Inland Steel Company *and* Sheldon Caref. Case 13-CA-19595

July 22, 1981

DECISION AND ORDER

On January 16, 1981, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a brief supporting those exceptions and in support of the Administrative Law Judge's Decision.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by refusing to rehire Sheldon Caref on or after February 14, 1980. The General Counsel and the Charging Party except to this finding and contend that Respondent refused to rehire Caref on and after February 14, 1980, because of his protected activities in violation of Section 8(a)(3) and (1) of the Act. We agree with the General Counsel and the Charging Party. In so doing, we find no fault with the Administrative Law Judge's findings of fact and credibility resolutions, which we adopt. Our disagreement with the Administrative Law Judge lies in his legal analysis of the issues before him.

The essential facts are as follows: Respondent's facility in East Chicago, Indiana, has a work force of approximately 23,500 employees, some 18,000 of whom are in the collective-bargaining unit represented since 1943 by Local 1010, United Steelworkers of America, AFL-CIO (hereafter referred to as the Union). From his date of initial hire on January 28, 1972, until he voluntarily quit employment on July 7, 1979, Charging Party Caref worked in the central mechanical department (CMD) mobile equipment repair shop. During this time, Caref moved from an apprentice to the highest rating of journeyman, mechanic "A," which he achieved in the summer of 1976.

Approximately 8 months after Caref voluntarily quit Respondent's employ, he sought reemployment with Respondent. Thus, on or about February 4, 1980,[2] Caref telephoned Carl Foreman, the general foreman of the mobile equipment repair shop, and told him he needed a job. Foreman told Caref that he would think the matter over and get back to him in a few days. Approximately 3 days later, after receiving no response, Caref again telephone Foreman. Foreman told Caref that he would not be rehired because Respondent was building a new shop and desired to staff it with personnel of a "certain mold" which Caref did not fit. Undeterred, Caref appeared personally at Respondent's plant to obtain an employment application. Caref contacted Ray Meinert, a foreman he had worked under in the mobile equipment repair shop, to help him file his application directly (rather than by mail, which is Respondent's policy). Meinert delivered Caref's application to the reception desk personally and at that time described Caref as an excellent mechanic whom he would like to see employed. An interview was arranged for the following morning.

Caref was interviewed on February 14 by William W. Gillespie, a senior personnel representative. Gillespie testified that, at the conclusion of his interview with Caref, he informed Caref that he was not willing to provide employment at that time, but would reconsider his application at some future date. Gillespie explained to Caref that Respondent would conduct a broad search because it sought to fill the positions with the most qualified people in the market. Gillespie testified that he elected to proceed in this fashion solely because of warnings and reprimands contained in Caref's personnel file,[3] and not due to any outside influence or informaton. Gillespie acknowledged on the witness stand that Caref was the only applicant for rehire to a skilled job who did not progress beyond the interview stage to testing.[4]

The record reveals that several vacancies existed for skilled maintenance equipment machinists. There were 30 such vacancies in early 1980, and only 10 had been filled prior to the hearing in this case.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates are in 1980 unless otherwise indicated.

[3] The record evidence shows that, in 7-1/2 years of continuous employment with Respondent, Caref never had a disciplinary layoff, but had four reprimands and one warning, the most recent being on October 25, 1977. The Administrative Law Judge found Gillespie's claim that he made the decision not to rehire solely based on Caref's personnel file was suspect as the file would have apprised Gillespie that Caref had not been the subject of formal discipline in the last continuous 21-month period of his employment.

[4] Respondent has a three-step hiring process: Thus, after the initial interview in personnel, an applicant is tested, and then interviewed by a management representative in the department of his or her potential hire. An applicant must successfully progress through all three stages to be hired.

The Administrative Law Judge found that, during the course of his 7-1/2 years of employment with Respondent, Caref engaged in a series of protected activities of which Respondent was aware. Thus, in 1972, while still an apprentice, Caref filed a complaint with the Occupational Safety and Health Administration (OSHA) protesting unhygienic conditions in Respondent's locker rooms. To enlist support for his effort, Caref circulated a petition on which employees could indicate support for his OSHA complaint. He testified that 70 percent of the men in his shop signed this petition.

In 1973, also while an apprentice, Caref became involved in the Worker's Action Movement (WAM) partially because he was interested in securing a shorter workweek and ending discrimination in employment. Caref assisted in the publication and distribution of the WAM newsletter at Inland. Caref also contributed articles to the newsletter including one concerning working conditions at Inland to which he signed his first name and phone number. Caref continued his efforts on behalf of WAM until the winter of 1975–76. During this same period Caref became involved in the Progressive Labor Party. He wrote articles for the Progressive Labor Party newspaper, Challenge, and sold this newspaper to others at Respondent's plant gates between the summer of 1972 and the fall of 1977. In the November 11, 1976, edition of Challenge, a letter to the editor was published under Caref's signature discussing an accident at Respondent's facility (and setting forth a message regarding the need for a workers' revolution).[5]

In 1977, Caref ceased his involvement with the Progressive Labor Party and WAM. During that year he organized a 30-minute demonstration for three Inland workers who were killed in an accident at the plant.

Over his years at Inland, Caref ran for various union positions and served as a union steward in the CMD for 3 months in late 1977 and early 1978. In this capacity, he filed four grievances, all of which the Administrative Law Judge found to be of a routine, nonharassing nature. As to other union-related activity, in 1973 Caref participated in the preparation of a demographic study of craft positions in the plant conducted by the union civil rights committee. He distributed a leaflet in the summer of 1973 encouraging Inland employees to utilize the Union to protest race discrimination and other conditions of employment. This leaflet was sponsored by "a group of Inland workers who are members of the Civil Rights Committee." Caref participated in shop meetings every 5 to 7 months in the CMD, and kept copies of arbitration awards, contracts, job descriptions, and other materials available at the union hall in his locker to enable him to inform coworkers of their rights in the collective-bargaining process. During his last week of employment in July 1979, Caref wore a T-shirt which had the words "INLAND SUCKS" on the front panel.[6] Caref testified that the shirt had been given to him by some of his coworkers.

The Administrative Law Judge found the following evidence of Respondent's hostility to Caref's activities. Caref testified that he was photographed by plant security personnel in 1974 and 1975 while distributing WAM leaflets and in 1977 when he led the demonstration protesting the death of three coworkers. Caref further testified that, on two occasions in 1972, Line Foreman Mayfield tampered with his locker containing union materials and copies of Challenge.

In the fall of 1977, Shop Foreman George Kramer, after leaving a foremen's meeting, told Caref's coemployee, Kevin Ledster, to tell Caref that "he'd better watch himself because they had a meeting and they were mostly concentrating on him, telling the foremen to keep an eye on him, that they were trying to find a way to get rid of him." Caref also recounted an incident in June 1978 concerning his periodic attempts to be transferred from shift rotation to a steady assignment on the 3 to 11 shift. His foreman, Carl Foreman, finally agreed to such an arrangement but, in doing so, alluded to the fact that Caref had "leadership ability" while remarking that "it's too bad that it's not in other directions." Several other witnesses testified about various foremen making derogatory remarks about Caref's activities and telling CMD employees to stay away from Caref because he was a bad influence.

Respondent's defense focused on the assertion that, on the basis of Gillespie's independent judgment, Caref was not rehired due to his poor record contained in his personnel file. The Administrative Law Judge rejected this defense and discredited the testimony of Respondent's central witness, William W. Gillespie. In so doing, he noted testimony which indicated that other company officials were involved in the refusal to rehire Caref. In this regard, the assistant director of personnel, Morgan

[5] The message was: "Under capitalism, it would take thousands of years, if ever, to improve each aspect of a worker's job conditions and retire with a long life. And that would mean fighting every inch of the way and never losing. On the other hand, it would take only a few years to organize a revolt, establish working class State power and run the factories the way we think its [sic] safe to operate."

[6] Caref testified that he wore the T-shirt only for a few hours on his last day of employment. Carl Foreman testified that Caref wore the T-shirt to and from work several days during his last week of employment but that he did not see Caref wearing it during working hours. The Administrative Law Judge did not resolve this conflict in testimony.

Burke, had a conversation with Paul Arsenal, superintendent of CMD, on February 14, the date of Caref's interview with Gillespie. During this conversation, Arsenal informed Burke that Caref was seeking reemployment and, based on his overall work record, his rehire could not be recommended. Burke then conveyed the recommendation that Caref not be rehired to Gillespie's supervisor, Wilson, on February 14. After this, Burke received information that Caref had been interviewed and turned away with the interviewer informing Caref that "it was felt there were better applicants available for the positions that were open" and thus the interviewer rejected Caref for employment at that time. Gillespie denied making this statement to Caref.

In addition, the Administrative Law Judge observed that Respondent adduced evidence regarding Caref's previous work performance which could not have been within Gillespie's knowledge. Thus, several witnesses testified about Caref's allegedly subpar job performance. Those witnesses admitted that these opinions were not discussed with others in management and conceded that Caref was not disciplined on any basis other than "verbal warnings or . . . discussions." Moreover, the Administrative Law Judge noted that this testimony was countered by that of George Kramer, another supervisor, who recommended Caref for a Tops award in his last year and a half of employment.[7] He further noted that employee Pierce credibly testified that Foreman Meinert told him that he had tried to get Caref's job back because Caref was a good worker, but the Company had convinced Meinert to have nothing more to do with Caref or Meinert might lose his job.

Finally, in rejecting Respondent's defense that its decision was based on Gillespie's independent judgment concerning Caref's work performance, the Administrative Law Judge stated:

> This overarching aspect of the defense was predicated upon testimony so shifting, evasive, and improbable as to reduce to the inescapable the conclusion that it was concocted as a basis for insulating those with more direct knowledge of Caref's reputation from immediate involvement in the rehire decision and thereby to throw off suspicion of any proscribed motivation.

On the basis of the foregoing, the Administrative Law Judge found that the inference was warranted that Caref would have been rehired into one of several vacancies that existed for skilled maintenance equipment machinists but for the "negative attitude" he manifested against Respondent during his prior employment. However, he also noted that "Respondent, in its zeal to disabuse of any notion that Caref's 'negative attitude' toward the Company contributed measurably to the refusal to rehire, may well have overlooked the possibility that Caref's attitude may well have been manifested in a fashion critically removing his cause from the protective veil of Section 7."

Other evidence found by the Administrative Law Judge to counter Respondent's defense that Gillespie refused to rehire Caref on the basis of a poor work record included the following: Caref had progressed to the highest level of journeyman status in his craft, had never been the subject of a disciplinary layoff during his previous employment, and had received no complaints about his work for the last 21 months of his employment; he was denied employment at a time when a need existed for workers possessed of his skills, and foremen referred to Caref's "negative attitude towards the company" rather than to a poor work performance.

The Administrative Law Judge then relied upon a defense never asserted by Respondent's counsel. He found that Caref did not participate in any protected activity after sometime in 1978, but in his last week of employment elected to wear a T-shirt, displaying the slogan "INLAND SUCKS." The wearing of the T-shirt, the Administrative Law Judge concluded, was not protected by the Act.[8] Considering the above, the Administrative Law Judge reasoned that Respondent would have disregarded Caref's militant stance, which he had apparently abandoned, and availed itself of his skill in the needed classification were it not for his final unprotected act of wearing the T-shirt. On this rationale, the Administrative Law Judge recommended dismissal of the complaint in its entirety.

The General Counsel and the Charging Party contend, *inter alia*, that the General Counsel has shown by a preponderence of the evidence that Respodent refused to rehire Caref in violation of Section 8(a)(3) and (1) of the Act, and that the Administrative Law Judge erred in relying on a de-

[7] Under the Tops award program, employees are nominated to receive special recognition because of outstanding performance. From among the nominees, an employee is selected to receive the award each month.

[8] In support of his conclusion that a T-shirt displaying the slogan "INLAND SUCKS" is unprotected conduct, the Administrative Law Judge cited *Southwestern Bell Telephone Company*, 200 NLRB 667 (1972). The General Counsel and the Charging Party argue that this case is distinguishable from *Southwestern Bell* because in *Southwestern Bell* the employees were asked to remove T-shirts which said, "Ma Bell is a Cheap Mother," and refused to do so. We agree that his reliance on *Southwestern Bell* is misplaced. In the present case there is no evidence that any management official said anything to Caref about the T-shirt or even saw him wearing it during working hours and, further, Caref was never disciplined for wearing the T-shirt.

fense never raised by Respondent. We find merit in these arguments.

In this case, the Administrative Law Judge found, on the basis of credited evidence, that Caref had participated in a series of protected activities while previously employed with Respondent and that Respondent had exhibited animosity toward those activities. Further, the Administrative Law Judge found that the reasons advanced by Respondent for failing to rehire Caref were untrue. Thus, the General Counsel has established an illegal motivation for the refusal to rehire Caref and Respondent has failed to set forth credible, lawful reasons for such action. Accordingly, the Administrative Law Judge should have found that Respondent's action violated Section 8(a)(3) and (1) of the Act.

However, the Administrative Law Judge dismissed the complaint on a theory never advanced by Respondent. Indeed, Respondent consistently maintained at the hearing of this case and in its post-hearing brief that Caref was denied rehire based on the independent judgment of William Gillespie, and no witness for Respondent offered any testimony that Caref's wearing of the T-shirt bearing the slogan "INLAND SUCKS" contributed in any way to its decision not to rehire Caref.[9] In these circumstances, the Administrative Law Judge overstepped his role as a trier of fact and took on the mantle of a litigant. It is precisely this type of judicial overreaching for which the Supreme Court admonished the court of appeals in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), where the court of appeals speculated on a motive for respondent's conduct that respondent itself had introduced no evidence to support.

The Administrative Law Judge attempted to justify his action by a most peculiar construction of the Board's Decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). In that case, the Board stated that, after the General Counsel had made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct."[10] According to the Administrative Law Judge, the employer's burden can be met by the administrative law judge when the employer "thoroughly misconceives" its defense. We disagree. The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions. This, contrary to the Administrative Law Judge's perception of the litigation process, is the "hard core reality" of the "prosecution and defense of unfair labor practice allegations." [ALJD, fn. 34.]

Here, the Employer's witnesses gave false testimony, demonstrating that the reasons asserted for its conduct were not in fact relied upon. Thus, the inference of wrongful motive established by the General Counsel is left intact.[11] Although legitimate reasons may have existed for refusing to rehire Caref, they were not advanced in this case and we refuse to conjure up a rationale never presented. Accordingly, we find that the General Counsel's showing of wrongful motivation is not rebutted and, therefore, we find Respondent's refusal to rehire Caref in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Inland Steel Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1010, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing or refusing to rehire Sheldon Caref, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take appropriate affirmative action to effectuate the policies of the Act.

Having failed to rehire Sheldon Caref because he engaged in protected concerted activities, we shall order Respondent to offer reemployment to Caref in the job he applied for or in a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that which he would have earned from February 14, 1980, to the date of a valid offer of employment, less net earnings during such period, with interest thereon, to be computed in a manner prescribed in *F. W. Woolworth Compa-*

[9] Indeed, we do not find a scintilla of credited evidence to support the position advanced by the Administrative Law Judge on behalf of Respondent. Caref's uncontroverted testimony is that no warnings or comments of any kind were made to him about the T-shirt. Further, the Administrative Law Judge failed to resolve the conflict in testimony regarding whether Caref wore the T-shirt at work at all, only for a few hours, or for a week.

[10] 251 NLRB at 1089.

[11] See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

ny, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Inland Steel Company, East Chicago, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to rehire employees for engaging in protected concerted activities.

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

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

(a) Offer Sheldon Caref immediate and full reemployment in a position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its East Chicago, Indiana, facilities copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT refuse to rehire employees for engaging in activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Sheldon Caref immediate and full reemployment in a position for which he applied or, if such position no longer exists, to a substantially equivalent positon, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings incurred, with interest.

INLAND STEEL COMPANY

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: The hearing in this proceeding was held in Chicago, Illinois, on September 10 and 11, 1980, upon an unfair labor practice charge filed on February 19, 1980, and a complaint issued on March 27, 1980, alleging that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by refusing on and after February 14, 1980, to reemploy Sheldon Caref because he had engaged in union and/or other activity protected by the Act. In its duly filed answer, Respondent denied that any

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute the interest due on any loss of earnins suffered by Caref by reason of the Respondent's discrimination in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

unfair labor practices were committed. Following the close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and Respondent.

Upon the entire record in this proceeding, including my opportunity to observe directly the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, I hereby find as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with a facility located in East Chicago, Indiana, from which it is engaged in the manufacture of steel products. During the calendar year 1979, a representative period, Respondent, in the course of said operations, received at said facility materials valued in excess of $50,000 which were shipped directly from points outside the State of Indiana.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local 1010, United Steelworkers of America, AFL–CIO, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Issue*

This proceeding emerges from the unsuccessful effort by the Charging Party, Sheldon Caref, to secure reemployment with Respondent in February 1980. The General Counsel and the Charging Party contend that said denial of rehire was predicated upon Caref's having engaged in union and protected concerted activity while previously employed by Respondent, and hence that Respondent violated Section 8(a)(3) and/or (1) by its refusal to act favorably upon his application. Respondent, on the other hand, contends that Caref was terminated on the basis of an adverse performance record as evidenced by various warnings and reprimands contained in his personnel file.

B. *Background*

Respondent's facility in East Chicago, Indiana, occupies some 1,600 acres and is manned by a work force consisting of some 23,500 employees, some 18,000 of whom are in the collective-bargaining unit which, since 1943, has been represented by the Union. Among Respondent's various operational units was a central mechanical department (CMD) to which some 1,150 unit employees were assigned. The mobile equipment repair shop was a component of CMD. Some 140 production and maintenance employees were assigned to the mobile equipment repair shop and it was controlled by 20 supervisors in discharging the basic responsibility for the maintenance and repair of heavy mobile equipment utilized throughout the plant.

Charging Party Caref was initially hired by Respondent on January 28, 1972, and was assigned shortly thereafter to an apprenticeship in the CMD mobile equipment repair shop. His 3-1/2-year apprenticeship was completed successfully in late 1975 when he became a journeyman classified as a "mobile equipment machinist." Three distinct ratings are accorded journeymen in that classification with the starting level termed a mechanic "C," the intermediate level a mechanic "B," and the standard or highest rated mechanic, a mechanic "A." In the summer of 1976, Caref qualified for and received the rating of mechanic A. Three years later, on July 7, 1979, Caref voluntarily quit his employ with Respondent.

Within 8 months after said termination, Caref sought reemployment with Respondent at the East Chicago plant. On or about February 4, 1980[1] he telephoned Carl Foreman, the general foreman of the mobile equipment repair shop. Caref told Foreman that he needed a job, and was informed by the latter that a decision could not be made that night but that Foreman would think the matter over and get back to Caref in a few days. Approximately 3 days later, Caref, having received no response, again telephoned Foreman, inquiring as to whether a decision had been reached. Caref was told that he would not be rehired as Respondent was building a new shop and desired that it be staffed by personnel of a "certain mold" which Caref did not fit.

Caref's efforts to obtain reemployment did not end there. Later in February, he appeared personally at the East Chicago plant and obtained an application. However, unwilling to suffer the delays occasioned by Respondent's policy that completed applications be returned by mail, he contacted Ray Meinert, a foreman under whom Caref had worked in the mobile equipment repair shop, seeking Meinert's assistance in filing the application on a direct basis. Meinert apparently agreed and that same afternoon Caref met Meinert at Respondent's employment office. Meinert himself delivered Caref's application to the reception desk in the personnel office. An interview was arranged for the next morning.

The next morning Caref was interviewed by William Gillespie, a senior personnel representative for Respondent who had no firsthand knowledge of Caref's background with the Company apart from that which appeared in the latter's personnel file. According to Gillespie, based solely upon what appeared in Caref's file, he decided "not to offer him employment, at that point, in light of his work record . . . reprimands, and warnings, and other items which pertained to his work performance or . . . violation of company rules and regulations." Having allegedly reached this conclusion, he testified that, as Caref was a craftsman, the possibility existed that Gillespie would review the application at some future date. However, it is conceded that at no time thereafter did Gillespie reconsider his decision.

[1] Unless otherwise indicated, all dates refer to 1980.

Caref filed the instant unfair labor practice charges on February 19. Since his initial inquiry, Caref has not been offered a job.

C. *Caref's Activity in Quest of Improved Conditions of Work*

In support of the complaint, counsel for the General Counsel and the Charging Party point to a litany of activity on the part of Caref during the 7-year term of his prior employment. Thus, Caref joined the Union within 30 days after his initial hire.[2] Over the years he ran for various positions in the Union but his service as a union representative was confined to a 3-month period from late 1977 to early 1978 when he was appointed union steward in the CMD. During that period, Caref claims to have filed four grievances, but could recall the issues involved only with respect to three. With respect to the latter, the Company ultimately acceded to the Union's position on the issues at stake, and afforded appropriate redress. Complementing the apparently amicable disposition of said grievances is the fact that their content failed to suggest that extraordinary issues were involved, and all seemed of a routine, nonharassing nature. Objectively viewed, I am not convinced that Caref's actions in connection with these grievances aroused in any unusual fashion the sensitivities of management.[3]

Evidence was also adduced as to Caref's involvement in antidiscrimination activity. It is noted that the Union had a civil rights committee which consisted of three appointed representatives. Caref's initial testimony seemed calculated to overstate his involvement in that committee and later it became clear that Caref was not among the representatives, but that during 1973 and 1974 he was simply a union member interested in the role of that committee, who attended meetings along with 20 others on a regular basis. Apparently, Caref's only specific function sponsored by the Committee consisted of his participating with other employees in the preparation of a demographic study showing the ethnic, national origin, and sex of employees occupying skilled craft positions at the plant.[4] There is no evidence that Respondent was mindful of Caref's involvement in union-sponsored efforts to quell discrimination.

Finally, in connection with his overall union activity, Caref testified generally that he participated in shop meetings every 5 to 7 months, apparently attended by his coworkers in the central mechanical department, to discuss work-related problems. He also averred that it was his practice throughout his employment to obtain copies of arbitration awards, contracts, job descriptions, and other materials available at the union hall, which he retained in his locker for the purpose of informing his coworkers as to the meaning and extent of the rights conferred upon them through collective bargaining. Here, again, there is no affirmative evidence that Respondent was aware that Caref had engaged in this form of consultation for the benefit of his coworkers.

In addition to his union activity, in 1972 Caref, early in his employment, filed a complaint with OSHA protesting unhygienic conditions in the locker rooms. Caref testified that he enlisted support for this effort from fellow workers by circulation of a petition in his shop which was captioned as follows: "We, the undersigned, support Sheldon Caref in his complaint with OSHA." According to Caref, 70 percent of the men in the shop signed the petition.

The proponents of the complaint also point to extraunion activity waged by Caref which I considered to be of a more daring nature. Thus, it is established on the record that Caref's involvement included activity which transcended the official union function or policy. Thus, in 1973, while still an apprentice, Caref became involved in a national organization called the "Worker's Action Movement" (WAM). Caref's interest in WAM was nurtered by the latter's objective of securing a shorter workweek and ending discrimination in employment. Its voice at Inland was a newsletter, to which Caref contributed articles while assisting in its publication and distribution. In evidence is a December 1973 version of the "Inland WAM Newsletter."[5] Items alluded to in the newsletter related to health, safety, seniority, and other conditions of work, which were linked to conditions at the East Chicago plant. That document urges interested employees to call "Shelly at 981-3255," a reference to the given name and phone number of Sheldon Caref.

Caref published and distributed literature on behalf of WAM continuously until the winter of 1975-76. In the interim, Caref became involved in the "Progressive Labor Party," which had its own publication, a newspaper called Challenge. The latter was published under a masthead containing the following inscription: "The Revolutionary Communist Newspaper." Caref wrote articles for Challenge, and sold the newspaper to others at the plant gates between the summer of 1972 and the fall of 1977. An edition of Challenge dated November 11,

[2] This presumably was pursuant to a contractual union-security arrangement.

[3] The testimony of employee Kevin Ledster in this regard has not been overlooked. Thus, according to Ledster, on one occasion he confronted Carl Foreman, charging the latter with violation of a principle established in one of the grievances pursued by Caref, and threatening to call the matter to Caref's attention. With this, Foreman receded and took steps to comply with said grievance disposition. In my view, Ledster's account of this incident is at best ambiguous and hardly suggests that Foreman viewed Caref with hostility because of his involvement in the grievance of which Ledster had reminded.

[4] Although Caref intially indicated that his only effort in connection with the civil rights committee was preparation of the demographic study, he later testified that he helped to prepare and distribute a leaflet in the summer of 1973. See G.C. Exh. 2. That document encouraged employees to utilize the Union to protest alleged race discrimination, unfair distribution of overtime, the maintenance of unsafe job conditions, and practices which impair job security. Caref related that he was among those who distributed this document at the plant gate. The leaflet was unsigned, and merely indicated that it was "sponsored by a group of Inland workers who are members of the Civil Rights Committee." The record does not disclose that the distribution was under the formal auspices of said committee.

[5] See G.C. Exh. 3. That document defines the purpose of WAM as follows:

> The Workers Action Movement (WAM) is a workers's group organizing in the unions and committees throughout the United States and Canada around a 3 point program: (1) 30 hours work for 30 hours pay; (2) democratic control of the Unions; (3) support of other workers. . . . WAM acts as a caucus to make sure the Unions fight for the workers.

1976, is in evidence and includes a letter to the editor over Caref's signature. That letter discusses an accident at the plant, and concludes with the following message penned by Caref:

> Under capitalism, it would take thousands of years, if ever, to improve each aspect of a worker's job conditions and retire with a long life. And that would mean fighting every inch of the way and never losing. On the other hand, it would take only a few years to organize a revolt, establish working class State power and run the factories the way we think its [sic] safe to operate.

From his own testimony it appears that Caref's involvement with WAM and the Progressive Labor Party ended in 1977. In that year, three workers were killed in an industrial accident at the East Chicago plant. In response, Caref claims to have organized a demonstration of 20 to 25 employees who picketed for a period of 30 minutes.[6]

Clear and convincing evidence does not exist indicating that Caref extended activity of a protected nature beyond 1977 and into the final years of his employment prior to July 1979. At the same time, however, it is noted that, during the week of his termination in July 1979, Caref wore a T-shirt which had the words "INLAND SUCKS" on the front panel.[7] Any inference of proscribed motivation arising from the evidence must be assessed in the light of the fact that Caref's activity in conjunction with WAM, and the Progressive Labor Party, and the distribution of their publications, occurred contemporaneously with Caref's having been graded by managment on 7 distinct occasions as an apprentice eligible for continuing towards journeyman status,[8] his being granted journeyman status, and, as a journeyman, his having been promoted to the highest rated journeyman classification. Nonetheless, as shall be seen below, counsel for the General Counsel and the Charging Party attempted to establish that management representatives over the years were not always passive in their reaction to Caref's activity.

D. *Evidence of Hostility to Caref's Activities*

Caref testified that he was photographed by plant security personnel on four occasions in 1974 and 1975 while distributing WAM leaflets and again in 1977 in the course of the demonstration protesting the death of three coworkers. He also claims that on two occasions in 1972 Line Foreman Mayfield had tampered with his locker which contained union materials and copies of Challenge.[9]

Caref further testified that in the fall of 1977 Shop Foreman George Kramer, after leaving a foreman's meeting, told Caref that he must be pretty important because a portion of said meeting was devoted to Caref and that it would be a feather in "someone's cap" to get Caref out of the shop or transferred.[10] Caref accounted to an incident in June 1978 concerning his periodic attempt to be transferred from shift rotation to a steady assignment on the 3 to 11 shift. At that time Carl Foreman finally agreed to such an arrangement, but according to Caref, in doing so alluded to the fact that Caref had "leadership ability," while remarking that "it's too bad that its not in other directions."[11]

In addition of Caref, the General Counsel produced other employee witnesses who attributed statements to foremen arguably indicative of animus they held against Caref. Thus, Tom Talaga testified that Foreman Stanley Rutkowski, in 1973, questioned Talaga's association with Caref, advising Talaga, "[Y]ou best stay away from him . . . he's a bad influence and he'll get you in trouble."[12]

---

[6] Also in 1977, in connection with impending contract negotiations, Caref assertedly discussed with fellow employees what improvements in shop conditions were necessary and then circulated a petition containing proposals for their inclusion in the Union's demands. The signed petition ultimately was presented to the Union's negotiating committee.

[7] Caref testified that he wore the T-shirt only for a few hours on the last day of his employment. Carl Foreman testified that according to his recollection Caref wore it several days during the last week of his employment. The conflict need not be resolved.

[8] Under the applicable apprenticeship program, apprentices are reviewed, graded, and accorded pay increases at 6-month intervals if management judges them qualified to continue to the next level of their apprenticeship.

[9] Mayfield denied knowledge of Challenge or that Caref was engaged in distribution thereof.

[10] Although I did not regard Caref as an impeccably credible witness, in this respect, his testimony receives some corroboration from incumbent employee Kevin Ledster. According to Ledster, Kramer told Ledster that he should tell Caref that "he'd better watch himself because they had a meeting and they were mostly concentrating on him, telling the foreman to keep an eye on him, that they were trying to find a way to get rid of him." I credit Ledster and Caref over Kramer, who testified that he could not recall making such statements and that it was not possible that he could have. Respondent contends that the improbability that Kramer could have made such a statement to Caref is supported by the fact that in the fall of 1977 Kramer was assigned to the 80-inch coil carrier garage located about a mile and a half from the central shop. Kramer, who worked the day shift, acknowledged that he could have confronted, though the possibility was remote, Caref when he turned in the employees' timecards between 3:15 or 3:30 p.m. each day. Nonetheless, I am not convinced. As I understand Kramer's own testimony, he admitted the possibility of contact during that period. In addition, he acknowledged that it was his responsibility after 3 p.m. each day to line up the 3 to 11 p.m. crew. It also is a fact that mobile equipment mechanics are assigned on a rotation basis to satellite jobs, including the 80-inch coil carrier division. Documentary evidence shows that on August 20, 1977, Caref was subject to such an assignment. See ALJ Exh. 4. It is further noted that Kramer's testimony does not deny that he attended shop meetings in the central shop area.

[11] Foreman denied that any such reference was made on that occasion but admitted that during a later conversation in January or February 1979 he and Caref were "talking about attitude." He admitted that he spent "quite a bit of time" talking to Caref about his view that Caref "had leadership ability . . . it's a shame that he didn't direct it . . . he was directing . . . but not in the direction that . . . that he should, that he had the capability of doing." When asked to describe the nature of the "direction" of Caref's leadership ability, Foreman responded, "[N]egative towards the Company." However, when asked for a further clarification, Foreman merely alluded to a failure on Caref's part to honor a request by management that he provide input into the Company's job safety analysis, which was part of its accident prevention program. In my opinion Foreman was less than candid in this regard. Furthermore, although Foreman admitted to hearing "scuttle butt" concerning Caref's activity in connection with the Progressive Labor Party, I did not believe his asserted lack of knowledge of Challenge or WAM or that Caref had been engaged in handing out leaflets at the plant gates.

[12] Talaga, when questioned as to his understanding of what Rutkowski was referring to, testified that he could not honestly say whether the foreman's remark was derived from Caref's work, philosophy, or anything else.

In addition, employee Wayne Dekker testified that in mid-1976 Foreman Leonard Goldbrecht came out of an office shouting in the presence of other employees that if he ever caught Caref selling "them papers" he would have him terminated.[13] Dekker testified to a further conversation in 1976 or early 1977 with Foreman Mayfield in which the latter questioned Dekker's association with Caref, telling him that Caref was a "bad influence."[14] Pierce also testified that in 1973 he had a conversation with Goldbrecht in which Goldbrecht asserted that Caref was the reason that OSHA inspectors were in the plant.

E. *Vacancies Existing in 1980 in Caref's Former Position*

Other facts offered in support of the complaint convincingly demonstrate that in February 1979 vacancies existed in the very craft in which Caref had previously served. Thus, during his prior employment, Caref had started and completed Respondent's apprenticeship program, and not only reached journeyman status, but also enjoyed the highest rating for his particular job. It is conceded that at the time of his application for rehire Respondent had vacancies in that classification. Thus, under the manpower requisition system utilized by Respondent to fill vacancies, in February 1980 a requisition was entered, apparently by CMD, for 10 mobile equipment machinists in the starting grade of mobile equipment machinist C. Thereafter, in April 1980 an additional requisition was issued for 20 mobile equipment machinists in the classes A, B, or C. Although Caref was denied reemployment, between February 1980, and the opening of the hearing Respondent had hired only 10 in the categories sought, and 20 vacancies remained in the classification in which Caref had previously trained and worked for a period of 7-1/2 years.

F. *The Defense*

On behalf of Respondent, the foregoing is countered principally by argument and evidence to the effect that Caref was denied employment by William W. Gillespie, a senior representative in Respondent's personnel department, who lacked knowledge of Caref's involvement in any activity protected by Section 7 of the Act. It is claimed that Gillespie's decision was made independently and based exclusively upon four warnings and reprimands which were in Caref's personnel file at the time he was interviewed for employment, and which led Gillespie to conclude that Caref's prior employment record was unsatisfactory.

Thus, it is undisputed that on February 14 Caref was interviewed by Gillespie. The day before Foreman Meinert had assisted Caref by filing his application. At the time Meinert described Caref to the "receptionist" as an excellent mechanic whom Meinert would like to see reemployed.[15]

Parenthetically, it is noted that, pursuant to Respondent's personnel practices, job applicants are not automatically granted interviews. Their applications are first screened, and then presumably, if certain minimum standards are met, an interview is scheduled. With respect to those with a prior employment history, the interviewer will have available the prior personnel file of the applicant. In the case of the latter, the interviewer has the benefit of the application, the personnel file, and whatever information might be gleened independently from the applicant. The interviewer has no authority independently to effect hiring. Instead, hiring will be deferred in the case of an applicant who has been approved initially by the interviewer until completion of testing and a second interview conducted by a management representative in the department in which the applicant last worked.

On the other hand, the interviewer does possess authority to decline employment to applicants on his own. Indeed, Gillespie testified that at the conclusion of the February 14 interview he informed Caref that he was not willing to provide employment at that time, but perhaps would reconsider his application at some future date. Gillespie continued, explaining to Caref that at that time Respondent would conduct a broader search for applicants because Respondent sought to fill the positions in question with the most qualified people in the market. Gillespie claims that he elected to proceed in that fashion solely because of the warnings and reprimands contained in Caref's personnel file.[16] While normally upon completion of an interview Gillespie would make a written notation for the file as to the action taken, he neglected to do so in this instance.[17]

Quite obviously, in a plant of some 25,000 employees, there would be no inherent basis for suspecting that one occupying a position in a personnel department such as that held by Gillespie would have any knowledge whatever as to a job applicant's having engaged in statutorily protected activity during a prior period of employment. Nonetheless, as shall be seen below, Gillespie was an incredible witness and I am convinced that the effort to isolate the decision to him was contrived.

Gillespie acknowledged that his alleged action in the case of Caref was unprecedented. Thus, Caref was the

[13] Employee Arthur Pierce also testified that Goldbrecht, in reference to "Challenge," stated that he would terminate Caref if he caught him selling the papers in the plant.

[14] Dekker could only speculate as to the basis for Mayfield's remark.

[15] The foregoing is based upon the credited, uncontradicted testimony of Caref. Meinert, who was described as having been a foreman for some 30 years, was not called by Respondent to refute such testimony.

[16] Gillespie, whose testimony was not always consistent, characterized his decision in this regard as of an "emerging" nature developing from the commencement to the end of the interview. However, he subsequently testified that after the interview began he glanced through Caref's personnel file and detected the reprimands. For that reason, he claims to have sought out his supervisor, Bob Wilson, and Jerry Ruben, the assistant director of personnel, to assure that Caref's effort to obtain reemployment was not endorsed by other management representatives unknown to him. Gillespie claims to have been informed that he was to use his own judgment. Called as a rebuttal witness, Caref contradicted Gillespie by testifying that at no time during the interview did Gillespie leave the room. I was inclinded to believe Caref.

[17] Such a document was subsequently prepared by Gillespie on March 17. See G.C. Exh. 8. The instant unfair labor practice charges were filed on February 19.

only applicant for rehire to a skilled job who was not moved by Gillespie beyond the interview for testing.[18] Yet Gillespie acknowledged that he was aware of the requisition for mobile equipment machinists and, further, that Caref, having completed his apprenticeship, met the basic qualifications for such work. Gillespie was also aware that Caref could not be hired until interviewed by a management representative, normally the shop foreman, in the shop area in which he previously worked. Furthermore, according to Gillespie, while he sought direction from his supervisors out of concern that Caref's rehire may have been endorsed by a superior and received no concrete response, he sought no guidance from anyone having direct familiarity with Caref's qualifications for the requisitioned position and the details surrounding any discrepancies in the latter's past performance—this despite Gillespie's admission that Caref told him during the interview that he had been accompanied by Foreman Meinert to the personnel department, a fact which at a minimum would have signaled the possibility that a supervisor may well have endorsed rehire. Along this same line, curiosity also emerges from Gillespie's testimony that, when he interrupted the interview to direct his superior's attention to the reprimands in Caref's file, Employment Supervisor Wilson told him to use his judgment in terms of making a decision, "but" that Wilson "had a general inference that the employee [Caref] had responded to the ad, had been through the Company's program, and that, without having any prior knowledge of the folder, we should hire him unless there was something startling in his folder such as an unsatisfactory work record."

The claim that Gillespie actually made the decision is also rendered suspect by the content of Caref's personnel file. That file, as it existed at the time of the interview, disclosed that in 7-1/2 years of continuous employment Caref was never afforded a disciplinary layoff, but that he received four reprimands and one warning, the most current of which was dated October 25, 1977. Thus, the information available to Gillespie would have disclosed that in the last continuous 21-month period of Caref's employment his performance was unmarred by formal discipline. Summaries of the adverse action reflected in the personnel file are as follows:

1. On June 5, 1973, a reprimand was issued because Caref left his assigned work area without permission and punched out 6 minutes prior to the scheduled terminus of his shift. (See ALJ Exh. 1.)

2. On March 21, 1975, a formal reprimand was issued because Caref left his job and work area without permission, and changed his clothes, while reporting that he was leaving because a child had taken sick. As the reprimand recites, this explanation was viewed as lacking in authenticity because Caref did not proceed home directly but participated in a meeting outside the plant. (See ALJ Exh. 2.)

3. On July 15, 1977, a reprimand was issued to Caref because of his failure to follow established craft procedures, resulting in damage to parts valued at $149.53, and causing 3–4 weeks of downtime for the equipment involved until replacement parts could be obtained. (See ALJ Exh. 3.)

4. On August 23, 1977, a reprimand was issued because Caref left the plant, refusing to accept assignment to the 80-inch coil carrier division. This discipline called attention to company rules which brand Caref's conduct as the type which "may be cause for discipline, up to and including suspension preliminary to discharge." (See ALJ Exh. 4.)

5. On October 24, 1977, a "warning" was issued because Caref and a coworker, while working on a front-end loader, performed in an unsafe manner in spite of having been informed of the proper safety procedures in connection with such work. (See ALJ Exh. 5.)[19]

Thus, the personnel file would have apprised Gillespie that Caref had not been the subject of formal discipline between October 24, 1977, and July 9, 1979. A further amiguity was thrown upon CMD's position with respect to rehire by a job action form contained in the file which memorialized Caref's separation, and was signed by Hayden Fox, assistant administrative foreman of CMD. This document left unchecked the boxes indicating the department's recommendation for rehire. This too was not further explored by Gillespie.[20]

Justification for Respondent's subsequent failure to reconsider the refusal to rehire is also founded upon Gillespie's testimony that this, too, was based upon his decision, which was independently arrived at without outside consultation or influence.[21] Other evidence adduced through Respondent's witnesses is of interest here. Thus, Morgan Burke, assistant director of personnel, and Paul Arsenal, superintendent of CMD, testified that on February 14, 1980, Arsenal informed Burke in a telephone conversation[22] that Caref was seeking employment and that based upon his overall work record his rehire could not be recommended. Burke, in turn, relayed the substance of this call to Wilson, instructing him that "if the individual were to come to the employment office, in light of the overall record, the department did not recommend that we rehire this employee."[23]

[18] Gillespie testified that in an average workday he would interview from zero to 15 applicants during heavy hiring. He testified that in 1980 he had from three to seven applicants for skilled classifications above the entry level who had completed their experience and training during a prior period of employment with the Company. He testified that the number of interviews he conducted since January 1, 1980, would be between 50 to 60.

[19] The personnel file also contained raw attendance records pertaining to portions of the years 1978 and 1979. However, it does not appear that these documents contributed to Gillespie's alleged decision.

[20] The form contained instructions requiring that such boxes be checked.

[21] In so testifying, Gillespie explained that after February 14 he refused to further consider the employment of Caref "because his record reviewed the same way in the future as it did on the 14th of February." This explanation is difficult to reconcile with Gillespie's claim that no final decision had been made at the conclusion of the February 14 interview. It will be recalled that the parties stipulated that, of 30 vacancies existing in Caref's classification in early 1980, only 10 had been filled prior to the opening of the instant hearing.

[22] Arsenal testified that the telephone call to Burke was prompted by information received from Carl Foreman to the effect that the latter would not recommend Caref's rehire.

[23] Burke went on to testify that on February 14, after conveying to Wilson the recommendation that Caref not be rehired, he received infor-

Continued

In addition to Respondent's incredible evidence that Gillespie alone made all of the decisions denying Caref employment, Respondent adduced evidence which could not have been within Gillespie's knowledge to substantiate that Caref's earlier employment was marked by an unsatisfactory work record. Thus, Arsenal testified that he had received reports from Foreman to the effect that Caref was a loner, and, if assigned a helper, would refrain from providing direction while attempting to do as little as possible. Foreman, under whom Caref served in various degrees of immediacy since 1974, also related that Caref did no more than he had to do, that orders had to be exactly precise, that Caref would observe them to the letter without exercising initiative to do more. Foreman also urged that Caref failed to report back to superiors after completing a job and had to be questioned as to whether a given task had been completed. When questioned on cross-examination as to specific examples of such derelictions, Foreman referred to an instance in 1977 when Caref was assigned to change the bind rollers or crawler pads on a crane. According to Foreman, Caref worked on this assignment for three shifts, but made practically no progress whatever and hence was removed from the job and replaced by another mechanic.[24] Foreman conceded that Caref was not disciplined for declining to do more than he had to do on any basis other than "verbal warnings or . . . discussions."

Monroe Mayfield, an area supervisor in the mobile equipment shop, estimated that he had been Caref's immediate supervisor during 30 percent of the time that Caref was assigned to the mobile equipment shop. He described Caref as a marginal employee with subpar productivity[25] and a "negative attitude toward the Company." He testified that in 1976 or 1977 he instructed Caref to check out a "charging circuit." He claims that later, not having heard from Caref, he approached Caref and asked what Caref had discovered. Caref replied that the alternator was bad, and asked Mayfield what he should do. Mayfield had to tell Caref to replace the alternator. Mayfield testified to another instance in which Caref was asked to check a brake pedal on a crane. Later, not having heard from Caref, he approached Caref asking what he had learned. Caref replied that the brake was bad and asked what should be done. Mayfield again had to direct Caref to replace it. Mayfield also referred to disagreements with Caref as to whether it was the latter's responsibility to see to it that his assigned helper or apprentice reached the jobsite. In this connection, Mayfield testified that he ultimately pulled Caref's job description, and pointed out language suggesting that it was within his area of responsibility. Mayfield also claimed to have issued numerous oral warnings to Caref, including one for having taken lunch too early in the shift[26] and another when he was assigned a job at 7 o'clock, and had made no attempt to get started by 8. Mayfield admitted that in February 1980 his views concerning the adverse work history of Caref were not discussed with anyone else in management. Another foreman, George Kramer, testified that, while he knew that Caref was reputed to be a worker who was not doing his job, he recommended Caref for a Tops Award[27] sometime in the last year and a half of Caref's employment. Contrasted with the experience evident in testimony by the other supervisors, Kramer's recommendation was based upon Caref's having performed work beyond what he had been instructed to do. Finally, Respondent also called Leonard Gobeck, who had served in the past as general foreman in the mobile equipment shop. He described Caref as having to be "pushed all the time."

G. *Concluding Findings*[28]

Upon analysis, I am convinced that on the credible proof an inference is warranted that Caref would have been rehired into one of the several vacancies that existed for skilled maintenance equipment machinists on and after February 14 but for the "negative attitude" he manifested against the Company during his prior employment. Undisputed evidence shows that during the period of his previous employment, Caref had progressed to the highest level journeyman status in his craft and had never been the subject of a disciplinary layoff. In addition, he was denied reemployment at a time when a need existed for the employment of those possessed of his skills. With this in mind it will be recalled that Mayfield and Foreman both described Caref as having "a negative attitude toward the Company." Indeed, Foreman, on February 7 in a telephone conversation with Caref, told him that he would not be recommended for

mation from Wilson that Caref had been interviewed, and turned away, with the interviewer, Gillespie, informing Caref that "it was felt there were better applicants available for the positions that were open and that he had rejected him for the employment at that point in time." It is noted that Gillespie denied having made such a statement to Caref.

[24] It is noted that this specific instance does not appear to square with the general criticism leveled at Caref by Foreman on direct examination.

[25] Mayfield admitted that he did not maintain productivity records for mobile equipment machinists.

[26] Mayfield testified that a written report of the above incident was made, but could not be placed in Caref's personnel file under an agreement reached pursuant to the grievance procedure.

[27] Under the Tops Award program, employees are nominated to receive special recognition because of outstanding performance. From among the nominees, an employee is selected each month and made the recipient of the award.

[28] During the course of the hearing, it became apparent that Respondent had failed to make a timely return pursuant to viable subpenas issued on behalf of the General Counsel and the Charging Party. In consequence, the latter were denied the opportunity during the course of the hearing to utilize relevant documents necessary to test the reliability of certain of Respondent's evidence. In the interest of expediting the matter and to offset the effects of Respondent's noncompliance, an accommodation was made by all parties whereby following the close of the hearing counsel for the General Counsel and the Charging Party would have the opportunity for post-hearing examination of such documents and to reopen the record for inclusion of those sought to made part of the record. It was agreed that independent authentication of such documents would be unnecessary. Pursuant thereto, after the close of the hearing, counsel for the General Counsel submitted G.C. Exhs. 10(a) through (x) inclusive, consisting of subpenaed materials which were not made available as called for at the inception of the hearing. By letter dated September 17, 1980, counsel for Respondent objected to receipt of the exhibits on grounds which, in my opinion, not only offend the accommodation made at hearing, but also seek to perpetuate possible prejudice sustained by an opposing counsel due to the failure of Respondent to make these documents available on a timely basis. The record is reopened for such limited purposes and G.C. Exhs. 10(a) through (x) inclusive are received. In addition, Respondent's letter to me dated September 17, 1980, has been marked as Resp. Exh. 8 and is received in evidence.

rehire because of his "record" and also because of "the type of attitude you had, and as much as you disliked Inland." These references by Mayfield and Foreman were taken as more closely resembling the true reason for the denial of rehire than other evidence offered by Respondent to demonstrate that Caref did not "fit the mold" of those sought for employment in 1980. This view was enforced by the incredible testimony offered by the defense. First, Respondent's claim that Caref's adverse performance record would have foreclosed rehire was based upon highly suspect testimony. Undoubtedly, Caref was guilty of indiscretions during his 7-1/2 years of employment, but those attested to on this record, stripped of exaggeration, furnished no credible support for a conclusion that his rehire was barred on that basis. In addition to the unreliable testimony on this regard, it is a fact that during the last 21 months of his employment, and since October 1977, Caref had not received formal discipline. Although Mayfield, Gobeck, Kramer, and Foreman adversely characterized Caref's work habits, none afforded specific examples of misfeasance on Caref's part during the period in which available documentary evidence on this record demonstrates an effective effort on Caref's part to eliminate job inadequacies over a sustained 21-month period. Furthermore, Respondent's effort to impugn Caref's job performance was hardly enhanced by the failure to produce Meinert, who had endorsed Caref's rehire in February 1980,[29] and by the absence of any reasonable explanation as to why Foreman "purposely" declined in 1979 to signify on separation papers that he would recommend against Caref's rehire.

In any event, according to the central defense of Respondent, none of the above foremen had input into the ultimate decision on rehire. Instead, Respondent contends that such action was effected pursuant to the independent judgment of William Gillespie, an interviewer in the personnel department who would have had no personal knowledge of Caref's past participation in conduct protected by the Act. This overarching aspect of the defense was predicated upon testimony so shifting, evasive, and improbable as to reduce to the inescapable the conclusion that it was concocted as a basis for insulating those with more direct knowledge of Caref's reputation from immediate involvement in the rehire decision and thereby to throw off suspicion of any proscribed motivation. In sum, studied evaluation of Gillespie's overall account leads to regrettable suspicion that his actions in connection with this entire proceeding might well have been orchestrated by superiors.

Ordinarily disbelief of the cause assigned by a respondent for an alleged act of discrimination serves to enforce a claim of proscribed motivation. However, on the credited facts herein, to adopt such a mechanistic approach would nullify the logical inference arising from a basic flaw in the General Counsel's case. I cannot fault or question Respondent's counsel for proceeding upon theories supported by facts developed in his prehearing investigation and I consider the defenses postulated herein to have been pursued in good faith on belief of such facts. Nonetheless, it remains that Respondent, in its zeal to disabuse of any notion that Caref's "negative attitude" toward the Company contributed measurably to the refusal to rehire, may well have overlooked the possibility that Caref's attitude may well have been manifested in a fashion critically removing his cause from the protective veil of Section 7.

Thus, the General Counsel's proof chronicles a variety of activity on Caref's part dating back some 7 years, and for the most part accurately observes that his agitation for improved working conditions during that period was of a protected nature under the Act. But the inference drawing process entertains other facts as well. Thus, during his prior employment, Caref as of 1978 or perhaps even earlier appears to have reformed and altered his general posture as an agitator for improved conditions of work. Thereafter, his involvement in such activity was not shown to have continued—that is, until the last week of his employment. Thus, in July 1979 during the week in which he quit, Caref elected to wear a T-shirt displaying the slogan "INLAND SUCKS." The scurrilous nature of this message and its timing and remoteness from Caref's clearly protected conduct all point persuasively to the view that this recent manifestation of negativism toward the Company was the dominate, controlling, precipitant cause underlying the refusal to rehire.[30]

The question that emerges is whether this conduct on the part of Caref was protected by Section 7 of the Act. I think not. Although it has long been recognized that employees have a right guaranteed by the Act to wear union insignia, including buttons, emblems, and T-shirts displaying slogans, while at work, the right is not unlimited, and is removed where the slogan published by employees is indefensibly obscene and offensive or so scurrilous and defamatory as to hold up management to ridicule and contempt or to constitute a disruptive influence on work and discipline.[31] With respect to the foregoing, in *Southwestern Bell Telephone Company*, 200 NLRB 667 (1972), the Board affirmed an Administrative Law Judge's dismissal of 8(a)(1) and (3) allegations based upon an employer's instruction that employees either remove sweat shirts containing the slogan "My Bell is a Cheap Mother" or remove themselves from the premises. The T-shirts in that case were worn on a concerted basis and in the context of collective-bargaining negotiations. However, as the message contained on the T-shirts was

[29] Arthur Pierce credibly testified that in May 1980 he had a conversation with Meinert, who requested that Pierce inform Caref that he wanted nothing more to do with Caref's situation "because the Company had convinced him he shouldn't or he may lose his job." Pierce also testified credibly and without contradiction that on that occasion Meinert explained that he had attempted to get Caref's job back and that he had done so because Caref was a good worker.

[30] A witness for the General Counsel, Michael Mezzo, who as a grievance man sought to intervene on behalf of Caref, testified that superintendent Arsenal, 3 weeks before the instant hearing, suggested that, although Caref's work record was not that bad, Caref "did not like the Company." When Mezzo sought to dismiss this, Arsenal went further, stating, "Well, this guy was running around the shop with a T-shirt on that says 'Inland Sucks.'"

[31] See, e.g., *Maryland Drydock Company* v. *N.L.R.B.*, 183 F.2d 538 (4th Cir. 1950); *Caterpillar Trailor Co., etc.* v. *N.L.R.B.*, 230 F.2d 357 (7th Cir. 1956); *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers* [*Jefferson Standard Broadcasting Company*], 346 U.S. 464 (1953).

of a controversial nature and susceptible to derisive and profane construction, it was reasoned that the employer could legitimately "ban the use of the provocative slogan as a reasonable precaution against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant."[32] Thus, Section 7 was deemed inapplicable to the employee conduct under consideration.

Here, the message conveyed on the T-shirt worn by Caref demeaned Respondent with unmistakable vulgarity. It was not specifically linked with any form of grievance action, any aspect of collective bargaining, or any policy of the Company with respect to any employee or condition of work.[33] Wearing it was no less than a gratuitous gesture of disparagement and ridicule performed at a time when Caref's personal circumstances seemingly insulated him from discipline. I can conceive of no statutory interest which would be furthered by branding with protected status this callous expression of "dislike" and "negativism" toward the Company.

Furthermore, considering the inherently exacerbating message on the T-shirt, together with the fact that Caref had not engaged in any form of protected activity for more than a year prior to this incident, I am convinced on all the credible proof and infer that Respondent would have disregarded Caref's seemingly aborted, earlier, militant stance, and availed itself of his skill in the needed classification were it not for his final, unprotected Act of disrespect.[34] Accordingly, as the General Counsel has not established by a preponderance of the evidence that Caref was denied rehire upon grounds protected by the Act, the complaint shall be dismissed in its entirety.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing on and after February 14, 1980, to rehire Sheldon Caref.

[Recommended Order for dismissal omitted from publication.]

---

[32] 200 NLRB at 670.

[33] Cf. *N.L.R.B.* v. *Thor Power Tool Company*, 351 F.2d 584, 587 (7th Cir. 1965); *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946); *Liberty Nursing Homes, Inc., d/b/a Liberty House Nursing Home of Lynchburg*, 245 NLRB 1194, 1203 (1979).

[34] In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board attempted to allay confusion in the process of determining motivation where legitimate and unlawful considerations contribute to an alleged act of discrimination. Under the shifting proof responsibility articulated therein, where the General Counsel has simply shown that "protected activities played a role in the employer's decision," the burden "will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB at 1089. The Board, in laying down these guidelines, did not address itself to certain realities affecting the litigation process and whether allowances are to be made for the imponderables under which counsel pursue litigation. Thus, it is a hard core reality that both prosecution and defense of unfair labor practice allegations often rest upon facts and, in turn, upon theories originating with sources whose credibility is not always within the relm of predictability. Yet, counsel must forge a consistent strategy and go to trial on the strength of such imponderables. In the past, allowances have been made for counsel's misjudgment in that process. Experience has shown that a failure of proof on the part of General Counsel's witnesses, though barring the theory on which an unfair labor practice is prosecuted, may not be fatal if the violation nonetheless might stand on some independent ground beyond the anticipation of the proponent of the complaint. See, e.g., *Liberty Nursing Homes, Inc.*, 245 NLRB at 1202-03. At the same time, the credibility of witnesses for the defense may collapse, and yet, upon the credited evidence, a violation may not have been substantiated. See, e.g., *Knapp-Monarch of the Hoover Company*, 207 NLRB 76 (1973). Thus, under the conventional approach to determination of causation, misconceptions of counsel, formed prior to trial, have not necessarily proven dispositive. As I construe *Wright Line, supra*, the inquiry need not come to an abrupt halt simply because (1) the General Counsel has made some showing that protected activity, however slight, contributed to an alleged act of discrimination and (2) the employer thoroughly misconceived its defense. Even in such circumstances, only through careful analysis of the credited facts might inferences be drawn compatible with the statutory standard set forth in Sec. 10(c) of the Act that unfair labor practices be substantiated "upon the preponderance of the testimony." Thus, I do not construe *Wright Line, supra*, as foreclosing an independent, reasoned analysis based on bearing on the issue of motivation irrespective of whether such facts were offered in support of one theory or another one party or the other or originate from some independent source. Thus, in the particular circumstances of this case, *Wright Line, supra*, does not impel a violation simply because Respondent's specific defenses are lacking in substantiation on the credible proof.