Form NLRB-877

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

In the Matter of OVATIONS FOOD SERVICES, L.P. INC and NADINE WEAVER, AN INDIVIDUAL	Case 9-CA-046264

Date of Mailing **July 24, 2012**

AFFIDAVIT OF SERVICE OF **ACTING GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO THE ADMINISTRATIVE LAW JUDGE TO DISMISS COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

DAVID K. MONTGOMERY, ATTORNEY JACKSON LEWIS LLP PNC CENTER, 26TH FLOOR 201 E. FIFTH STREET CINCINNATI, OH 45202 david.montgomery@jacksonlewis.com	MS. NADINE Y WEAVER 1631 REPUBLIC STREET #5 CINCINNATI, OH 45202 dinaweaver@live.com RONALD M. WILLIS, ATTORNEY CHICAGO & MIDWEST JOINT BOARD, UNITE HERE AND IT'S A/W LOCAL 12 8 S MICHIGAN AVE, STE 1900 CHICAGO, IL 60603-3357 rwillis@dbb-law.com * National Labor Relations Board Washington, D.C. 20570
Subscribed and sworn to before me this _____ day of _____ 2012	Designated Agent **NATIONAL LABOR RELATIONS BOARD**

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

In the Matter of

OVATIONS FOOD SERVICES, L. P.

and Case 9-CA-46264

NADINE WEAVER, AN INDIVIDUAL

ACTING GENERAL COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO THE ADMINISTRATIVE LAW JUDGE TO DISMISS COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGEMENT

Counsel for the Acting General Counsel opposes Respondent's renewed Motion to Dismiss Complaint or, alternatively, motion for summary judgment which it previously filed with the Board for the same reasons stated in the attached documents. (See Attachment A) Respondent filed an identical motion with the Board and its motion was denied. (See Attachment B, Board Order, dated July 10, 2012). Because Respondent raises no arguments in its motion that were not previously considered by the Board, granting Respondent's motion for summary judgment, would be wholly inappropriate and accordingly, Counsel for the Acting General Counsel respectfully urges the Administrative Law Judge to deny Respondent's Motion to Dismiss.

Dated at Cincinnati, Ohio this 24th day of July 2012.

Respectfully submitted,

Julius U. Emetu, II
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

Attachments

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

In the Matter of

OVATIONS FOOD SERVICES, L. P.

and Case-9-CA-46264

NADINE WEAVER, AN INDIVIDUAL

ACTING GENERAL COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT

Counsel for the Acting General Counsel opposes Respondent's Motion to Dismiss Complaint or, alternatively, grant summary judgment in Respondent's favor, (a copy of the Motion to Dismiss is attached hereto as Exhibit A – without its Exhibits) because "the motion itself fails to establish the absence of a genuine issue and the pleadings and this response" indicate on their face that a genuine issue may exist. See Sec. 102.24(b) of the Board's Rules and Regulations. In support of this response, Counsel for the Acting General Counsel states:

On February 22, 2011, Nadine Weaver, an individual, filed an unfair labor practice charge alleging that Respondent discharged her in violation of Section 8(a)(1) and (3) of the Act. (A copy of the charge is attached hereto as Exhibit B). Then, on April 26, 2011, the Acting Regional Director deferred further processing of the charge to the parties contractual grievance/arbitration procedure pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1^84). (A copy of the deferral letter is attached hereto as Exhibit C.)

ATTACHMENT A

An arbitrator issued his decision on the underlying grievance on February 5, 2012 denying the grievance and upholding the Emlpoyer's discharge of Weaver. (A copy of the Arbitrator's Decision and Award is attached hereto as Exhibit D.) Weaver subsequently asked for review of the arbitrator's decision. Following its review of the arbitrator's decision, the Region concluded that continued deferral was inappropriate and issued a Complaint and Notice of Hearing in this matter on May 18, 2012. (A true copy of the Complaint and Notice of Hearing with proof of service by certified mail is attached hereto as Exhibit E.) Thereafter, on June 1, 2012, Respondent filed an answer to the complaint. (A true copy of Respondent's answer is attached hereto as Exhibit F.) Respondent's answer denies the allegations contained in paragraphs 5(b) and 6 of the complaint. Specifically, Respondent denies that it discharged its employee Nadine Weaver because she engaged in union activity.

On June 1, 2012, Respondent filed its Motion To Dismiss Complaint, or alternatively, Motion for Summary Judgment. (See Exhibit A attached hereto.) In its Motion, Respondent again denied the complaint allegations and made various assertions regarding its evidence and the arbitral award that issued pursuant to a grievance filed by Weaver contesting her discharge by Respondent.

Genuine issues exists regarding many of the legal arguments and factual assertions made by Respondent in its motion, this response to the motion, and the pleadings in this matter. Contrary to Respondent's contention that the arbitral award satisfies the Board's *Spielberg/Olin* deferral guidelines, Acting General Counsel asserts that the award is repugnant because the arbitrator failed to consider that Respondent's purported reason for Weaver's discharge (abuse of time reporting) was pretextual and deferral is inappropriate when an award upholds discipline based upon an employee's protected activity in the course of performing union representational

functions. In this regard, if there is an eventiary hearing before an administrative law judge, the Acting General Counsel will show Respondent complained about Weaver's conduct as a union steward in a December 6, 2010 letter to the Union (copy attached hereto as Exhibit G), informed the Union by letter dated January 24, 2011 that it planned to discharge her because of her conduct as a union steward (a copy is attached hereto as Exhibit H), and expressly cited Weaver "inappropriate conduct: as a union steward as one of the two basis for her discharge in the February 17, 2011 termination notice given to her. (A copy is attached hereto as Exhibit I). The arbitrator found that the Respondent failed to prove that the alleged inappropriate steward conduct was a just cause for her discharge. Thus, the arbitrator implicitly found Weaver's activities as steward were appropriate and a reason for her discharge but nonetheless concluded that her discharge did not violate the Act. In upholding a discharge that was motivated primarily by Weaver's protected activity as a union steward, the arbitrator reached a result that is not susceptible to an interpretation consistent with the Act and therefore fails to satisfy the *Spielberg/Olin* deferral standards. Furher, there is a genuine issue regarding whether the arbitrator correctly enunciated or applied the Board's *Wright Line* [1]/ principles. In this regard, although the arbitrator discussed *Wright Line* and noted that the parties disagreed about who bore the burden of proof under *Wright Line*, he did not articulate a resolution of that issue. Moreover, despite strong evidence that Weaver's activities as a union steward was also a cause of her discharge, the arbitrator did not make the key *Wright Line* determination of whether the Employer would have discharged Weaver absent her aggressive pursuit of her steward duties.

Finally, Acting General Counsel asserts that there is no merit to Respondent's contention that the complaint is arguably *ultra vires* because the Acting General Counsel's appointment

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

allegedly expired before the complaint issued (See Exhibit A, Respondent's Motion To Dismiss, p. 12, n. 2). The Board historically has declined the invitation to determine the merits of claims attacking the validity of Presidential appointments and applies "the well-settled presumption of regularity of the official acts of public officers [.]" See *Center For Social Change, Inc.*, 358 NLRB. No. 24, slip. op. at 1 (March 29, 2012).

Based on the foregoing, dismissal of the complaint or, alternatively, granting Respondent's motion for summary judgment, would be wholly inappropriate. Accordingly, Counsel for the Acting General Counsel respectfully urges the Board to deny Respondent's Motion to Dismiss.

Dated at Cincinnati, Ohio this 8th day of June 2012.

Julius U. Emetu, II
Julius U. Emetu, II
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachments: Exhibits A – I

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

MOTION TO DISMISS COMPLAINT AND NOTICE OF HEARING, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

Pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, Respondent Ovations Food Services, L.P. ("Ovations" or "Respondent") respectfully requests that the Board dismiss the Complaint and Notice of Hearing ("Complaint") issued in this matter by the Acting General Counsel on May 18, 2012, or, alternatively, grant summary judgment in Ovations' favor. The Acting General Counsel must defer to the arbitration award rendered in this matter on February 5, 2012, in which the arbitrator considered and rejected the unfair labor practice allegations at issue in the Complaint.

In essence, the Acting General Counsel is seeking a second bite at the apple in this dispute; however, he cannot ignore an arbitration award simply because he does not agree with the result. In light of the strong public policy favoring arbitration as the preferred method of resolving labor disputes, applicable Board precedent demands a significantly higher showing in order to disregard a binding arbitration award, and the Acting General Counsel has not and cannot satisfy his burden of making that showing in this dispute. Here, the unfair labor practices allegations at issue in the Complaint were considered by the arbitrator and determined to be without merit. As the arbitrator held, Nadine Weaver was terminated with just cause as a result

EXHIBIT A

of her insubordinate and dishonest conduct that violated Respondent's time-card policy. Importantly, the arbitrator also held that the evidence did not demonstrate a causal nexus between Weaver's protected activity and her termination. Deferral is necessary and the Acting General Counsel's Complaint must be dismissed because the arbitration award is not "clearly repugnant to the purposes and policies of the [National Labor Relations] Act."

I. FACTUAL BACKGROUND

Ovations provides food and beverage services to public assembly facilities throughout the country, including the Duke Energy Convention Center in Cincinnati, Ohio. (*See* Exhibit B to Affidavit of David K. Montgomery ("Arbitration Award") at p. 2.) Ovations and Chicago 7 Midwest Regional Joint Board and its affiliated Local 12, Cincinnati, Ohio (the "Union") are parties to a Collective Bargaining Agreement that was in effect at all times relevant to this dispute. (*See id.* at pp. 7-8.)

Weaver was hired as an A-Cook by Ovations on March 28, 2009, and retained that position until her termination on February 17, 2011. (*Id.* at p. 2.) As an A-Cook, Weaver was responsible for working with Executive Chef Purvill Chaney and the entire kitchen staff in order to prepare meals for guests of the Duke Energy Convention Center. (*Id.*) During part of her tenure with Ovations, Weaver also served as a Union Steward. (*Id.* at p. 14.)

As an hourly employee, Weaver was required to clock-in at the beginning and clock-out at the end of each scheduled shift. (*Id.* at p. 2.) According to Ovations' written Payroll Policy, employees are not permitted to clock-in more than five minutes prior to the start of their scheduled shifts. (*Id.*) This policy was in effect during Weaver's entire employment with Ovations. (*Id.*) Not only was the policy located in the Employee Guidebook (which Weaver acknowledged having received), but also was posted near the time clock where Weaver and the

other kitchen employees clocked-in and clocked-out. (*Id.*) In practice, Ovations was even more lenient than the written policy and permitted its kitchen employees to clock-in up to ten minutes before the start of their shifts. (*Id.* at pp. 2-3.) Additionally, the Employee Guidebook expressly identifies "having time card violations" and "falsifying . . . timecards, in any way" as infractions for which immediate termination may be warranted. (*Id.* at p. 2.)

On December 2, 2010, Chef Chaney held a meeting with the kitchen staff, including Weaver, to remind them about Ovations' clock-in/clock-out procedures and policies. (*Id.*) At the meeting, Chef Chaney advised Weaver and the rest of the kitchen staff that (1) they were required to comply with Ovations' Payroll Policy, which prohibits employees from clocking-in more than ten minutes prior to the start of their scheduled shifts without management permission; and (2) an employee's failure to comply with Ovations' clock-in policies would be cause for termination. (*Id.* at pp. 2-3.)

Approximately one month later, and despite Chef Chaney's unambiguous warning, Weaver repeatedly clocked-in early on a number of occasions (interestingly, many of these instances occurred when Chef Chaney was working out of town). (*Id.* at p. 3.) Ovations discovered that between January 9 and January 23, 2011, Weaver clocked-in up to 77 minutes early for her scheduled shifts, without management approval, on seven separate occasions. (*Id.*) Shortly after making this alarming discovery, Ovations began attempting to schedule a meeting with Weaver and the Union. (*Id.* at pp. 3-4.) As a result of scheduling difficulties with the Union, the meeting was not scheduled until February 17, 2011. (*Id.* at p. 4.)

At the February 17, 2011 meeting, Ovations gave Weaver the opportunity to explain her pattern of unauthorized early clock-ins. (*Id.*) Weaver, however, was not able to provide any

legitimate explanation for her conduct, and Ovations terminated her employment as a result of the repeated time-card violations at the end of the February 17 meeting. (*Id.*)

II. PROCEDURAL HISTORY

Days after her termination, on February 22, 2011, Weaver filed an unfair labor practice charge against Ovations, alleging that she was unlawfully terminated in retaliation for her Union activities.[1] (*Id.* at p. 6.) On February 24, 2011, she also filed a grievance in relation to her termination. (*Id.*) The parties agreed, pursuant to the Collective Bargaining Agreement, to submit the grievance to binding arbitration. (*Id.* at pp. 6-7.) On April 26, 2011, the Board notified the parties that it would defer its final determination regarding Weaver's charge until after the arbitration was complete. (*See* Exhibit A to Montgomery Aff.)

The arbitration hearing was held in Cincinnati, Ohio on October 13 and December 6, 2011 before Arbitrator Stephen L. Hayford. (Arbitration Award, at p. 1.) Arbitrator Hayford was selected in accordance with the arbitrator-selection procedures described in the Collective Bargaining Agreement. (*See generally id.* at p. 7.) Prior to the arbitration, the parties stipulated that the issues before Arbitrator Hayford would be:

> 1. Whether Ovations discharged Weaver for just cause, and whether the discharge was in violation of the National Labor Relations Act; and
>
> 2. If the discharge was not for just cause or was in violation of the National Labor Relations Act, what was the proper remedy?

(*Id.* at p. 6.)

At the hearing, both parties were given the opportunity to present evidence supporting their positions; multiple witnesses – including Weaver and Chef Chaney – testified, and

[1] Weaver also filed at least two separate unfair labor practice charges against the Union for failing to adequately represent her. Weaver independently dismissed the first charge (NLRB Charge No. 9-CB-12490) on or about April 27, 2011. The Regional Director dismissed the second charge (Charge No. 09-CB-073966) on or about March 28, 2012.

numerous documents were submitted as exhibits. (*Id.* at p. 1.) Additionally, Ovations did not object to Weaver's personal attorney attending the hearing, in addition to her Union representation. Following the hearing, both Ovations and the Union submitted post-arbitration briefs summarizing the evidence presented at the hearing and urging Arbitrator Hayford to accept their respective arguments. (*Id.*)

On February 5, 2012, Arbitrator Hayford issued his award. (*Id.*) In the award, Arbitrator Hayford specifically held that "[t]he Company discharged Nadine Weaver for just cause ***and her discharge did not violate the National Labor Relations Act.***" (*Id.* at p. 19 (emphasis added).) Arbitrator Hayford held that Weaver's repeated, unauthorized early clock-ins violated Ovations' policy and constituted just cause for her termination, as her conduct was "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)." (*Id.* at pp. 16-18.)

Importantly, Arbitrator Hayford specifically analyzed whether Weaver's termination was in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. (*Id.* at p. 18.) In doing so, he applied the four-factor test articulated by the Board in *Wright Line*: (1) whether Weaver was engaged in Union or other protected concerted activities; (2) whether Ovations knew about that activity; (3) whether Ovations took an adverse employment action against her; and (4) whether there was a nexus between the protected activity and the adverse employment action. *See Wright Line,* 251 NLRB 1083 (1980). Finding that the first three factors were met in this case, Arbitrator Hayford's analysis focused on the fourth and final factor – whether there was any causal connection between Weaver's Union activities and her termination. (Arbitration Award, at p. 18.) After reviewing the evidence, Arbitrator Hayford held that Ovations did not violate either Section 8(a)(1) or Section 8(a)(3) when it terminated 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 the Company did not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it discharged Nadine Weaver.

(*Id.* (emphasis added).)

Following the issuance of the arbitration award, Ovations notified the Board of the award and requested that Weaver's charge be dismissed in accordance with the award. On May 18, 2012, however, the Acting General Counsel issued its Complaint and Notice of Hearing, in which he alleged that Ovations discharged Weaver because she "formed, joined or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these concerted activities." (*See* Complaint, ¶5.) According to Board Agent Julius Emetu, the Acting General Counsel elected not to defer to the arbitration award because the Region had determined that the award was repugnant to the Act. (*See* Exhibit C to Montgomery Aff.) This conclusion was based on the Region's significant mischaracterization of the award, in which the Region erroneously alleged that "[t]he arbitrator found that one of the primary reasons the Employer stated for Nadine Weaver's discharge was her activities as a union steward and 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." (*Id.*) Board

Agent Emetu also relayed the Region's misguided opinion that the arbitrator's application of the *Wright Line* analysis was improper. (*Id.*)

Interestingly, the Complaint made no mention of the arbitration award, and noticed a hearing for July 9, 2012. (*See id.*) To date, neither Weaver nor the Union has moved to vacate, modify or otherwise challenge the arbitration award.

III. ARGUMENT

A. Under Current Board Precedent, The Acting General Counsel Must Defer To The Arbitration Award And The Complaint Must Be Dismissed.

a. Legal Standard.

According to the Board's seminal *Spielberg Manufacturing Co.* decision, the Board should defer to an arbitration award where (1) the arbitration proceedings appear to have been fair and regular; (2) all parties had agreed to be bound by the arbitration award; and (3) the decision of the arbitration panel is not "clearly repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955) (dismissing complaint in its entirety). To satisfy the "clearly repugnant" standard, an arbitrator's award need not be totally consistent with Board precedent; rather, the Board should defer unless the award is "palpably wrong" and "not susceptible to an interpretation consistent with the Act." *See Olin Corp.*, 268 NLRB 573, 574 (1984). In *Spielberg*, the Board promulgated this standard with the acknowledgment that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id.*

The Board later added an additional element to the deferral analysis – deferring to arbitration awards only where the arbitrator had considered the unfair labor practice issue. *See Olin Corp.*, 268 NLRB at 574. An arbitrator has adequately "considered" the unfair labor

practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id. See also Lewis v. NLRB,* 779 F.2d 12 (6th Cir. 1985) (affirming decision to defer even though the arbitration panel failed to explicitly set forth the fact that the statutory issue was presented and considered). Notably, the burden of showing that these criteria have not been met is on the party requesting that the Board reject deferral and consider the merits of the dispute. *See Olin Corp.*, 268 NLRB at 574 ("[T]he party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award."). *See also IAP World Servs.*, 2012 NLRB LEXIS 92 (NLRB, Feb. 24, 2012) (ruling in favor of deferral to arbitration and holding that "the General Counsel shoulders the burden of establishing that arbitration decision was clearly repugnant to the Act and was palpably wrong"); *Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 (NLRB, Nov. 15, 2011) (ruling in favor of deferral to arbitration and stating that "the Board placed upon the party seeking to have the Board ignore the arbitrator's decision, 'the burden of affirmatively demonstrating the defects in the arbitral process or award'").

b. Arbitrator Hayford's Award Easily Satisfies The Requirements For Deferral.

The arbitration award issued by Arbitrator Hayford in this dispute clearly satisfies the conditions for deferral that have been promulgated by the Board in *Spielberg* and its progeny. It is without dispute that the arbitration proceedings were fair and regular; Arbitrator Hayford was selected using the procedures outlined in the Collective Bargaining Agreement, and both parties had the opportunity to – and actually did – present witness testimony and documentary evidence supporting their claims and positions. (*See generally* Arbitration Award.) Further, it is beyond

contest that both Ovations and the Union (of which Weaver was a member) agreed to be bound by arbitration.

It is clear from Arbitrator Hayford's award that he adequately considered the unfair labor practice issue. The contractual issue (whether Weaver was terminated for just cause) and the statutory issue (whether Weaver was terminated in violation of the Act) are factually parallel. Because both questions related to the reason for Weaver's termination, the arbitrator necessarily had to – and actually did – consider both Weaver's time-card violations and her alleged protected activity when determining whether she was terminated with just cause. (*See* Arbitration Award at p. 18 (noting the lack of "concrete probative evidence demonstrating that [Weaver's] otherwise justified discharge resulted from or was linked to her Union activities.").)

The record demonstrates that Arbitrator Hayford was presented with the facts relevant to resolving Weaver's unfair labor practice charge. His award outlines the Union's position that Weaver allegedly was terminated because of her Union activities. (*See id.* at pp. 11-12.) The record further demonstrates that the arbitrator considered purported and potential comparators who allegedly engaged in similar conduct to Weaver in an effort to determine if she was treated unfairly. (*Id.* at fn. 5, pp. 17-18) Based on the evidence, Arbitrator Hayford determined that Ovations treated Weaver fairly. (*Id.*) The evidence before Arbitrator Hayford relating to the question of whether Weaver was discharged with just cause is the same evidence necessary to determine whether Weaver's termination was related to her Union activities, and the Acting General Counsel cannot satisfy his burden of showing that Arbitrator Hayford was lacking any evidence relevant to the determination of the unfair labor practice issue.

Finally, the arbitration award is not clearly repugnant to the Act. Arbitrator Hayford applied the *Wright Line* analysis to the particular facts of this dispute, and ultimately held that

the evidence did not support a nexus between Weaver's Union activities and her termination. (*See id.* at p. 18.) Without any causal nexus, Ovations' discharge of Weaver did not violate the Act. (*Id.*) This holding is entirely consistent with the Act.

Clearly, the Acting General Counsel cannot satisfy the heavy burden of proving that the award is "palpably wrong." *See Verizon New Eng., Inc.*, 2011 NLRB LEXIS 630 ("although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, . . . the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong."). Under these circumstances, the Acting General Counsel must defer to the arbitration award, and the Complaint should be dismissed.

c. The Acting General Counsel's Justification For Refusing To Defer Is Neither Factually Nor Legally Supportable.

The Acting General Counsel has identified two reasons why it believes that the arbitration award issued in this matter is clearly repugnant to the Act: (1) that the arbitrator misapplied the *Wright Line* analysis; and (2) that "[t]he 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." (*See* Exhibit C to Montgomery Aff.) Both of these conclusions, however, mischaracterize the award and are contrary to the actual language and reasoning of the arbitration award.

Even a cursory review of the award confirms that Arbitrator Hayford correctly applied the *Wright Line* analysis. Arbitrator Hayford correctly identified all four elements of the analysis. (*See, e.g.,* Arbitration Award at pp. 9, 18.) After determining that the first three factors had been met in this dispute, his analysis focused on the fourth and final factor: whether there

existed a causal nexus between Weaver's Union activities and her termination. (*Id.* at p. 18.) Because the evidence in the record did not reveal "any concrete nexus between Ms. Weaver's union activities and the Company's decision to terminate her employment," Arbitrator Hayford correctly determined, pursuant to *Wright Line*, that Ovations' termination of Weaver did not violate the Act. (*Id.* at pp. 18-19.)

Furthermore, the Acting General Counsel's second assertion also is directly contrary to the arbitration award. In the award, Arbitrator Hayford expressly found that 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 was the motivating factor behind Ovations' termination decision. (*See id.* at pp. 17-18.) Arbitrator Hayford further explained that the evidence did not support the Union's contention that Weaver's termination was linked in any way to her Union activities. (*Id.* at p. 18.) Under these circumstances, it simply is incorrect for the Acting General Counsel to allege that the arbitrator found that one of the primary reasons for Weaver's discharge was her Union activities.

Therefore, none of the reasons provided by the Region are sufficient to justify the Acting General Counsel's decision to refuse to defer to the arbitration award, and the Complaint must be dismissed.

B. Even If The Board Decides To Adopt The New Standard Regarding Post-Arbitration Deferral Recently Proposed By The Acting General Counsel, Deferral Still Is Appropriate.

In a January 20, 2011 memorandum, the Acting General Counsel proposed a new framework for arbitral deference that re-allocates the burden of proof and largely ignores the well-established public policy in favor of arbitration as the preferred means of resolving labor

disputes.[2] *See* Memorandum GC 11-05 (January 20, 2011). In its proposal, the Acting General Counsel urged the Board to adopt a new standard where the party seeking deferral has the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. *Id.* at pp. 6-7. If the party urging deferral makes this showing, the Board should defer unless the arbitration award is clearly repugnant to the Act. *Id.* at p. 7. The Acting General Counsel's proposal, however, never has been adopted by the Board.

Even if the Board had adopted this framework, deferral still would be appropriate. As described more thoroughly above, the statutory issue – whether Weaver's termination violated either Section 8(a)(1) or Section 8(a)(3) – was presented at the hearing and considered by Arbitrator Hayford. Moreover, the arbitrator correctly enunciated and applied the *Wright Line* standard for determining whether a violation of those statutory sections occurred. Finally, for the reasons previously articulated, the arbitration award is not clearly repugnant to the Act.

Therefore, regardless of which standard the Board applies, deferral was appropriate in this case, and the Acting General Counsel's Complaint must be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, Respondent Ovations Food Services, L.P. respectfully requests that the Board dismiss in its entirety the Complaint and Notice of Hearing issued by the Acting General Counsel on May 18, 2012. Alternatively, Respondent requests that the Board grant summary judgment in its favor.

[2] Additionally, it is worth noting that the Acting General Counsel's memorandum, as well as the Complaint issued in this matter, arguably are *ultra vires* as a result of the fact that the Acting General Counsel's appointment expired under the Act long before the memorandum was published or the Complaint was issued.

Dated: June 1, 2012.

Respondent,

OVATIONS FOOD SERVICES, L.P.

By: */s/ David K. Montgomery*

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CERTIFICATE OF SERVICE

This is to certify that on June 1, 2012, a copy of the foregoing Motion to Dismiss Complaint and Notice of Hearing, or, Alternatively, Motion for Summary Judgment 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.nlrb.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

4819-5971-9695, v. 1

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 Ovations 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 Ovations Food Services, L.P. ("Ovations") in the above-captioned matter.

3. A true and accurate copy of the letter received by Ovations 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.

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 Pryor, Attorney at Law
NOTARY PUBLIC, STATE OF OHIO
My Commission has no expiration
date. Section 147.03 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.nlrb.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

4848-2823-0415, v. 1

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.

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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.nlrb.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.nlrb.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

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 Zdazenski	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

EXHIBIT
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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, 201	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 Zdazenski 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. Zdazenski, 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. Zdazenski 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. Zdazenski testified that the Catering Department time records were not examined in January 2011.

scheduled for early February, Ms. Zdazenski was eventually able to reschedule the meeting on or about February 17, 2011. That meeting was attended by Ms. Zdazenski, 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 Zdazenski 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 <u>any other</u> hourly employee within the 3 departments audited. The fact that you did this10 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 publically. [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 Ovations 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 [Ovations] 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 Ovations 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

> Zdazenski, 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 is 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 activates 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 Zdazenski testified when that 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 Zdazenski 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. Zdazenski 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

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[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. Zdazenski 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 Zdazenski'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. Zdazenski 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

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[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 Zdazenski 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

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[8] Regional General Manager Zdazenski 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. Zdazenski'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. Zdazenski'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:

EXHIBIT
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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:

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201 E. Fifth Street
Cincinnati, OH 45202

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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

> 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.

Verv 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.

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

Confidentiality Note: This e-mail, and any attachment to it, contains privileged and confidential information intended only for the use of the individual(s) or entity named on the e-mail. If the reader of this e-mail is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that reading it is strictly prohibited. If you have received this e-mail in error, please immediately return it to the sender and delete it from your system. Thank you.

FORM NLRB-501
(2-08)

FORM EXEMPT UNDER 44 U.S.C 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 9-CA-46264	Date Filed FEB 22, 2011

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Ovations Food Services, L.P.

b. Tel. No.
(513)419-7257

c. Cell No.
( ) -

d. Address *(Street, city, state, and ZIP code)*
The Duke Energy Convention Center 525 Elm Street
Cincinnati OH 45202-

e. Employer Representative
Ms. Teresa Perault
Human Resources Manager

f. Fax No.
( ) -

g. e-Mail

h. Number of workers employed
500

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Food Services

j. Identify principal product or service
Food Services

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
On or about February 17, 2011, the above-named Employer termianted Nadine Weaver in retaliation of her union activities.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Ms. Nadine Weaver

4c. Address *(Street and number, city, state, and ZIP code)*
223 Albion Place
Cincinnati OH 45219-

4a. Tel. No.
( ) -

4b. Cell No.
(513)371-3857

4d. Fax No.
( ) -

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Nadine Weaver
(signature of representative or person making charge)

An Individual
(Print/type name and title or office, if any)

Address Ms. Nadine Weaver
223 Albion Place
Cincinnati OH 45219-

2 22 11
(date)

Tel. No.
( ) -

Office, if any, Cell No.
(513)371-3857

Fax No.
( ) -

e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

I/O JDD/md

PRIVACY ACT STATEMENT

09-2011-0411

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

EXHIBIT B

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.

EXHIBIT C

(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.nlrb.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.nlrb.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

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 Zdazenski	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

EXHIBIT D

EXHIBIT B

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, 201	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 Zdazenski 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. Zdazenski, 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. Zdazenski 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. Zdazenski testified that the Catering Department time records were not examined in January 2011.

scheduled for early February, Ms. Zdazenski was eventually able to reschedule the meeting on or about February 17, 2011. That meeting was attended by Ms. Zdazenski, 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 Zdazenski 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 <u>any other</u> hourly employee within the 3 departments audited. The fact that you did this10 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 publically. [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 Ovations 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 [Ovations] 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 Ovations 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

Zdazenski, 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 is 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.

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[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 activates 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 Zdazenski testified when that 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 Zdazenski 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. Zdazenski 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

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[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. Zdazenski 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 Zdazenski'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. Zdazenski 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

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[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 Zdazenski 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

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[8] Regional General Manager Zdazenski 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. Zdazenski'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. Zdazenski'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

5/18/12

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

In the Matter of

OVATIONS FOOD SERVICES, L.P. INC

and Case 9-CA-046264

NADINE WEAVER, AN INDIVIDUAL

COMPLAINT
AND
NOTICE OF HEARING

Nadine Weaver, an individual, herein called Weaver, has charged that Ovations Food Services, L.P., Inc., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151, et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge was filed by Weaver on February 22, 2011, and a copy was served by regular mail on Respondent on February 23, 2011.

2. (a) At all material times, Respondent, a corporation with an office and place of business in Cincinnati, Ohio, has been engaged in providing food and beverage services at venues in various states, including the Duke Energy Convention Center in Cincinnati, Ohio, the only facility involved in this matter.

(b) During the past 12 months, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at its Cincinnati, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio.

EXHIBIT E

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times, the Chicago and Midwest Regional Joint Board, affiliated with Workers United, Local 12, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Karen Muros	- Director of Corporate Human Resources
Pamela Zdazenski	- Area General Manager
Carol Cooper	- Assistant Regional Manager
Teresa Perrault	- Regional Office Manager
Purvill Chaney	- Executive Chef
Maggie Wheeler	- Food and Beverage Manager
Rachin Thorton	- Manager

5. (a) About February 17, 2011, Respondent discharged its employee Nadine Weaver.

(b) Respondent engaged in the conduct described above in paragraph 5(a) because the named employee of Respondent formed, joined or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these concerted activities.

6. By the conduct described above in paragraph 5, Respondent has been discriminating in regard to hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

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

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6, the Acting General Counsel seeks an Order requiring Respondent to preserve and, within 14 days of request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due to Nadine Weaver or related costs due under the terms of this order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

Further, the Acting General Counsel seeks an Order requiring Respondent to reimburse Nadine Weaver for amounts equal to the difference in taxes owed by her upon receipt of a lump-sum payment and taxes that would have been owed to her had there been no discrimination; and, an Order requiring Respondent to submit the appropriate documentation to the Social Security Administration so that when back pay is paid, it will be allocated to the appropriate periods.

In addition, Acting General Counsel seeks an Order requiring Respondent to expunge from its files all reference to the discharge of employee Nadine Weaver February 17, 2011, and to inform her, in writing, that this has been done and such discharge will not be used against her in any way.

Lastly, the Acting General Counsel seeks all other relief that may be just and proper to remedy Respondent's unfair labor practices as alleged herein.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before **June 1, 2012**, or postmarked on or before **May 31, 2012**. Unless filed

electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically through the Agency's website. *To file electronically, go to www.nlrb.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **July 9, 2012**, **10 a.m.**, at **Room 3003, John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Cincinnati, Ohio this 18th day of May 2012.

Gary W. Muffley (CEZ)

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Attachments

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	Cases 09-CA-046264

ANSWER TO COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.20 of the National Labor Relations Board's Rules and Regulations, Respondent Ovations Food Services, L.P. (incorrectly designated as "Ovations Food Services, L.P. Inc.") answers the Complaint and Notice of Hearing as follows:

1. Admitted.

2. (A) Ovations Food Services, L.P. admits that it is a limited partnership with an office and place of business in Cincinnati, Ohio, has been engaged in providing food and beverage services at venues in various states, including the Duke Energy Convention Center in Cincinnati, Ohio, the only facility involved in this matter. Ovations Food Services, L.P. denies the remaining allegations in Paragraph 2(A).

   (B) Admitted.

   (C) Admitted.

3. Denied for lack of knowledge or information sufficient to form a belief.

4. Ovations Food Services, L.P, admits that the following individuals hold or have held the positions set forth opposite their names while working for Ovations Food Services, L.P.:

Kareen Muros:	Vice President of Human Resources
Pamela Zdazenski:	Regional General Manager
Carol Cooper:	Former Assistant General Manager

EXHIBIT F

Teresa Perrault:	Former Regional Office Manager
Purvill Chaney:	Executive Chef
Maggie Wheeler:	Director of Catering Sales (former Food and Beverage Manager)
Rachine Thornton:	Assistant Kitchen Manager

Ovations Food Services, L.P. denies the remaining allegations in Paragraph 4 of the Complaint.

5. (A) Admitted.

(B) Denied.

6. Denied.

7. Denied.

8. Respondent denies all allegations not expressly admitted herein.

9. In addition to these answers to the Consolidated Complaint and Notice of Hearing, Respondent asserts the following affirmative defenses:

(A) This case should be dismissed because Ovations Food Services, L.P. terminated Nadine Weaver for just cause.

(B) Weaver would have been terminated regardless of any protected activity.

(C) This case should be dismissed because Weaver and the Board are legally and equitably estopped from asserting that Ovations Food Services, L.P. violated the National Labor Relations Act when terminating Nadine Weaver.

(D) This case should be dismissed because the Board has violated and is ignoring its own policies, precedent, and guidelines by asserting the factual and legal claims asserted in this case.

(E) This case should be dismissed because it has already been arbitrated pursuant to the grievance procedures that are part of the Collective Bargaining Agreement between Ovations Food Services, L.P. and the Union of which Weaver was a member, the Board consented to the arbitration deferral, the arbitration

proceedings were fair and regular, all parties agreed to be bound by the arbitration award, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

(F) The complaint should be dismissed in its entirety because the National Labor Relations Board (and those acting on its behalf) lacks the authority to act in the absence of a lawfully constituted quorum.

(G) This Complaint and related proceedings are *ultra vires* because the Acting General Counsel of the NLRB, did not lawfully hold the office of Acting General Counsel at the time he directed this Complaint be filed or at the time he issued Memorandum GC 11-05. By answering the Complaint and continuing to participate in these proceedings, Ovations Food Services, L.P. does not waive any substantive rights of appeal.

Dated: June 1, 2012.

Respondent,

OVATIONS FOOD SERVICES, L.P.

By: */s/ David K. Montgomery*

David K. Montgomery, Esq.
David A. Nenni, Esq.
Jamie Goetz-Anderson, Esq.
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201 East 5th Street
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CERTIFICATE OF SERVICE

This is to certify that on June 1, 2012, a copy of the foregoing Answer 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.nlrb.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

4852-1272-6031, v. 1

OVATIONS FOOD SERVICES, LP

Pam Zdazenski
Regional General Manager

December 6, 2010

Mr. Bishaara A. Clark
Business Agent
UNITE HERE
Ohio State Counsel
35 E. 7th St. – Ste. 308
Cincinnati, OH 45202

Re: Grievance # 1 - Alleged Violation of Ovations' Alcohol Service Policy
Grievance # 2 - Alleged Failure to Pay Break Time per Break Sheet Notation
Grievance # 3 - Alleged Discriminatory Employment (Termination) Practice

Dear Bishaara,

Thank you for taking the time to formulate the union's position regarding Ebony _____'s termination in writing.

Alleged Violation of Ovations' Alcohol Service Policy

The Rusty Ball was a charity fundraiser. As a private catered event serving "invitation only" guests, alcohol service was not subject to the policy designed to safely facilitate high-volume service to the general public. The "drink policy" referred to by the Grievant only pertains to "open to the public" events (e.g. Car Show, Boat Show, Home and Garden Show). As is customary in our industry and compliant with the regulatory statutes of the State of Ohio, the employer may waive or amend its policy for certain types of private, monitored events to provide a higher level of personalized service to VIP guests.

Experienced union bartenders at the Duke Energy Convention Center are very familiar with this common industry practice, and can attest to the fact that we have historically treated major private events such as JDRF, Celestial Ball, and SPCA Fur Ball in the same manner. Similarly, the Grievant may not have been aware that TIPS training is not a regulatory requirement in the State of Ohio, although almost all Ovations employees and volunteers have completed the training.

Everyone working the Rusty Ball was well aware of the alcohol service guidelines for the event. There were significantly more than the required number of managers and supervisors dedicated to assuring responsible alcohol service, compliance and safety; every employee and/or volunteer assisting with the VIP area was trained prior to the event; there were no reported incidents involving alcohol whatsoever. Weaver's contention that "union jobs were at risk" is unfounded and inaccurate.

The Grievant's lack of familiarity with the various levels of compliant alcohol service could have

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EXHIBIT G

been better addressed had she brought her concerns and questions directly to the General Manager, as stipulated in the CBA. We respectfully view this grievance as lacking merit.

Alleged Failure to Pay Break Time per Break Sheet Notation

1. **Deductions from Pay due to Break Log Corrections**

   Ms Weaver is correct in stating that pay should not be deducted due to a discrepancy on time sheet regarding whether a break was taken or not, without informing the employee. This is contrary to Ovations established pay practices regarding breaks, and will be dealt with accordingly. This was not a flawed policy or corporate practice, but an individual divergence.

   Ovations will resolve the matter immediately by paying the full 30-minute meal period that were deducted on 11/16. Nadine Weaver's, as well as Connie Schiffmeyer's breaks for 10/5 will also be paid, despite witnesses corroborating that both employees' "No Break" notations during the Holiday Market were not consistent with the time both women were observed eating and observing the break time.

   Ovations has investigated Grievant's complaint and finds that while the Company policy is unequivocal, implementation and monitoring by Kitchen management was not as rigorous as it needs to be. An examination of current practices shows that Kitchen management subscribed to an "honor system" allowing employees to write-in their own break times and/or whether a break was taken or not. A review of this practice shows evidence of frequent abuse by employees routinely failing to note accurate break times, or employees noting "No Break Taken" when they were indeed observed eating and enjoying meal breaks in excess of 30 minutes.

   We appreciate the Grievant's vigilance in bringing this problem to our attention. Effective immediately, supervisors/managers will verify every break entry on the sheet and sign each break sheet. Once break sheets are submitted to Payroll, no deductions to pay or revisions to noted break times shall be made without the explicit written permission of the General Manager after reviewing with the employee. This shall be the case even if the review results in the disciplinary write-up of the employee's falsification of time records.

2. **Interaction between Nadine Weaver and Teresa Perrault/Sheron Duncan**

   While Grievant's complaint is technically valid and will result immediate corrective action, the manner in which this complaint was brought forward was not acceptable. Grievant's timing (interrupting a meeting between another union member and Payroll personnel) was disruptive to work flow; her remarks were inflammatory, unprofessional and resulted in disharmony in the work place. Weaver's loud, argumentative and abrasive exchange with Perrault was witnessed by union members, as well as staff. General Manager, Pam Zdazenski, immediately proceeded to Sheron's office upon hearing the disruptive commotion at the other end of the hall, fearing that the situation could escalate.

   The employer has grave concerns with Weaver's approach to bringing complaints forward. Not only were her actions disruptive, but taking a combative stance with staff before learning all the facts is unacceptable. The employer has an obligation to ensure ALL employees are protected from a volatile and hostile work environment; that applies to non-union, as well

as union workers. Weavers' loud exclamation of "You'll get yours!" to Perrault's request that she refrain from raising her voice is not only unprofessional and unacceptable, it was perceived as threatening and harassing by Perrault and the employees who witnessed the outburst. At least one union member expressed embarrassment and disappointment in Weaver's outburst.

Until we all have confidence that Weaver can display the level of professionalism, courtesy and adherence to protocol that her position of Steward requires, I respectfully request that all issues be directed to me. I cannot permit any of my staff to suffer further harassment/verbal abuse from Weaver.

3. **Alleged Discriminatory Employment (Termination) Practice**

Grievant alleges that she has participated in five (5) hearings involving Black employees. Her claim that "Every last one of them was terminated" is inaccurate. For example: Nadine Weaver was present during final resolution of Michael Kelow's grievance which occurred at the time of the CBA renewal. As you will recall, Kelow was discharged for use of a racial epithet "n——," among other transgressions. Weaver was present when we agreed to a Last Chance Agreement and reinstatement as a result of union support for Kelow. Kelow continues to be employed at the DECC.

Ovations takes all complaints of discrimination very seriously, and has a long-standing policy and practice of launching an immediate investigation. It does not matter whether the venue is union or non-union. Given the absence of any specifics supporting Weaver's allegation, Ovations can only review existing terminations in an attempt to corroborate Weaver's point. Statistics do not support Weaver's statement. We request that Weaver provide more detail on which employees she is referring to, and what facts support her complaint so that we can properly investigate her allegation.

Ovations fully understands and acknowledges the union's right to request "almost" any company information "related to workers' terms and conditions of employment **if the union can show that it is necessary and relevant.**" Weaver's demand for "*all files on employees that was* [sic] *terminated in Jan. 2009 to Nov. 2010*" along with "*files on any whites* [sic] *that receive a write up on discipline from Jan 9, 2010 to Nov, 2010*" is not reasonable given the absence of specifics. There have been no compelling facts presented to warrant Weaver's demand other than her opinion "*I don't feel Mgt. give Blacks the breaks whites get . . .*[sic]".

If the union shows evidence of relevancy, Ovations will be happy to comply immediately. In order to have the opportunity to investigate and respond with an EEOC-compliant Position Statement, we are requesting that Weaver present a factual and compelling reason. In addition to objecting to unsupported, non-specific claims based on opinion, Ovations has a serious concern with making any employee's private information available to Weaver without jeopardizing our duty to protect this information. Given Weaver's recent public and unsubstantiated remarks disparaging Alma Diaz's character, we have grave concerns about the legal exposure (to Ovations, the union, and herself) that could result from similar treatment of personnel file records which include subsets of private, personal, medical, criminal history, disciplinary, investigatory, etc. information that is not material to her complaint.

We stand on our position of encouraging and welcoming all employees who have an interest in partnering with us to build a positive, beneficial and inclusive workplace for everyone.

And while we have not always agreed with the union's position on every matter, we have always appreciated and valued the professionalism, knowledge, and fairness you have displayed in all of our dealings over the years, Bishaara. That relationship was built on respect and knowledge of employment/labor law and best business practices, mutual courtesy and common sense . . . and the critical ability of being able to separate the "person" from the "problem." No matter our differences of opinion, all parties were respectful of one another.

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, education, and familiarity with protocol, and that was fine. We assumed she would avail herself of the union's training resources and mentorship opportunities that would help her grow into her role. Unfortunately, we do not see evidence of this. Weaver is increasingly 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.

We remain hopeful that Nadine Weaver is committed to the shared values of integrity, respect, and ongoing workplace improvement that the union and Ovations subscribe to, but we need your help and intervention to get this situation on track, for the benefit of all.

Respectfully,

Pam Zdazenski
Regional General Manager
Ovations Food Services, LP
The Duke Energy Convention Center

OVATIONS FOOD SERVICES, LP

Pam Zdazenski
Regional General Manager

January 24, 2011

Mr. Bishaara Clark
Business Agent

Mr. Vann Seawell
Assistant Director

UNITE HERE Local 12
Ohio State Counsel
35 E. Seventh St.
Suite 308
Cincinnati, OH 45202

Re: Ms. Nadine Weaver
UNITE HERE Local Shop Steward
Proposed Termination of Employment

Dear Bishaara and Vann,

I understand that the decision to terminate employment is a management right that rests with the employer and one that we would not normally consult with the union on before exercising. However, given the fact that the employee is a shop steward with an extensive history of volatility, I am seeking your support and feedback before proceeding. I, as well our Regional VP, John LaChance, and our VP of HR, Kareen Muros, value the excellent partnership we have with Local 12 and we respect your input. If there is a better way of resolving this issue, we are certainly open to suggestions.

Terminating Nadine Weaver's employment for cause, no matter how well-documented and justified, will most certainly be contested by the employee – vehemently.

Bishaara, in my December 6 memo I stated that Ms. Weaver is becoming increasingly more agitated and disruptive. Her demeanor towards managers and union members alike is inflammatory, discourteous and unprofessional. Instead of partnering with Ovations to promote a positive, productive and respectful workplace, Weaver is creating disharmony and hostility. I know that you have attempted to mentor Weaver and help her gain a better understanding of workplace rules, basic employment practices, regulatory compliance, and appropriate ways to interact with others when bringing forward a complaint. We have attempted to be patient and tolerant of Weaver's lack of education and knowledge of workplace practices, and I have made myself available to discuss any issue she may have in the interest of

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EXHIBIT H

promoting a better and more productive work relationship.

Unfortunately, neither the guidance of the union nor the employer's attempts to mentor Weaver have been effective. The following are examples of recent incidents:

- At the end of December, Nadine Weaver shared confidential personal information regarding another union member's terminated pregnancy (abortion) with other employees. Not only was this private medical information shared publically, it was done in a mean-spirited, judgmental and very hurtful manner. Weaver shared this information in her capacity as shop steward while trying to get more hours for an employee. Weaver was counseled on the insensitivity and impropriety of her actions and directed to show immediate and sustained improvement in not sharing private information. Weaver acknowledged her mistake, and promised to refrain from spreading malicious gossip, true or not. Three weeks later, on January ____, Weaver learned that the same union member was pregnant again and proceeded to again share this private medical information with others, with the same results. The employee has complained to the employer about why we would continue to allow Weaver to malign employees in the workplace, causing her embarrassment and hostility. Weaver's actions were a clear violation of our code of conduct.

- Weaver's propensity for spreading disharmony is not limited to sharing private information she has learned of in the scope of her role as shop steward, she also continues to spread unfounded rumors that seem to be entirely fabricated. For example, she 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.

- This weekend, on January ___, former Ovations Assistant General Manager, Kevin Dolphin, complained that while he was working out one of the last shifts of his notice period, Weaver pulled him aside and said "What they [Ovations] are doing is wrong and I can help you get a lot of money from them." Despite the fact that Dolphin was being discharged (for reasons other than cause), he questioned Weaver's motivation and fixation on "getting money." He was left with the impression that Weaver thought she might be "rewarded" for this. Weaver initiated this discussion with the explicit purpose of harming the employer by colluding with an employee to perpetuate fraud.

- On January 22, Weaver complained to Pam Zdazenski, Maggie Wheeler and Carol Cooper that Ovations allows Gabby Bolden (another fellow union steward) to "work whenever she wants," and that Ovations "never writes her up." This was an untrue statement: Gabby Bolden has been written up twice in the past 6 months for attendance, as well as being written up on January 23 for failing to follow proper call-off procedure for her shift on January 21. Unfortunately, Nadine Weaver was vocal about sharing her unfounded opinion with other union members who did not have a need to know resulting in Bolden complaining to Ovations about allowing Weaver to spread false and malicious rumors about her.

- On January 22, Nadine Weaver voiced her dissatisfaction with how the union and Ovations had resolved a grievance settled on December 7. Even though the matter was resolved to the union's, Ovations', and the complainant's satisfaction, Weaver was adamant that she still deserved a written retraction. She became very agitated, loud and vehement in demanding a written apology (not warranted), and would not listen to reason. When Zdazenski pointed out that the issue was closed and Weaver should accept that, Weaver continued to vent to the kitchen staff about this, which has resulted in growing tension between kitchen and office staff regarding break tracking. The office staff has filed a written complaint regarding the employer's inability to ensure a respectful and harmonious workplace. They are fearful of Weaver and

are apprehensive about being treated differently by the kitchen staff as a result of Weaver's influence.

We have given Nadine Weaver a great deal of latitude in voicing complaints because of her role as shop steward. We wanted to make sure that she had every opportunity to bring problems forward on behalf of the employees she represents, so that I could address and resolve them without delay. But we have reached a point where Nadine Weaver is inciting employees to mistrust the employer and each other without cause, to imagine wrong-doing where there is none, and to treat each other and Ovations' non-union staff with disrespect. Nadine Weaver is responsible for creating such an extreme level of disharmony in our workplace that both union- and non-union morale is suffering, productivity has been adversely impacted by the amount of time management needs to devote to addressing problems she has created, and I am very concerned about the damage to employees' reputations and workplace relationships caused by Weaver's words. Her credibility as a union steward has been seriously compromised and many employees are fearful of her.

It would be irresponsible of me to allow Nadine Weaver to continue to create a hostile and disharmonious workplace. Any other employee would have been discharged for less egregiously violating the employer's code of conduct, respectful workplace and harassment policies. I have an obligation to assure a respectful and compliant workplace for all employees. Weaver's pervasive and blatant disregard of these policies creates untenable exposure for Ovations and the union, and I am seeking your support in taking appropriate corrective action. All remedies for corrective action laid out in the CBA, as well as in Ovations' p&p's, have been exhausted.

I am seeking your support of a decision to terminate Nadine Weaver's employment. If you would like to schedule a meeting to discuss your position, I would be happy to do so.

Respectfully yours,

Pam Zdazenski
Regional Area Manager
Ovations Food Services, LP
The Duke Energy Convention Center

OVATIONS FOOD SERVICES, LP

Pam Zdazenski
Regional General Manager

February 17, 2011

Ms. Weaver,

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 <u>any other</u> hourly employee within the 3 departments audited. The fact that you did this10 times during 3 weeks clearly demonstrates a blatant, willful and egregious disregard of policy, and unequivocally supports termination for cause.

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EXHIBIT I

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 publically. 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 Ovations 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 [Ovations] 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 Ovations 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 Zdazenski, 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.

CERTIFICATE OF SERVICE

June 8, 2012

I hereby certify that I served the attached Acting General Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss Complaint on all parties by electronic mail to the following addresses listed below:

David K. Montgomery, Esquire
David A. Nenni, Esquire
Jamie Goetz-Anderson, Esquire
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Ronald M. Willis, Esquire
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OVATIONS FOOD SERVICES, L.P.

and **Case 09-CA-046264**

NADINE WEAVER

ORDER[1]

The Respondent's Motion to Dismiss the Complaint and Notice of Hearing or, Alternatively, Motion for Summary Judgment is denied. This denial is without prejudice to the Respondent's right to renew its deferral arguments to the administrative law judge and to raise the deferral issue before the Board on any exceptions that may be filed to the judge's decision, if appropriate.[2]

Dated, Washington, D.C., July 10, 2012

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

SHARON BLOCK, MEMBER

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

[2] In its motion, the Respondent asserts that the Acting General Counsel's memorandum GC 11-05 and the instant complaint "arguably are *ultra vires* as a result of the fact that the Acting General Counsel's appointment expired under the Act long before the memorandum was published or the Complaint was issued." For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), we reject this argument.