in Ms. Weaver's grievance proceedings articulated the standard as follows:



The Parties both contend that the proper test for determining if a violation of Sections 8(a)(1) and 8(a)(3) is that first set out by the National Labor Relations Board in its Decision in *Wright Line*, 251 NLRB 1083. They disagree as to whether it is the Union and Ms. Weaver, or the Company that bears the burden of proof. Regardless, it is clear that the first three prerequisites to a finding that the Grievant's discharge resulted in a violation of Sections 8(a)(3) and 8(a)(1) of the NLRA are present here. That is so because: (i) as a Union Steward Weaver was engaged in union activities on a routine basis; (ii) the Company was aware of her union activities; and (iii) the Company took an adverse employment action against Weaver.

What the record does not reveal is any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment. That the Grievant at times behaved in an aggressive or abrasive manner in the course of fulfilling her union duties, and occasionally filed grievances does not demonstrate that the Company's decision to terminate her for what has been determined to have been repeated intentional time card violations was somehow a result of her actions as a Union Steward.

Decision at p 18.

The Arbitrator correctly articulated and applied the standard. After hearing all of the evidence he found that Ovations' decision was **not** motivated by Ms. Weavers' union activities. Rather, Ovations' motivation for terminating Ms. Weaver was her "repeated intentional time card violations."

Any decision to ignore the Arbitrator's decision in this case would be contrary to firmly established Board and Court of Appeals precedent. In addition, your correspondence confirms it is based on a mischaracterization of the Arbitrator's decision. The complaint should be dismissed.

David

From: Emetu, Julius U. [mailto:Julius.Emetu@nlrb.gov]
Sent: Wednesday, May 09, 2012 4:39 PM
To: Montgomery, David K. (Cincinnati)
Subject: RE: CASE 9-CA-46264 OVATION FOOD SERVICES, LP

Dear Mr. Montgomery:

The arbitrator found that one of the primary reasons the Employer stated for Nadine Weaver's discharge was her activities as a union steward and that the Employer failed to prove that the alleged inappropriate steward conduct was just cause for her discharge. The arbitrator nevertheless concluded that her discharge did not violate the Act. The arbitrator also failed to properly apply the *Wright Line* analysis. Based upon the above, the Region determined that the arbitrator's award is repugnant to the Act.

Very truly yours,

Julius Emetu

From: Montgomery, David K. (Cincinnati) [mailto:David.Montgomery@jacksonlewis.com]
Sent: Tuesday, May 08, 2012 2:01 PM
To: Emetu, Julius U.

Cc: Buechter, Amy M. (Cincinnati); Nenni, David A. (Cincinnati)
Subject: RE: CASE 9-CA-46264 OVATION FOOD SERVICES, LP

Julius-

Your email confirms that the General Counsel has already determined without a hearing that Charging Party was discharged for engaging in Section 7 activities. What is the basis for such a conclusion?

In addition, what is the basis for the determination that the arbitrator's award is "repugnant to the Act?"

Please advise at your earliest convenience.

David Montgomery
Please note our new address:

**PNC Center
26th Floor
201 E. Fifth Street
Cincinnati, OH 45202**

513-322-5032 | direct
513-898-0050 | main
513-276-0803 | mobile
513-898-0051 | fax
david.montgomery@jacksonlewis.com
www.jacksonlewis.com

Representing management exclusively in workplace law and related litigation.

From: Emetu, Julius U. [mailto:Julius.Emetu@nlrb.gov]
Sent: Monday, May 07, 2012 10:42 AM
To: Montgomery, David K. (Cincinnati)
Subject: CASE 9-CA-46264 OVATION FOOD SERVICES, LP
Importance: High

David K Montgomery
Attorney at Law
PNC Center, 26th Floor
201 East Fifth Street
Cincinnati Ohio 45202

May 7, 2012

Re: OVATION FOOD SERVICES, LP
CASE 9-CA-46264

Dear Mr. Montgomery:

This letter confirms our conversation this morning during which you were informed that the General Counsel would not defer to the arbitration award because the Charging Party was discharged for engaging in Section 7 activities as a union steward and the award upholding her discharge is repugnant to the purposes and policies of the Act. Let me know if the Employer is interested in settling this matter. Please be advised that a complaint would issue on May 14, 2012, absent settlement.

Truly yours,

Julius Emetu, Board Agent

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