

Merillat Industries, Inc. and Local No. 2037, Furniture and Equipment Workers Union, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 7-CA-31092(1) & (2)

July 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDAUGH

On July 23, 1991, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions¹ and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed a motion for a new trial, and the Respondent filed a brief in opposition to the motion.

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

The Board has considered the decision and record in light of the motion, exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and con-

¹No exceptions were filed to the judge's findings that the Respondent (1) did not violate Sec. 8(a)(1) by threatening union officials with discharge or discipline if they persisted in pursuing a request to excuse certain employees from work in order to engage in union business, and (2) did not violate Sec. 8(a)(5) by unilaterally changing to a system of posting incentive production bonus reports on a weekly (rather than daily) basis, or by including more hours than were actually worked by one employee in its incentive bonus calculations.

²We agree with the judge that the Respondent did not violate Sec. 8(a)(5) by unilaterally excluding certain productivity figures from its incentive bonus computations. We do not rely, however, on his statement that the adjustments in question were beneficial to the employees' interests, rather than to their detriment. Nor do we rely on the judge's implication that his finding in this regard was consistent with the management-rights clause of the collective-bargaining agreement. We base our affirmance on the judge's finding that the Respondent's action was consistent with past practice, and thus did not cause any change in the unit employees' existing terms and conditions of employment.

We note that the judge, in citing to *Precision Castings*, 233 NLRB 183 (1977), twice inadvertently referred to "*Precision Fittings*." We correct the errors. In addition, we correct the judge's citation to the Board's decision in *Thor Power Tool Co.*, 148 NLRB 1379 (1964). In addition, we note that, in the third sentence of par. 5 in pt. II, D,3,a, of the judge's decision, the last three percentages should be 65, 75, and 90 rather than 35, 25, and 10, respectively.

Member Oviatt agrees that the Respondent at the July 27, 1990 meeting of Union President Burns, Plant Manager Welsh, and Personnel Manager Stein did not, by the remarks of Welsh, unlawfully threaten Union President Burns, but he does so because the allegation lacks merit. He believes that the substantive reasons stated by the judge in finding no violation in regard to remarks made by Personnel Manager Stein at the meeting apply equally to Welsh's remarks. Thus Member Oviatt finds that Welsh's remarks were "a preventive step [that] was not likely to intrude upon activity protected by the Act and represented a balanced attempt to maintain discipline."

clusions for the reasons stated below and to adopt the recommended Order.

1. On September 20, 1991, the Charging Party (the Union), moved that the judge's decision be vacated and that the case be remanded for a new trial, presumably before a different administrative law judge. The Union argues that, because of certain circumstances that arose in a different case involving Judge Harmatz and counsel for the General Counsel Amy Bachelder, who also represents the General Counsel in this matter, there is a substantial question concerning the judge's ability to be impartial in this case. For the reasons discussed below, we shall deny the motion.

The hearing in this case was conducted before Judge Harmatz on April 1-3, 1991; Bachelder represented the General Counsel. As noted above, Judge Harmatz rendered his decision on July 23. In the decision, Judge Harmatz recommended that the complaint be dismissed in its entirety.

In the meantime, Judge Harmatz was assigned to preside over a hearing in an unrelated proceeding (*R. L. Polk & Co.*, Cases 7-CA-22444 and 7-CA-23046) in which Bachelder also represented the General Counsel. On June 25, in the course of that proceeding, Judge Harmatz made certain remarks questioning Bachelder's professional integrity. After making those remarks, he withdrew from the case. Judge Harmatz subsequently wrote a letter to the Regional Director for Region 7, essentially reiterating his allegations concerning Bachelder's actions.³

The Union contends that, in view of the judge's allegations of misconduct against Bachelder, this case should be retried. In support of its motion, the Union observes that Judge Harmatz withdrew from *R. L. Polk* precisely because of the accusations he had made regarding Bachelder's conduct, and argues that he should have reasoned and acted likewise in this case. According to the Union, Judge Harmatz' withdrawal from *R. L. Polk* indicates that he himself thought that he could not be impartial in cases in which Bachelder was involved. In any event, the Union argues that there is a substantial appearance that Judge Harmatz could not be impartial in this case.

We disagree. We have carefully examined the record and Judge Harmatz' decision, and we find no evidence of bias on his part against Bachelder. Indeed, the Union does not contend that the judge actually manifested bias in this case. Moreover, we find it significant that the General Counsel has not argued that Judge Harmatz should be disqualified from participating in this case, even though the General Counsel was on notice well before the judge issued his decision that

³In an unpublished order issued October 25, 1991, the Board specifically disapproved of Judge Harmatz' accusations against Bachelder, which it found to be gratuitous and unwarranted, and ordered them stricken from the record.

he had raised allegations of serious misconduct on the part of Bachelder. That Judge Harmatz withdrew from *R. L. Polk*, under the circumstances of that case, does not, in itself, disqualify him from participating in other cases in which Bachelder represents the General Counsel. The judge's comments regarding Bachelder, although unwarranted, do not compel his disqualification in this proceeding.⁴

2. The complaint alleges that the Respondent discharged Union President Robert Burns on August 28, 1990, in violation of Section 8(a)(3) and (1) of the Act. The record establishes that the Respondent discharged Burns, for the stated reason that he attempted to remove a small amount of sandpaper, valued at less than \$2 from the plant without permission.⁵ The judge found that the General Counsel had established a prima facie case that Burns' discharge had been motivated, at least in part, by his union activities, and therefore that, under *Wright Line*, 251 NLRB 1083 (1980), the burden shifted to the Respondent to show that it would have taken the same action even in the absence of Burns' protected activities. The judge then found that the Respondent had carried its *Wright Line* burden, and dismissed that portion of the complaint.

In exceptions, the General Counsel argues that the judge should not have found that the Respondent carried its *Wright Line* burden. In this regard, the General Counsel cites the case of Alan Ballenberger, a nonbargaining unit employee who was allowed to resign after being caught attempting to remove property valued in excess of \$200 from the Respondent's Adrian plant in 1986. The General Counsel contends that, because it allowed Ballenberger to resign, rather than be terminated, even though the amount of property involved in his case was vastly greater than that of the sandpaper at issue here, the Respondent has not demonstrated that it would have discharged Burns in the absence of his protected activities.

In evaluating the Respondent's *Wright Line* defense, the judge found that the Respondent's ouster of Ballenberger was not strong evidence of consistent treatment, because Ballenberger had been found with property of much greater value than that of the sandpaper in Burns' possession. However, the judge did not address the General Counsel's argument, which is that the Ballenberger episode not only fails to show *consistent* treatment, but actually (according to the General Counsel) demonstrates *inconsistent* treatment.

Contrary to the General Counsel, we find that the Respondent's treatment of Ballenberger is not fatal to

its *Wright Line* defense. Although Ballenberger was allowed to resign, the option given him was, in reality, a Hobson's choice: he could resign or be discharged. Either way, his employment with the Respondent was at an end. The substantive outcome in Ballenberger's case thus was no different from that in Burns' case.

In addition, the report of the episode that precipitated Ballenberger's departure suggests that the Respondent may have harbored a belief that Ballenberger was unaware that his actions violated company rules.⁶ It also indicates that Ballenberger, unlike Burns, did not attempt to conceal his actions, and that he defended his actions only by insisting that he did not realize that he was doing anything wrong. According to the report, Ballenberger and a friend were stopped in the act of removing cabinets from the plant in a van late at night. The pair had written authorization to remove certain property, but it did not encompass all the property found in the van. When confronted with the discrepancy, Ballenberger became upset, and claimed that he did not think he was doing anything wrong. He explained that the Company sometimes discounted cabinets in order to sell them, and that that was all that he had done. He also admitted, however, that he had not checked carefully to see if the materials in the van matched the authorization slip. Ballenberger said that he had been doing the same thing for about 2 years; that no one had said that he was doing anything wrong; that he was not getting any compensation for his actions, but was acting out of the goodness of his heart; and that he did not think that what he had done was stealing. He further stated that he was trying to do what was good for the Respondent while taking care of a friend.⁷ The report closes with the statement,

At the least, Al used incredibly poor judgement [sic], did not act in the best interest of the Company, failed to follow proper procedures, failed to protect Company property, and willfully misrepresented the value of Company products. At worst, he is a liar and an outright thief. I recommend immediate dismissal.

Thus, the report indicates that arguably mitigating circumstances existed in Ballenberger's case that were absent in the case of Burns.

The Respondent's discharge of Burns also was consistent with its treatment of other employees who had committed similar offenses. As the judge found, the Respondent terminated Todd Kroger from one of its

⁴See *Mason City Dressed Beef*, 231 NLRB 735 fn. 1 (1977), modified on other grounds 590 F.2d 688 (8th Cir. 1978).

⁵It is undisputed that the Respondent has a published rule that calls for discharge, even for a first offense, of an employee who removes or attempts to remove property belonging to the Respondent from the plant without authorization.

⁶The account of the episode contained in the report, which evidently emanated from a supervisor, was not developed further through testimony at the hearing.

⁷Certain passages in the report suggest that the Respondent had a regular practice of selling cabinets at the plant on Saturdays, perhaps to reduce inventory.

other plants, assertedly for attempting to remove property valued at approximately \$2, or roughly the value of the sandpaper found in Burns' possession. The Respondent also introduced evidence that it had discharged several other employees for removing property without authorization, albeit in less analogous circumstances. And, as the judge found, the Respondent adequately explained its failure to discharge other employees who assertedly had engaged in the same offense.

Finally, it is to be remembered that Respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence.⁸ The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.

3. In adopting the judge's finding that the Respondent demonstrated that it would have discharged Burns even in the absence of his union activities, we agree with him that the Respondent showed, through its earlier discharge of Kroger, that it had imposed the penalty of termination even for the theft of property of minuscule value. We also agree with the judge that the fact that Kroger had been employed for only 8 months, in contrast with Burns' tenure of 18 years, does not destroy the Respondent's case.⁹ As the judge remarked, it is rare to find cases of previous discipline that are "on all fours" with the case in question, and the Respondent should not be faulted for being unable to show that it had discharged an employee who, like Burns, had pilfered a picayune packet of property, and was a long-tenured employee as well.¹⁰ As we have noted, the standard of proof the Respondent must meet under *Wright Line* is that of the preponderance of the evidence. In the absence of countervailing evidence, such as that of disparate treatment based on protected

activity, the Respondent met that standard by demonstrating that it has a rule requiring discharge for attempting to remove property of the Respondent from the plant without permission, and that the rule has been applied to employees in the past.¹¹

In affirming the judge on this point, however, we do not rely on the judge's references to the Respondent's "initial burden," or on his statement that, "the Respondent having sustained a prima facie showing of valid cause, the onus returned to the General Counsel to demonstrate by a preponderance of the evidence that a collateral consideration, namely seniority, would have produced a lesser quantum of discipline or none at all." In those passages, the judge apparently recast the *Wright Line* defense as a two-stage process in which the Respondent first attempts to establish a prima facie case and, if it is successful in doing so, the General Counsel then attempts to rebut it.

Contrary to the judge, we see no useful purpose in recasting the *Wright Line* analysis. Once the General Counsel made a prima facie showing of unlawful motivation, the judicial inquiry under *Wright Line* was simply to decide whether a preponderance of the relevant evidence supported the Respondent's claim that it would have discharged Burns for the theft regardless of his protected activities. Naturally, evidence of the Respondent's treatment of more or less similarly situated employees was relevant to that inquiry. Although examples of the Respondent's treatment of employees who more closely reflected Burns' situation would have been helpful, their absence is not to be viewed as fatal to the Respondent. Thus, in view of all the examples presented, we find, in agreement with the judge, that the preponderance of the evidence indicates that the Respondent had consistently discharged other employees who attempted to remove property that did not belong to them from the Respondent's various plants, and that its discharge of Burns for a similar offense was consistent with both its published rules and its past practice. Accordingly, we find, as did the judge, that the Respondent successfully carried its *Wright Line* burden.¹²

ORDER

It is ordered that the Charging Party's motion for a new trial is denied.

¹¹ *A & T Mfg. Co.*, 276 NLRB 1183, 1184 (1985).

¹² We also agree with the judge that it was the General Counsel's burden to show that the Respondent's stated reason for firing Burns was pretextual, see *New York Telephone*, 300 NLRB 894 (1990), enfd. mem. sub nom. *Fouhy v. NLRB*, 940 F.2d 648 (2d Cir. 1991), and that the General Counsel did not carry that burden.

⁸ *Wright Line*, 251 NLRB at 1087; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

⁹ See *Host Services, Inc.*, 263 NLRB 672 (1982).

¹⁰ Indeed, it is questionable whether even such a showing would have convinced the General Counsel. The General Counsel argues that the Respondent's case is undercut by its failure to show that any other employee at the Adrian plant (rather than at one of the Respondent's other facilities) was discharged for theft (as opposed to Ballenberger, who was allowed to resign), or that it had ever disciplined an employee for removing a tool or supply used on the job, like Burns' sandpaper. Thus, without ever quite saying so, the General Counsel suggests that the Respondent, in order to avoid the finding of an 8(a)(3) violation, would have to show that it had (1) discharged, rather than allowing to resign, (2) a senior employee (3) at the Adrian plant (4) for stealing tools or supplies used on the job (5) of negligible value. It comes as no surprise to us that the Respondent was unable to produce evidence that it had faced that particular combination of factors in the past.

IT IS FURTHER ORDERED that the recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Amy Bachelder, Esq., for the General Counsel.
James M. Wimberly, Jr. and William P. Steinhilber, Esqs.
 (*Wimberly & Lawson*), of Atlanta, Georgia, for the Respondent.
Darryl R. Cochrane, Esq. (McCroskey, Feldman, Cochrane & Brock, P.C.), of Muskegon, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Adrian, Michigan, on April 1, 2, and 3, 1991, on an original unfair labor practice charge filed on October 9, 1990, and a consolidated complaint issued on November 29, 1990, alleging that the Respondent independently violated Section 8(a)(1) of the Act by threatening discharge and other discipline because employees, namely, union officials, engaged in protected union activity; and violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Robert Burns, also because of his union activity. The complaint further alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by making various unilateral changes in its bonus incentive system. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

On the entire record,¹ including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Michigan corporation, from, its facility in Adrian, Michigan, is engaged in the manufacture, sale, and distribution of kitchen cabinets. In the course of that operation, the Respondent, during the calendar year ending December 31, 1989, a representative period, derived revenues exceeding \$500,000, and purchased goods and materials valued in excess of \$50,000 shipped directly to the facility from outside the State of Michigan. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local No. 2037, Furniture and Equipment Workers Union, United Brotherhood of Carpenters and Joiners of America,

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent employs 150-175 production and maintenance workers at its plant in Adrian, Michigan. The Union has represented this unit since 1955. Employees at the Respondent's 10 remaining plants are nonunion.

The complaint attributes unlawful conduct to the Respondent during the 1989-1990 renewal negotiations. The most recent collective-bargaining agreement at Adrian expired on December 31, 1989. At the time of the hearing, the parties had met on 13 occasions without reaching agreement. The negotiations apparently were strained, but there is no allegation that the inability to conclude them successfully was attributable to surface bargaining, or any form of subjective bad faith on the part of the Respondent. Nevertheless, the Respondent is charged with 8(a)(5) violations in conjunction with a variety of revisions to its incentive system, which were effected unilaterally and without bargaining.

Remedially, the most significant of the alleged violations derives from the suspension and discharge of the Union's president and chief spokesperson, Robert Burns, in the midst of negotiations. The General Counsel contends that the action against Burns was motivated by considerations proscribed by Section 8(a)(3) and (1) of the Act. Beyond that, the complaint alleges that in its efforts to constrain protected activity, the Respondent threatened union leaders with reprisals in violation of Section 8(a)(1).

B. Interference, Restraint, and Coercion

1. The May 22 threat

Dan Stein, the Respondent's personnel manager, and Ray Welsh, the plant manager, are singled out as having unlawfully threatened employees with union-related reprisals. Two incidents are involved. As shall be seen, the theory of the violation advanced by counsel for the General Counsel is unfaithful to the specific allegation in both cases.

First, it is alleged that on or about May 22, 1990,² Stein and Welsh unlawfully threatened union officials with discharge or other discipline if they "persisted in pursuing a request to excuse a certain number of employees from work in order to engage in union business." The reference to "union business" pertained to the Union's uncommunicated plan to attract attention to the plight of Adrian employees during an annual stockholder's meeting of the Respondent's parent firm, the Masco Corporation.³ By its terms, the 8(a)(1) allegation assumes a coercive and illegal response to an effort by union officials to expand the number of employees that would participate in that venture.

In that connection, prior to May 22, Burns and another employee, Dick Sullens, had requested and received permission to take off from work on May 23, when the Masco meeting was scheduled to occur. Later, Burns solicited em-

¹The General Counsel moved to substitute for the document marked G.C. Exh. 3(b) on grounds that the version in the official exhibits might have been incomplete. It was not; the motion is denied. On the Respondent's motion and my recollection, errors in the transcript have been corrected.

²Unless otherwise indicated, all dates refer to 1990.

³Masco had been targeted by the Union previously. Thus, on several occasions, the Union picketed its headquarters in Taylor, Michigan. It also had sent letters to executives of that firm.

employees to join them. He apparently succeeded. On May 22, Burns and Jerry Ganun, the Union's chief steward, presented Dan Stein a written request that 13 additional employees, about 8 percent of the work force, also be given the day off. Stein summoned Plant Manager Ray Welsh. The request was given to Welsh on his arrival. Without elaboration, the Union simply stated that the 13 additional employees wanted time off for "union business." Welsh expressed that it was unusual and unfair to make such a request with such late notice where so many employees were involved. He asked the union representatives to leave in order that he and Stein might confer privately. Ganun and Burns were then called back and told by Welsh that permission would not be granted. Burns argued the point, asserting that management previously had assured that there would be no problem allowing employees to leave for union reasons. Welsh insisted that too many people were involved on too short notice, and, therefore, the request was detrimental to production. Burns said, "well, we're probably going to have to have the people call in sick." Welsh and Stein admit that if he did so he would be subject to disciplinary action, up to and including discharge.⁴

There was no sickout and the 13 employees reported for work as usual on May 23.

Consistent with the complaint, the issue turns upon whether employees who feign illness as an excuse for absenteeism in connection with union activity are engaged in activity protected by the Act. For, under settled Board authority, union officials are subject to legitimate discipline where they induce coworkers to engage in unprotected conduct. *Carlyle Corp.*, 248 NLRB 1121 (1990). In the case of a sickout, the objective communicated to management seems crucial. Thus, where the employer is on notice that the sickout is in protest of pending grievances, the job action falls within the protective mantle of Section 7 of the Act. See *Charge Card Assn.*, 247 NLRB 835, 842 (1980). But where merely a ploy to resist a management directive, the statutory accommodation shifts to preserve management's right to maintain production and discipline. In this latter case, employee interests must yield, and the incursion on working time will be deemed unprotected. For example, in *GK Trucking Corp.*, 262 NLRB 570, 572-574 (1982), the Board held that employees who had absented themselves from work to attend a union meeting were lawfully terminated despite pleas that the incident involved a protest of working conditions. There, the judge reasoned, with Board approval, that the conduct was unprotected because the employees had participated in a transitory usurpation of working time, rather than a strike designed to obtain concessions from the employer. Group resistance of an insubordinate nature was treated similarly in *Interlink Cable Systems*, 285 NLRB 304 (1987), where discipline was upheld as lawful because the employees concertedly had defied a management directive. In sum, the law protects a walkout, which is nontransitory and in quest of improved conditions of work, but does not embrace insubordination, even where manifested on a group basis, and in conjunction with union or concerted activity.

⁴The above is a composite of credible aspects of testimony by Burns, Ganun, Stein and Welsh. Where conflict existed, the testimony of Welsh and Stein was preferred.

Here, the Company, obviously, was not obligated to excuse, on a last minute "request,"⁵ a substantial sector of its operating personnel on a blind justification that they wished to engage in "union business." Had the sickout occurred it would have been an act of retaliation against that decision, and hence, designed merely to frustrate management's control over production and discipline. Thus, the possibility of a sickout did not emerge, until the Union's request on behalf of the 13 employees was denied. As Welsh held to his refusal, Burns reacted smartingly, in effect, stating that participation by the 13 supporters in the "union business" would be salvaged through means of a "sickout." It was an "in-your-face" reaction to reasonably based, clearly communicated management decision. The Respondent had every right to defend its authority and Burns was the only logical target for this attempt to preserve managerial control. Welsh rightfully would believe that the sickout was Burns' idea, raised by the latter, impulsively, as a defiant reaction to management's declared position, and, in this light, that Burns, if anyone, would implement the stratagem by inducing employees to feign illness. At that point, the law did not interdict Respondent's authority to remind Burns that it retained control over and would enforce discipline in the workplace. Had the sickout occurred, it would have been no more protected by Section 7 than the insolence with which it was raised. Accordingly, on the credited facts, it is concluded that the Employer's interest in the preservation of production and discipline was entitled to primacy over employee concerns, and the Respondent did not violate Section 8(a)(1) of the Act in this respect.⁶

2. The incident of July 27

Burns allegedly was the offended employee in the second incident. In this connection, the complaint states that, "on or about July 27, Respondent by its agent, Dan Stein, threatened the Charging Party's president, Robert Burns, an employee, with discipline for his inquiries involving the production bonus incentive system and/or other union and/or protected activities."

⁵The Union's position was expressed in writing in a letter dated May 21, over signature of Burns. That document was more in the nature of a declared absence, than a request. (G.C. Exh. 13.)

⁶The General Counsel sidesteps the issue as to whether the sickout would have been protected. She claims that Burns was threatened because he was a union officer, and hence *Precision Castings*, 233 NLRB 183 (1977) applies; ergo, the threat was unlawful even if the sickout were unprotected. This theory is at war with the scenario depicted in the complaint, which explicitly states that the Respondent unlawfully reacted to the conduct of union officials. The allegation in no way suggests that management was reacting to their status as union officials. In any event, any such claim is based on a different perception of the facts than this record allows. Burns, having acted as spokesman for the group, and having raised the specter of this form of disobedience, identified himself as the protagonist, and his union presidency, in the circumstances, did not insulate him from legitimate discipline. Burns was singled out because he in this fashion, as the complaint itself acknowledges, "persisted in pursuing a request to excuse a certain number of employees from work . . ." The issue alleged, and as proven, was his conduct, not his status. *Precision Fittings* does not apply where, as here, the union official is disciplined because he initiates, or threatens, unprotected activity. 233 NLRB at 184 fn. 3. Also distinguished on the same ground is *Gould Corp.*, 237 NLRB 881 (1978).

Burns suggests that a meeting on that date was inspired by his earlier confrontation with John Knauss, the Respondent's production manager. At that time, he advised Knauss of his concern that a mistake had been made by management in computing incentive bonuses. Knauss agreed to look into the matter. The next day, Burns asked what he had learned. Knauss stated that he had not checked as yet. Burns construed this as reflecting a "[v]ery uncaring attitude." He upbraided Knauss, stating, "with that attitude if you're looking for trouble you're going to get it." Knauss shrugged his shoulders and walked away.⁷

Burns claims that later that day, he was summoned to Welsh's office. Larry Shadewald, the union vice president, and Stein were also present. According to Burns, Welsh pounded on the table, pointing his finger at Burns, shouting, "What kind of trouble can we expect from you? I want to know."

Shadewald testified that, during the meeting, Burns explained that Knauss in their earlier conversations had manifested an attitude which could only produce trouble in light of the fact that "the people was in an uproar at the time." Welsh mentioned that he was aware that employees were rejecting overtime,⁸ accusing Burns of initiating this as well as a general lack of cooperation, while stating that he would be held responsible. Burns indicated that he was not the Union and was not responsible for what was going on in the shop. Shadewald jumped in, making the point that Burns was merely a representative of the Union.

Burns also testified that, during this meeting, Welsh stated that management did not want to discuss "penny ante crap" at a negotiating session that had been scheduled for August 6. Burns asked if he considered the bonus within that category, and Welsh replied in the negative, whereupon Burns stated, "Well, neither do we."⁹

Burns testified with neither corroboration nor contradiction that Stein told him that what took place in Welsh's office would be memorialized in writing for inclusion in Burns' personnel file.¹⁰ This is the only remark attributed to Stein that remotely corresponds to the instant allegation.

⁷ Knauss could not recall any such confrontation with Burns. He testified that during August, he was approached on several occasions by Burns concerning the latter's belief that the bonus was too low. Knauss insists that Burns ceased after Knauss took Burns to Welsh's office. He also described two conversations with Shadewald concerning the failure to pay a bonus when in fact a quarter of a cent had been earned. He failed to impute any manifestation of temperament to either Burns or Shadewald on any of these occasions.

⁸ At the time, all but one employee in the shop were refusing to work overtime.

⁹ Welsh who apparently failed to recall any meeting of this nature or on this date, did deny stating that he regarded Burns as responsible for conduct of employees in the shop. He also could not recall using the terms "penny ante crap" or commenting upon the appropriateness of discussing the incentive system during the August 6 negotiating meeting.

¹⁰ The Union, in consequence requested that file, but found that it lacked reference to the incident. Neither Shadewald, nor Welsh was examined as to any such statement on the part of Stein. Stein, like Welsh had no recollection that such a meeting actually occurred. Stein did recall a meeting on August 3, prompted by rumors that the Union was about to cancel the negotiation session scheduled for August 6. During that meeting, the bonus system was discussed, but only with respect to the Company's practice of rounding off fractions; there apparently was no mention of any confrontation with

In this instance, the General Counsel has veered from the complaint even more dramatically. Indeed, this time she ventures from the undenied testimony of her own witness. The allegation in question attributes a threat solely to Stein. Burns testified, without denial, that Stein, at the meeting's close, stated that his conduct would be memorialized in his personnel file. Yet, in briefing the issue, the General Counsel fails to implicate Stein in any untoward conduct. Instead, Welsh, alone, was identified as the villain. Indeed, the General Counsel's fascination with Welsh was sufficiently boundless to lead to the representation in her brief that: "Welch [sic] told Burns that the proceedings would be documented and put in his file."

It appears that the General Counsel, while ignoring her own prima facie evidence, seeks to convert this incident to a totally unalleged violation, implicating an entirely different representative. Thus, her only stated theory is that July 27 marked an extension of Welsh's pattern of holding Burns responsible for the conduct of others, contending that it is impermissible under the National Labor Relations Act for an employer to require a union official to be the guarantor of the actions of unit employees. *Precision Fittings*, supra. Though evidence was adduced indicating that Welsh admonished Burns that he believed that Burns was behind the employee's job actions and would hold him "personally responsible," this concept is not embraced by any allegation of the complaint.

In this respect, while union officials may not be singled out and disciplined for the conduct of others, this prohibition does not preclude management from communicating with them concerning either employee incursions upon work time, their inefficiencies suspected of being union related, or their own responsibility for causing others to engage in unprotected activity.

The line between the privileged and proscribed is a delicate one, warranting special attention of the litigants. If in fact the General Counsel possessed evidence that the Employer went too far and that Burns, in this context, was wrongfully threatened, the matter should have been alleged to provide advance notice in the form necessary to full and fair litigation of all ramifications of the issue. During the hearing, I, for one, had no idea that this was a viable theory under the complaint, and since the General Counsel's three witnesses who testified to these matters provided a total of seven affidavits, it is entirely possible that the evidence was not uncovered for the first time during the hearing. To "back-door" the theory by raising it for the first time in the posthearing brief is too late to permit fair assessment.¹¹ It

Knauss or reference to trouble on the floor. Stein was aware of no other meetings in which the Union complained of bonus calculations. He did not specifically deny the statement that the matter would be written up and placed in Burns' file.

¹¹ The General Counsel elicited testimony from Burns tending to show that the Company on other occasions, particularly February 14, informed him that he was responsible for the conduct of employees generally. It was assumed that this proffer was made to demonstrate animus, in support of the 8(a)(3) allegations, rather than an independent Sec. 8(a)(1). In this connection, I have no doubt that in February and July, the Company attempted to use Burns as an intermediary to assure that he and other employees engaged in union activity in conformity with union rules, and also stated that he could be deemed responsible where Burns, himself, was an offender. Beyond that, however, the quality of the litigation under this unalleged

was not fully litigated and to find an unfair labor practice on this basis is to disregard the purpose of advance notice, fair pleading, and to rob all meaning from the allegation specified in a complaint.

As for the specific 8(a)(1) allegation, Stein, as already noted, did not deny the remark attributed to him concerning the personnel file.¹² Burns' own account reveals that the July 27 meeting was triggered by his statement to Knauss that because the latter's investigation of the bonus issue was not sufficiently prompt to satisfy the Union, it could lead to "trouble on the floor." This remark could be taken as a threat broad enough to include unprotected activity, a possibility not lacking in plausibility considering the slowdowns that the Respondent had already experienced. Burns, having voiced the possibility, condoned "trouble on the floor" as an appropriate means of dealing with unfavored managerial attitudes. Thus, the Respondent, in the circumstances, had the right to inquire as to his intentions, and to adopt reasonable precautions against its spread. Moreover, while the report of a bonus discrepancy presumably was protected activity, and Burns could not legitimately be disciplined for that reason, this did not strip management of every available tool designed to maintain respect and dignity against gratuitous, derisive behavior by a union official toward a supervisor and to assure efficient operation of the workplace. While I am aware of the latitude afforded under the *Thor Power* doctrine¹³ considering the nature of the remark attributed to Stein, and the conduct which it addressed, this preventive step was not likely to intrude on activity protected by the Act and represented a balanced attempt to maintain discipline. The Respondent did not violate Section 8(a)(1) in this respect.

C. The alleged discrimination

1. The prima facie case

On Saturday, August 25, Robert Burns was observed removing a small quantity of sandpaper from the plant. This led to an immediate informal suspension, which was followed by a suspension pending investigation on Monday, August 27, and, finally, discharge, on Tuesday, August 28. Since Burns was hired on March 13, 1972, this terminated an employment history exceeding 18 years. At times material, he had served the Union as its president, and was chief

theory was not refined to the point allowing conclusive determination that management engaged in an unwarranted intrusion upon statutory interests while pursuing its otherwise legitimate goals. One further note is in order. As I construe a memo introduced by the General Counsel which summarizes what transpired at the February meeting, it conforms with management's attempt to use Burns as an intermediary with employees, but not to hold him responsible for their actions. That document does reflect that matters of this nature were called to his attention. It also shows that he was disciplined. However, the discipline related solely to Burns' own conduct. G.C. Exh. 30.

¹²I am somewhat bewildered by the observation in the General Counsel's brief that Stein and Welsh were not asked by the Respondent's counsel to deny the remarks attributed to Welsh by Burns and Shadewald "because they could not truthfully do so." From this, am I expected to assume that both were truthful in areas where their counsel showed no similar reluctance?

¹³*NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 179 (1964).

negotiator during renewal negotiations which were in progress at the time of his discharge.

The Adrian plant happened to be the only unionized facility in the Respondent's nationwide network of 11 plants. The record confirms that employees at that facility were highly active in furthering their employment-related goals. Burns seemed to be a highly visible part of that process.

The activism was not confined to Adrian. In 1990, the Union targeted certain of the Respondent's plants for organizational handbilling. Burns was involved, having testified that, together with Larry Shadewald, the Union's vice president, he handbilled the Respondent's plant in Culpeper, Virginia.¹⁴ In addition, he spearheaded an attempt to circumvent local management by visiting a Masco shareholder's meeting.

Burns' more localized activities would hardly endear him to management. Under the strain of unsuccessful negotiations, Burns was highly critical of management's attitude in the labor relations area, going so far as to accuse the Company calculating bonuses in a manner that understated the return actually due employees. Burns also was associated with threatened job actions, including slowdowns, a boycott of overtime, and a possible sickout. His 11th-hour request on May 22 that 13 employees be given time off for union business was received as unreasonable and in disregard of the Respondent's production needs. Of major import, however, was Burns' cancellation of a negotiating meeting that had been scheduled for August 6. This last-minute step caused the Company inconvenience and unnecessary expense. The Respondent's bargaining committee, by letter of August 7, declared that, in consequence, it was "outraged." (G.C. Exh. 6.)

Thus, the case-in-chief is based on more than Burns' union presidency and participation on the Union's negotiating committee. The immediate background substantiates that Burns was involved in a pattern of known or suspected activism that made him a thorn in the side of management at the only plant where the Respondent had to vie with union organization. His last act, namely, cancellation of the August 6 negotiating meeting, drew a clear blast of fire, and provided the immediate foreground for the abrupt end, only a few weeks later, to Burns' 18 years of employment. In these circumstances, an inference is warranted that union activity was

¹⁴The Respondent answered the Union's literature distributed at Culpeper with its own explanation of difficulties at Adrian and their cause. (G.C. Exh. 3(b).) A document embodying a similar message was distributed to employees at Adrian. (G.C. Exh. 3(a).) The General Counsel does not challenge the legitimacy of this propaganda, and it apparently was insufficient to support any merit in unfair labor practice charges that the Respondent was guilty of bad faith in its dealings with the Union at Adrian. Nevertheless, the General Counsel insists that the literature establishes union animus to a degree warranting consideration in assessing legitimacy of the Burns discharge. I disagree. At best, this documentation demonstrates a general resistive approach to union organization of nonunion plants, while placing the onus upon the Union for the inconclusive state of negotiations at Adrian. The Act does not require an employer to remain mute when accused of impropriety or a lack of fair dealing; it certainly has a right to respond. While management's intentions might be flawed by propaganda admitting a propensity to discriminate, the instant literature, neither directly nor on reasonable interpretation, conveys such a message, and, accordingly, it is viewed as neutral. See, e.g., *Dynatron Bondo Corp.*, 302 NLRB 507 fn. 2 (1991); *Holo-Krome Co.*, 302 NLRB 452 (1991).

at least a part of the motivation, requiring the Respondent to demonstrate that Burns would have been discharged in any event. See *Wright Line*, 251 NLRB 1083 (1980).

2. The defense

The Company's "Employee Manual" sets forth a progressive system of discipline. An exception exists for certain misconduct classified as a "Class Three offense." (G.C. Exh. 11.) This more severe category, at least facially, requires "automatic discharge." The Respondent argues that the discharge of Burns was grounded on such an offense, defined in published plant rules, as follows:

6. Removing or attempting to remove from Company property, without proper authorization, any Company property, or record of any customer, visitor, employee, or any other persons at the Company's facility.

There is no denying that Burns, on Saturday, August 25, without requesting authority or obtaining permission, left the plant with a small amount of sandpaper, at most, having a gross value of less than \$2. He was caught with the material in his possession in the parking lot after the close of his shift. However, he insists that this was an act of inadvertence, and, as he had done many times in the past, the material was removed unintentionally.

More specifically, Burns, on August 25, was scheduled to work from 6:30 until 11:30 a.m., a shift that contrasted with his normal quitting time of 3 p.m.¹⁵ That week, he had been working in the paint line for several days. That day, Burns, with coworkers, performed a variety of jobs on the paint line, including sanding at the "curve" on freshly painted parts that had cleared the first of several paint booths.

The foreman of the paint line, Terry Phenicie, was not on duty that day, leaving no one officially in charge other than Larry Shadewald, the most experienced employee. At some point, the parts were to change to cabinet frames, and Burns sought out Shadewald for instructions as to how they should be sanded. Then, apparently close to shift's end, as he and Shadewald carried their discussion toward the restroom, Burns claims that he remembered that sandpaper at the sanding curve had been running low. He asserts that he had forgotten that the shift was scheduled to end, but believed that the lunchbreak, customarily scheduled from 11:30 a.m. to noon, was about to begin. He explains that he also recalled that a coworker, Hope Lopez, told him that Phenicie had stated that if sandpaper was needed it could be obtained from a cabinet near the bathrooms.¹⁶ On his stated belief, that he would be returning to the "curve" that afternoon, and since in the area of the cabinet, Burns, at about 11:25 a.m., removed a passel of sandpaper not more than "a quarter of an inch thick" from the cabinet and placed it in his back left

¹⁵ Burns had not worked the day before, electing to take a paid birthday holiday.

¹⁶ Lopez did not testify. There is no corroboration that employees ever went directly to the cabinet to secure sandpaper or that low stocks at work stations were replaced in small quantities. Sandpaper is housed in 6-by-4-3/4-by-3-1/4 inch boxes. Each contains 400 sheets. Burns correctly assumed that, as Knauss testified, sandpaper on the paint line is replenished in full boxes. Knauss also testified that this task is performed by the supervisor on request of an employee.

pocket.¹⁷ He noticed that George Davis, a maintenance supervisor, was in the area.

At that juncture, and at about 11:25 a.m., Shadewald approached Burns, requesting that the latter accompany him to his truck in order that Burns might examine a document of interest to the Union. Before leaving, as they were talking near the bathroom, the buzzer sounded, signifying that the shift had ended. Shadewald and Burns began walking toward the timeclock. Both punched out. On leaving, Linda Robinson, a coworker, gestured from her car in the parking lot that she too wanted to see Burns. He obliged, and they spent about 5 minutes discussing union business. He then went to Shadewald's truck where he allegedly sat on the passenger side, half in, half out, with the left side of his back observable to Shadewald. He examined the material until he saw Welsh approaching from the north. Shadewald indicated that he would have to leave, lest he be caught "dodding around [on company property] after the work shift."¹⁸ Burns headed for his car.

According to Burns, Welsh then called Burns,¹⁹ stating, "Bob, you've been observed putting something under your shirt." As he picked up his shirt, Welsh stated: "No, your back pocket." At this point, Burns related that he reached around and pulled the sandpaper out of his back pocket,²⁰ acknowledging that he had the sandpaper and used it on his job, that he normally would throw it on his dashboard, and bring it back with him the next day.²¹ Welsh advised Burns that he did not like this, and that it did not look good. On request, Burns gave the sandpaper to Welsh. When George Davis arrived at the scene, Welsh asked if the sandpaper was consistent with his observations. Davis replied in the affirmative. Welsh again stated that it did not look good, and requested that Burns report to his office at 8 a.m. on Monday, instructing that he not punch in.

Welsh testified that, in company of George Knauss, he then went to the cabinet and retrieved the opened box of sandpaper. After securing the box and the sandpaper taken from Burns,²² Welsh, with Knauss, went to the paint line,

¹⁷ In his prehearing affidavit, Burns averred that the packet was one-quarter or one-third of an inch thick. He states that on further reflection the affidavit was in error.

¹⁸ From this remark, Burns clearly would have learned that the shift had ended. Shadewald would not have expressed concern about idling on the parking lot during lunch hour.

¹⁹ Welsh testified that after spotting Burns at Shadewald's truck, he headed in that direction. Burns turned toward his car, and when Welsh attempted to intercept him by calling Burns, the latter did not stop, but continued to his car. When Burns got to his car, he opened the door and turned, with his back to the car.

²⁰ Welsh disagrees with this account. He avers that Burns reacted by opening the front of his shirt, whereupon Welsh corrected, "no, Bob, underneath the backside." Burns then produced the sandpaper from his "waistband."

²¹ Welsh testified that Burns, on producing the sandpaper explained: "Oh, I must have left this here from the work station . . . I probably have a pencil too."

²² Welsh identified R. Exh. 3 as the precise sandpaper removed from Welsh. The day before, counsel for the General Counsel, in response to subpoena, was given a different stack, but of similar content on representation that it was the stack taken from Burns. Counsel for the Respondent explained that this latter return was made in error. It was not offered for comparison and there was no suggestion that it no longer was available. Though counsel for the Charging Party and General Counsel were given the opportunity to advise me

finding ample sandpaper at the work stations to meet immediate production needs, including a 2-1/2- to 3-day supply at the "curve"—Burns' last work station. From this inspection, Welsh concluded that the main work stations, at the least, had sufficient sandpaper to continue operations for about 2 hours.

Burns avers that he reported to the office at 8 a.m. on Monday, August 27, as instructed. The meeting was attended by Welsh, Stein, Jerry Ganun, and Tom Jacobs. Burns was afforded an opportunity to explain the incident. He explained that it was an honest mistake, as he had inadvertently carried the sandpaper off in his pocket, with intention to use it after returning from lunch. Burns relates that thereafter a dispute arose with Welsh who accused him of carrying the sandpaper inside his waistband. The latter insisted that the sandpaper was in his pocket. Burns was informed that he was suspended pending further investigation. Ganun questioned this procedure, while asserting that he believed it to be unprecedented. Ganun indicated that the Union would conduct its own investigation. Welsh allegedly advised that the Union could do so, but that outsiders could not come into the shop and the investigation had to be waged on their own time.²³

At noon, management summoned Union Representatives Ganun and Jacobs to a second meeting.²⁴ The findings were explained. Ganun was asked whether the Union had anything further to add. Ganun was advised that Burns would be called in the next morning and informed of management's decision.

According to Welsh, by virtue of facts at hand, management rejected Burns' explanation that he took the sandpaper on mistaken assumption that he would return to work that afternoon. First, Burns punched out at 11:31 a.m., a step that would not have been taken if he believed he was merely

as to their understanding as to possible advantage that may have been gained through this incongruity, nothing of a suspicious nature was raised which would tend to cast doubt on the Respondent's representation that a mistake had been made. Burns was not recalled to refute the authenticity of R. Exh. 3. Nevertheless, I draw no conclusions from the presence of a fine lateral mark across the body of the sandpaper or speculation by Welsh that it may have been an impression from Burns' waistband. I would note that the corners and edges of constituent parts do not reflect the physical signs of wear that would be associated with movement, even for brief periods, if carried in the tight "patched" pockets of blue jeans.

²³Stein testified that the Union expressed a desire to bring in a nonemployee union representative to investigate the matter. He assertedly responded with the observation that, according to the contract, such an investigation would be limited to the front office. Stein advised that if the Union wished to broaden access, it would be required to address a request to himself.

²⁴The testimony of Welsh and Stein concerning this meeting is less than entirely symmetrical. Welsh states that at the time of this meeting, the discharge decision had already been made. Stein, on the other hand, described the meeting as a means of communicating management's findings in order to aid the Union in conducting its own investigation. He denies that a decision had been made at that time. That Stein was mistaken is suggested by a concession on his part that Ganun and Jacobs were informed at the noon meeting that the Company was attempting to contact Burns to get him to come in, a fact evidenced by a notation apparently penned by Stein that day. It is conceivable that management believed at that time the proof of theft was unassailable and sufficient to withstand challenge no matter what was disclosed through the Union's subsequent investigation.

leaving for a lunchbreak.²⁵ Any innocent mistake was also contradicted by his having gone to the cabinet after production had ceased and employees were waiting to leave the plant, and, as Welsh claims to have witnessed, his removing the sandpaper concealed under his shirt and waistband. Finally, investigation disclosed that sandpaper was not needed at the work stations, and, in any event, if sandpaper is needed for work purposes, one takes an entire box, not just a few sheets.

Later that evening, according to Burns, Stein telephoned him, requesting that he report the next day at 8 a.m., again without punching in. He did so, and met with the same individuals in attendance. Welsh advised that the investigation had been completed and that Burns had been deemed guilty of a class three offense, reading the following from a written termination notice:

Immediate discharge for violation of Class Three, Rule #6 Offense—(Removing or attempting to remove from Company property, without prior authorization, any Company property or record, or property or record of any customer, visitor, employee, or any other persons at the Company's facility). Unauthorized removal of 30 sheets of new sand paper from Company property on August 25, 1990. [G.C. Exh. 9.]

According to Burns, Welsh then again explained that the offense was confirmed by the concealment of the sandpaper. Burns denied that this was so, stating, that it was in his pocket. Welsh answered back, "I know what I saw."²⁶

3. The credibility of Burns and other union officials

The General Counsel endorses Burns' testimony as to his state of mind, arguing that the sandpaper's removal was an "honest mistake." Unfortunately, Burns was an incredible witness. The linchpin of his story is his explanation that he went to the storage cabinet, having forgotten that it was Saturday, thus, planning to use the sandpaper after returning to the plant following lunch. He insists that he did not realize that the shift had ended until Welsh confronted him in the

²⁵A published rule requires employees to punch out when leaving the plant. Welsh testified that this rule was not enforced. Burns' timecards substantiates that this was the case. For while Burns almost always took lunch at home, his timecards for the past year reflect that he never punched out on these numerous occasions.

²⁶Shadewald, who did not attend the August 28 meeting, testified to a grievance session on September 7 in which the Company presented its grounds for terminating Burns. At that time, Shadewald allegedly inquired as to why he and Robinson had not been questioned, adding that had he been questioned, he would have pointed out that he had observed the sandpaper in Burns' pocket. The General Counsel adopts Shadewald's position, arguing that discrimination is indicated by the Respondent's failure to pursue these "obvious avenues of inquiry." If they were "obvious" the General Counsel failed to lay the foundation for such a conclusion. Thus, evidence is totally lacking that, prior to the grievance meeting, the Company, even in light of certain incredible testimony of Ganun, would have had the slightest inkling that Shadewald had seen anything. In the case of Robinson, evidence is not present suggesting that the Company might have assumed that she was even present, with Burns, in the parking lot on August 25. Moreover, in the final analysis, since Welsh credibly testified that he was an eyewitness to the fact that Burns had concealed the material under his waistband, there was no need to explore the issue further.

parking lot. At that time, he admittedly did not alert Welsh to his confusion.

This self-serving tale did not ring true. Burns must have known that it was Saturday, and that he was not scheduled to work beyond 11:30 a.m. that day. He had not worked on Saturday for more than a year, and, apparently, was unaccustomed to having his weekend disrupted in this fashion.²⁷ He admits to knowledge of the time and circumstances at some point during and prior to the shift, but claims subsequently to have lost track. However, at least 10 minutes before Welsh appeared, Burns had punched out, an unusual step if he merely was leaving for lunch. He admits that when scheduled to work a full shift, he customarily eats at home, and on those occasions seldom, if ever, punches out.²⁸ Moreover, Burns punched out in the midst of what appears to have been a wholesale exodus from the plant.²⁹ He also would have observed that the lights had been turned off, a procedure not followed during lunchbreaks.³⁰ Finally, Burns admitted that he assumed that both Shadewald and Robinson, after the conversation with each, were leaving the plant for the day.³¹

Also flawed was Burns' explanation that he went to the cabinet at 11:25 a.m. out of a work-related need. He admitted that boxes of sandpaper were retained at work stations on the paint line and replaced with full boxes as needed. On direct examination, he testified that, when in the vicinity of the cabinet, he recalled that they were low in sandpaper at the "curve," his work station. On cross-examination, Burns suggests that he did not know whether this was so, for when questioned as to the status of the material available on the line, Burns could only speculate that the boxes "may have had a small amount of sandpaper in them."

Apart from my disbelief that Burns had become so disoriented that he did not know that it was Saturday and that his shift would end at 11:30 a.m., I also reject testimony of witnesses for the General Counsel that he carried the sandpaper in his left rear pocket.

Davis, who no longer is employed by the Respondent, testified that at 11:28 a.m. he observed Burns knelt in front of

²⁷In her brief, counsel for the General Counsel states that "Saturday overtime work was normally scheduled for a full day." Burns, in response to questioning by me testified that Saturday work was "generally" a full shift. On further examination, it was disclosed that he had not worked on Saturday for about a year and could not recall when a full shift was worked on Saturday. Welsh was in a better position to know, and testified that the Saturday shift is customarily a half day. Welsh is credited.

²⁸As indicated, his timecards for the entire year reflect that he never punched out for lunch.

²⁹Shadewald, a witness hardly unfriendly to Burns, testified that at 11:25 numerous employees were in the cleanup area preparing to leave. Timecards indicate that at the clock used by Burns on August 25, 13 employees punched out at 11:31, as did Burns. At a second timeclock, only 6-feet distant from that used by Burns, the timecards of 13 more disclose that they punched out at 11:31 a.m.

³⁰Shadewald acknowledged that he turned off the lights in the area, that this was not necessary merely to accommodate a lunchbreak, and that Burns was in a position to observe that he had done so.

³¹The General Counsel in attempting to deflect this incredulous tale, reasons that one is easily confused as to what day it is when a holiday intervenes during the Monday through Friday workweek. Whatever the case there, it is unacceptable that one who rarely works on weekends would lose sight of the fact that a Saturday had been given up to work, and for how long.

the closet ripping the top off a box of sandpaper. He avers that he watched as Burns removed a portion of the sandpaper and then placed the top back on the box. He later noticed Burns tug at the back of his shirt several times, stating further that he saw the outline of the sandpaper under Burns' shirt, well above the latter's trouser pockets. He noticed that the bulge under Burns' shirt after Burns walked out of the plant. He did not see under the shirt and therefore did not know how the sandpaper was secured to Burns' person. Davis reported to Welsh that he believed that he had just observed Burns remove sandpaper from the plant without authorization. He stated that he had observed a bulge under Burns' shirt formed by what he believed to be the sandpaper.³²

Burns and Davis differ as to the precise content of Davis' verbal report in this respect. Welsh testified that shortly after 11:30 a.m., Davis reported that he saw Burns "put sandpaper in back underneath his waistband . . . and leave the plant." Davis testified that while Welsh "believed" that the sandpaper was secured by Burns' trouser waistband, he did not report that this was so, as he could not say for certain that this was the case. However, Davis held fast to his observation of a bulge under Burns' shirt, which was not tucked in. Although he could not explain how the sandpaper was secured to Burns' person, under his description, the waistband provided the only logical answer. In this light, it is understandable that Welsh would have placed this interpretation on Davis' report, and then, in error, remembered this as actually reported. The discrepancy is considered minor with no crucial impact on the credibility of either Burns or Davis, whose accounts in essence are mutually corroborative. Indeed, Burns testified that, when confronted by Welsh on August 25, the latter said, "Bob, you've been observed putting something under your shirt." It is doubtful that Welsh would have made such a remark had he not been alerted by Davis that this had been the case.

Welsh did not profess to rely entirely on Davis. He insists that he followed, as Burns walked toward his vehicle in the parking lot, himself spotting the sandpaper tucked under Burns' shirt on the left-hand side of his waistband. He avers that later, at his request, Burns removed it from that very location.

Burns denies that this was so. He insists that he carried the sandpaper in his left rear pocket, an unusual place to stow work materials for a right-hander, as Burns was. However, he explains that his wallet was in his right pocket. Several witnesses were called by the General Counsel, all union officials, to corroborate Burns. None were in a position to observe the location of the sandpaper at the precise moment that Burns came within Welsh's view. With each account my doubt grew stronger.

First, Union Vice President Shadewald testified that he habitually checks the trousers of people entering his truck to preserve cleanliness of the upholstery. He claims that Burns positioned himself in the seat, half in and half out, a posture that would expose the left side of his back to Shadewald. He

³²Davis did not actually see Burns reduce the sandpaper to his possession, but deduced that he had done so, and after talking to Welsh, he returned to the cabinet to find that the sandpaper was no longer in that area.

states: “While . . . [Burns] . . . was reading the letter . . . I noticed sandpaper in his back left pocket.”

An indirect form of corroboration of this scenario was expected from Jerry Ganun, the Union’s chief steward. Although not a witness to the events of August 25, he attempted to recant Burns’ explanation of his actions on August 25, as the latter imparted them to management during the early meeting on Monday, August 27. Ganun offered a detailed narrative of Burns’ statement, including a representation by Burns that he was positioned in Shadewald’s truck so that his left rear pocket might be observed. Ganun’s testimony was an exceptional display of recall, typifying a highly selective memory—acute as to matters favorable to Burns, but woefully amiss in virtually all other areas. Indeed, as of August 27, there would have been no reason for Ganun to ingest this sector of Burns’ story. Ganun admitted that, at the time, he was unaware that the was a matter of significance. Moreover, Burns did not testify that his encounter at Shadewald’s truck was mentioned on August 27, and I can understand why. Under his account, he did not know that the location of the sandpaper on his person was an issue until Welsh, that very morning, accused him of carrying it under his belt. His position was that the sandpaper at all times was in his pocket. He, therefore, had no reason, prior to the actual accusation by Welsh, to check with Shadewald, who did not work on August 27 and did not attend the meeting, as to what the latter might have observed on August 25. There was not the slightest suggestion that, as of Monday morning, the two had communicated, so as to impress Burns with the fact that his position on the truck seat was a relevant factor. Ganun’s testimony left me with the clear impression that he was a willing collaborator in a scheme to create a false impression of corroboration on what the union officials believed to be an important issue in the case.

The credibility of the union officials continued its descent with the appearance of Linda Robinson. She professed to offer another eyewitness account. First she asserts that she observed Burns and Shadewald as they were leaving the plant, walking to their cars. She swore that she “noticed” that Burns had something in his back pocket, explaining further, “I wasn’t sure what it was because he was quite a distance away.” She then goes on to describe her conversation with Burns, who was positioned at her car, at the driver-side window, while she sat behind the wheel of her car. She claims that as Burns left, turning from her car door and walking diagonally toward Shadewald’s truck, she spotted *unfolded* sandpaper in Burns’ rear left pocket. Aside from her searching attentiveness to Burns’ backside, her sworn representations were replete with contradiction. She first offered a misleading explanation to me as to how she knew the material was sandpaper.³³ She next repudiated her sworn prehearing affidavit on two material facts. There, she averred that she observed the material in Burns’ *right* pocket. As indicated, this would have been a logical place for it to be. Next, she described it as *folded*. Her affidavit, to this extent,

³³At this point, Robinson stated that because she had worked on the paint line, she was familiar with the appearance of sandpaper. However, when asked to explain a conflict between her prehearing affidavit and testimony in another area, she confessed that she had no such familiarity, but learned of its characteristics the day before when she saw a sample that had been brought to the hearing.

had to be voided, for, on both, highly material counts, it contradicted the testimony of Burns and Shadewald.

The testimony of Burns, Shadewald, Ganun, and Robinson is rejected as a contrived attempt to support the conception that the sandpaper was removed as an innocent, inadvertent act. The unusual powers of observation and recall, which are a common thread of these separate accounts were a bit too remarkable. Given no reason, people rarely would recognize what others carry in which of their pockets. On balance, the corroborative effort by these union officials struck as a contrived act of solidarity, so patently false as to reinforce, rather than allay, the evidence that Burns offended the Respondent’s rules deliberately. Consistent with the entirely believable testimony of Davis and Welsh, it is concluded that Burns secreted the sandpaper under his shirt, with the intention of removing it from the premises for his personal use.

4. The evidence of disparate treatment

The General Counsel contends that the Respondent had condoned such behavior in employees who lacked stature in the Union, suggesting that the evidence demonstrates that the Respondent, over the years, had failed to impose discipline in cases where plant property had been removed without authorization in circumstances similar to, or even more grievous, than that of Burns. The evidence is unpersuasive.

More specifically, First, Shadewald testified that in 1985, he observed a foreman, Ralph Ham, load two filled gas cans on a truck, which then drove from the premises. He mentioned this to his brother, whom he identified as a truck foreman, inquiring as to one possible scenario that might have legitimated the incident. However, his brother rejected that as a possible explanation.

Shadewald did not relate that he carried the matter to higher levels. Nevertheless, the incident was not ignored by management. Shadewald admits that, subsequently, he was approached by Dan Rozko, then personnel manager, who questioned him concerning the incident. Shadewald avers that he described what he had seen. According to Shadewald, Rozko suggested that Ham was suspected in connection with other types of missing company property, stating, “Maybe we’ll have to set him up.”

Ham is no longer employed. His personnel file fails to mention the gas removal incident. Ham testified that he had access to gasoline during his tenure as foreman, that he never removed gasoline from the plant and that until this trial, he was never accused of having removed gasoline from the plant without authorization.

Rozko testified that he sought out Shadewald after receiving a report that the latter knew something about the alleged theft, but that the information Shadewald provided was inconclusive and so vague that there was nothing definitive to pursue. Rozko’s testimony was entirely probable, and, in fact, was supported by the final comment that Shadewald imputes to him, a statement reflecting Rozko’s position that, if the theft occurred, there was a shortfall in the proof against Ham. Moreover, it is entirely unlikely that the Company would have exercised restraint, and withheld investigation or discipline, if possessed of reasonable proof that an employee or member of supervision had participated in the unauthorized removal of gasoline. I credit Rozko. The incident is neutral to the issues in this case.

Shadewald describes a further incident which he places during the late 1970s. He implicates John Osenko, an employee who retired 4 years prior to the hearing, in an unauthorized removal of materials. Shadewald claims that Osenko left the building with several 21-by-30 inch oak frames when he was met by a foreman, Roger Dickerson, who asked what Osenko was carrying. The latter replied "a couple of frames." Osenko added that the buzzer sounded and "I guess I just forgot to set them down." Osenko is retired and his personnel file does not refer to the incident.³⁴ Even if the incident took place as described by Shadewald, the element of condonation would stem from an act of judgment on the part of a low level supervisor, some 11 years earlier. In my opinion, such evidence would not impose an intractable floor on management's ability to enforce disciplinary rules in the future against union activists or workers in any other protected category. The incident is insufficient to generate any fair inference that those acting on behalf of the Respondent in the case of Burns, were aware of the Osenko incident, would have taken the same action as Dickerson had, and consciously departed from that precedent, in discharging Burns.³⁵

Betty Ward, according to Ganun, was also mentioned by Shadewald during a September 7 grievance meeting as having removed property without authority, while going undisciplined. There is no denying that on an occasion in 1979, doors and fronts were detected in Ward's automobile on the parking lot. Her supervisor reported that Ward had not been authorized to remove the company property. The failure to discipline was adequately explained. Thus, Robert Myers, who was the Respondent's personnel manager at the time, testified credibly that although Ward was not disciplined, the possibility of discharge was discussed with legal counsel. There was a deficiency in proof. Ward had been authorized to remove some of the parts. More were found, but she denied removing the remainder, explaining that her car was unlocked and her windows open. Thus, the possibility existed

³⁴The complaint does not name Dickerson as a supervisor. The evidence, however, shows that between August 1977 and September 1979 he served as "working foreman" on a night shift. In that capacity, at that time, he was the sole representative of management, possessing authority to exercise independent judgment in connection with the assignment of work, while having authority to recommend discipline, including discharge, while conducting his own investigation of work derelictions on the shift of some 20 employees. I find that he held authority sufficient to establish supervisory status within the meaning of Sec. 2(11) of the Act.

³⁵Osenko offered a materially different, albeit slight, version of what had occurred. First, he denied ever having removed property from the plant without authorization. He admitted to removing six or eight pieces of wood up to 14 inches in length from a scrap bin, which stowed at his work bench before leaving. He asked Dickerson if he needed permission to remove them since they came from scrap. Dickerson stated that it would be stealing to remove them without permission even though the wood was in the scrap bin. He then asked Dickerson for written authorization, but Dickerson declined, stating that it had to come from higher supervision. Osenko returned the parts, but the next day, Osenko obtained permission from higher supervision to take the pieces home. Osenko emphatically denied that he was stopped as he walked towards the guard shack. Were it necessary to resolve the issue, I would view Osenko as a more reliable source of what actually occurred, and credit him over Shadewald, who in significant areas, struck me as willing to offer any slant to events that might prove helpful to Burns.

that she had been set up. There was no proof to the contrary and therefore the attorney advised that a discharge would not be sustained in arbitration.

Another employee, Ron Ward, testified that 3 years earlier he observed an unidentified employee walk past Welsh and Knauss after punching out with a pair of work gloves in his pocket. The gloves were of the type distributed by the Company. Ward avers that Welsh and Knauss were watching employees as they filed out of the plant. Although he testified that he was "sure" they observed the pocketed gloves, Ward was not examined, and there was no evidence, as to whether this unidentified employee was corrected.³⁶ Furthermore, Ward's assertion as to what Welsh and Knauss observed struck as his opinion, there being no foundation laid by Ward sufficient to lead to an objective conclusion that this might have been the case.³⁷

In sum, the attempt by the General Counsel to prove that the Respondent's disciplinary rules were disparately applied is of no aid in assigning the claim of pretext. On the contrary, the testimony of lay witnesses falls short of any rational inference that the Respondent adopted a posture of indifference toward theft. Overall, the evidence suggesting that this was the case seemed half-baked and superficial, and sometimes offered without thought as to its implications.³⁸

5. Conclusions regarding the Respondent's initial burden

While the General Counsel has not demonstrated that the Respondent had condoned misconduct of the type involved here, as indicated, Burns' status in the Union, together with events preceding the suspension and discharge were sufficient to support an initial inference of discrimination, requiring the Respondent under *Wright Line* to show that this was not the case. The General Counsel correctly observes that this burden is not met simply by verbalizing an ostensibly legitimate ground for termination. The defense must go further, demonstrating "by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oils & Hacksaws*, 293 NLRB 84 (1989). Moreover, where pretext is asserted, it must be ascertained whether the employer's assigned ground is credible, so as to substantiate that protected activity was mere coincidence, as the discipline would have been forthcoming in its absence. *Wright Line*, supra.

³⁶The General Counsel also elicited testimony from Dean Richard that he on many occasions unconsciously carried sandpaper from the plant, yet was not disciplined. Richard had no idea whether these episodes had been observed by management.

³⁷The General Counsel produced Dan Bennett, who testified that George Davis allayed his concern that the discharge of Burns established precedent exposing employees to discharge for unwittingly carrying their tools from the premises. Consistent with the view attributed to Davis, I would agree that Burns' case offered no precedent for such action. Burns was caught red-handed, going out of his way to obtain the sandpaper only 5 minutes before the end of his shift, then concealing it to avoid detection. His excuse that he did not know that the shift was about to end was patently false.

³⁸For example, the General Counsel's attempt to establish that discipline did not occur where costly items were taken was counterproductive and served to support the Respondent's position that proof did not merit discipline. It is only reasonable that management not have exercised forbearance in the more egregious, unquestionably serious cases had the requisite proof been available.

To demonstrate that unauthorized removal of plant property was supported by a common disciplinary pattern, the Respondent adduced segments of personnel files of 10 employees whose employment terminated on this or related grounds.³⁹ Most might be discounted as involving property of substantial value.⁴⁰ Also irrelevant is another case pertaining to an employee's unauthorized attempt to gain computer access to confidential personnel and payroll data,⁴¹ and, yet, another, involving removal and perusal of a supervisor's file.⁴² Only two involved appropriation of materials of diminutive value,⁴³ and in one of those cases, the larcenous behavior was aggravated by the fact the employee was told to return the property before he was caught removing it under his shirt.⁴⁴ The other, however, involved Todd Kroger, who was discharged for removing a single piece of scrap particle board valued in the neighborhood of \$2.⁴⁵

On the evidence available to the Respondent on August 27, it rightfully concluded that Burns removed the sandpaper without authority, and that he did so intentionally. Though the value was small, the Respondent produced evidence, through Kroger's case, that this factor did not preclude discharge in the past. It remains, however, that Kroger's personnel file reveals that he could not have been employed for more than 8 months prior to his termination, a marked difference from Burns' 18 years.

This, in my opinion, raises a fundamental question under *Wright Line*. In this case, Burns had 18 years invested in his job. The record is silent on the question of whether discharge would follow in the case of an unmistakable "class three" offense involving a senior employee. It is an evidentiary void which requires the case to turn on whether the burden remained with the Respondent to prove that it would, or passed to the General Counsel to show the opposite.

In my opinion, the better view is that the Respondent's credible showing that the same discipline had previously been imposed in connection with a theft of similar proportion sufficed, without more, to nullify the General Counsel's initial inference of discrimination. Seldom will plant experience reflect disciplinary precedent so free of mitigating factors as to be absolutely identical to the case under scrutiny. Having met its initial burden, the employer need not go further and discount all mitigating factors that arguably might have supported a more compassionate response. As stated in *Wright Line*, supra:

This shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the em-

³⁹ The evidence was adduced through Robert Myers, the Respondent's vice president of industrial relations, and the custodian of the personnel files. Although the Respondent could not demonstrate that anyone had been discharged at the Adrian plant for a class three unauthorized removal of company property during the period 1980 through 1990, Roger Ballinger was caught and compelled to resign for such an offense.

⁴⁰ R. Exhs. 8, 9, 13, 14, 15, and 16.

⁴¹ R. Exh. 11.

⁴² R. Exh. 14.

⁴³ R. Exhs. 10 and 12. Based on the documentation, the discharge of Robert Gaede is viewed as outside this category. R. Exh. 13.

⁴⁴ R. Exh. 10.

⁴⁵ R. Exh. 12.

ployer to make out what is actually an affirmative defense . . . to overcome the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden. [251 NLRB at 1088 fn. 11.]

Thus, the Respondent, having sustained a prima facie showing of valid cause, the onus returned to the General Counsel to demonstrate by a preponderance of the evidence that a collateral consideration; namely, seniority, would have produced a lesser quantum of discipline or none at all.

On this record there is no evidence that length of service was viewed by the Respondent as a material basis for differentiating between discipline imposed for class three offenses. This evidentiary void could be overcome solely on assumption that, in dealing with willful theft, employers always manifest greater lenience toward senior employees than others with less service. On the contrary, offenses of this type might well arouse concern for plant security which transcends the individual, the incident, or the value of the property involved. See, e.g., *Rock Tenn Co.*, 234 NLRB 823, 824 (1978). Accordingly, it would be inappropriate to tinker with management's judgment in so sensitive an area based upon IPSO factor ruling that a senior employee would not have been disciplined in the very fashion that management had dealt with one employed less than a year. In the final analysis, it is my opinion, that, if length of service would have made a difference, that proposition required proof, rather than a ruling against the Respondent founded upon presumption or naked suspicion.

Accordingly, it is concluded that the General Counsel has not demonstrated by a preponderance of the evidence that the assigned, otherwise substantiated and legitimate, ground for the discharge of Burns was pretextual. The credible evidence fails to disclose that he was suspended and discharged in reprisal for union activity, and the 8(a)(3) and (1) allegations in this respect shall be dismissed.⁴⁶

D. *The Alleged Refusal to Bargain*

1. Preliminary statement

The 8(a)(5) allegations relate solely to the Company's implementation of changes in its incentive system. Employees in the bargaining unit, over the years, have been compensated on the basis of a guaranteed hourly rate, augmented

⁴⁶ Were I to view the proof responsibilities differently, and on that basis conclude that the discharge was unlawful, the allegation that the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending Burns on August 25 would be dismissed. Apparently Burns was informed of the suspension by Welsh telling him to report on Monday morning at 8 a.m. rather than the beginning of his normal shift. In this respect, it is noted that evidence available to Welsh at that time offered more than ample suspicion that Burns had perpetrated a deliberate theft. Similar evidence was available to the Respondent on August 27 when Stein informed Burns of his indefinite suspension, action also alleged to be violative of Sec. 8(a)(3) and (1). The fact that Chief Steward Ganun, himself an unreliable witness, argued that he had never heard of such a procedure is neither convincing, nor probative evidence that this was an extraordinary measure in the particular circumstances. It is concluded that the suspension or suspensions would have been effected, on the facts available to the Respondent at the time, irrespective of Burns' status as a key union official.

by a bonus earnable through an incentive system that, in its basic form, has been in effect since January 1, 1987.⁴⁷

Historically, the Company has refused to include language in the collective-bargaining agreement pertaining to the production bonuses, and successive collective-bargaining settlements were achieved within that framework. During the inconclusive 1989–1990 negotiations, the Union’s demands included a short-lived appeal that incentives be eliminated in favor of higher wages. Later, this was withdrawn, but supplanted by demands that the system be incorporated in the contract and that a board be established to review the system. The Company orally represented that it would allow anyone to see the incentive calculations and would explain to employees the basis for the underlying computations. Beyond that, the Union’s proposals were resisted by management, but they remained on the table throughout. However, the Union registered no proposals seeking changes in the structure of the plan, the incentive formula, the factors affecting computation, or any aspect of the means by which bonuses are administered.

There is no dispute that, between May and August, the Respondent adjusted certain productivity inputs in the program, without consultation or negotiation with the Union. In addition, its practice of informing employees as to incremental efficiency on a daily basis was modified when the Respondent announced that it no longer would post daily reports. Finally, the General Counsel contends that bad faith was exhibited when the Respondent allegedly included inappropriate data into the bonus calculation. Each event is targeted by the complaint as a separate 8(a)(5) violation.

2. The mechanics of the incentive system

In the main, the incentive calculation is driven by factors which are measurable in absolute terms, such as actual hours worked and units produced. The equation contains a single component which is reckoned from experience; namely, a production standard set for each department based on the type of production and nature of the parts produced. The bonus is determined each week by factoring the departmental figures garnered over a rolling 4-week period.⁴⁸ This produces an aggregate productivity factor in the form of saved hours⁴⁹ which by formula will signify whether a plantwide bonus has been earned. If so, the identical bonus will be factored into the fixed hourly rates earned by all workers during the next weekly period.

3. The alleged violations

a. *The removal of operating from the incentive formula*

In this respect the complaint alleges that: “certain percentages of the productivity figures for the Rutland group of cabinets [were removed] from the . . . calculation formula.”

⁴⁷This replaced another plan, which apparently was scrapped because it lacked sufficient flexibility to keep pace with changes in operations and production processes. G.C. Exh. 12.

⁴⁸Under this arrangement, a fluctuation in production during a particular week will be balanced against other weeks during a representative period.

⁴⁹This system differs in focus from others which place a premium on exceeding unit of output standard. The objective here is to produce a specified number of units in less than the time allocated for a prescribed quantity of production.

According to the complaint, the revision was effective in the finishing department during the week ending July 7, and in the outplant area on September 7.⁵⁰ In each instance, the General Counsel challenges the adjustment as an independent refusal to bargain violative of Section 8(a)(5) and (1) of the Act.

The Respondent defends in all cases on grounds that the figures were deleted from the incentive formula to account for slower production rates associated with introduction of a new product line, and that the action taken was not detrimental to earnings, but necessary to avoid an unfair diminution in the overall bonus rate. The Respondent further observes that the conduct in question was in comport with an established practice and rights retained by management through negotiating history and past practice. The Respondent argues that these considerations are reinforced by the Union’s failure to question administration of the bonus formula in the current negotiations.

In the late spring of 1990, the Respondent introduced a new line of cabinets at the Adrian plant referred to as the Rutland group. This product incorporated an unprecedented paint process,⁵¹ together with different style doors on a maple frame.

The adjustments in the incentive computation were announced in the Respondent’s memorandum of May 30. (G.C. Exh. 5.) This document informed employees that “direct labor hours” would be charged to incentive on a reduced basis “[i]n order to be as equitable as possible on the startup of these cabinets.”⁵² Although it included no invitation to commit these actions to bargaining, the changes were not indelible, but subject to correction. Burns conceded that the Union did not request bargaining with respect to the adjustments signalled by this publication.

The paint line did not begin operation on the Rutland line until August. Earlier, other operations engaged in Rutland production were actually benefited by a reduction in the actual hours multiplier. Thus, during the first week employees involved in these operations were only charged with 50 percent of the time actually spent in Rutland production; 55 percent, during the second; 35 percent, during the third; 25 percent, during the fourth, and finally 10, during the fifth. This set of adjustments was phased out during the week of July 14. In August, when the paint department resumed operation with white frames used on the Rutland line, efficiency inputs from that department were excluded in their entirety from the

⁵⁰This is a shipping operation limited to handling of assembled components destined for shipment to the Respondent’s other plants.

⁵¹Other product lines were stained, varnished, or lacquered. Burns admitted that problems encountered with the Rutland line required corrective work by paint shop employees at greater levels than usual. Shadewald acknowledged that a trial and error procedure was used in actual paint line operations on the Rutland line. Thus, he avers that traditional methods were broken when parts were run through the paint line three times to avoid bubbles, cracks, and splits in the finish. His testimony illustrates the unforeseeables encountered and time consuming steps confronted upon introduction of a new product.

⁵²Burns concedes that the Respondent explained to the Union that this step was necessary because the Company was unable to forecast a “standard” for the new operation. He also admitted that changes of this nature were not unprecedented. See, e.g., in R. Exh. 5.

incentive calculation. This same tact was taken in August in the outplant department.⁵³

The historic approach to incentive rates confirms that fairness was the sole consideration behind the adjustments. As indicated, the objective of this incentive system is to reward productivity gains by a single bonus payable to all bargaining unit employees. An overall team concept is at the core, with productivity levels in each department combined to produce a single plantwide productivity factor, which, on the basis of a rolling 4-week average, is translated into a dollar-and-cents figure. Therefore, higher efficiency in a particular department will increase the likelihood of an incentive bonus for all unit employees, while low productivity will lessen that possibility. At the same time, the introduction of new products or processes will not be accompanied by definition of permanent incentive standards. Flaws in process, material, and technique must first be identified and adjusted before promulgation of an average rate of output which is the premise of any fair incentive computation.

To account for time consumed in the new Rutland line and the new packing processes in the outplant area, the Respondent made adjustments in its weekly totals by reducing actual hours and increasing saved hours. These artificial increases in the saved hours quotient had an upward influence upon productivity earnings. It prevented the plantwide incentive from being driven down by inefficiencies engendered by unforeseeable demands upon production.⁵⁴ Employees directly involved were not hampered by production delays, while those engaged in other operations avoided prejudicial consequences attributable to others.⁵⁵ In short, absent adjustment, which were temporary in nature, productivity could not be measured logically, and data emerging from the affected operations would unfairly distort efficiency, and exert downward pressure on the overall bonus.

The Board in the past has afforded management latitude in dealing with employees as they had in the past, where no

⁵³ Welsh explained that, with respect to the finishing department, the Rutland line offered a higher degree of difficulty under a completely different process. He states that "until we could establish a new standard and understand the new process, we eliminated the calculation from the incentive so that it would not be a negative drain on the incentive." The same principle was extended to the outplant area, where new products required different packaging techniques, prompting management to remove the area from the incentive calculation until a fair standard could be defined. Welsh testified that management's action in both cases was beneficial to unit employees, produced no protest from the Union, nor request for bargaining.

⁵⁴ At the hearing, the General Counsel conceded that common sense supported the fact that an appropriate production standard is not ascertainable during initial production after introduction of a new product line.

⁵⁵ Union witnesses attempted to downplay the benefits produced by these adjustments. I reject the unsubstantiated, not rationally supported testimony by Burns that withdrawal of the bonus in the finishing department did not result in a higher bonus to those assigned to that operation. Shadewald though initially denying that the additional time spent on Rutland parts would have reduced incentive pay, later admitted that this was the case. Moreover, when cross-examined as to whether removal of the paint line from the incentive system had a beneficial effect on employees, Shadewald replied, "possibly," a response so clouded as to suggest an element of discomfort on his part in crediting management with positive action.

one is hurt. In the line of cases commencing with *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), and *Westinghouse Electric Corp. (Bettis Plant)*, 153 NLRB 443, 446 (1965), the Board excused unilateral action which was coextensive with an existing practice, and had no detrimental impact on unit employees. This precedent is dispositive. It reflects established Board policy that extends with equal force and vigor where the subject matter consists of unilateral changes to an incentive system. Thus, in *Frontier Homes Corp.*, 153 NLRB 1070 (1965), the Board dismissed an 8(a)(5) allegation seeking to condemn an employer's unilateral substitution of new "allowance rates" for those specified in an expired contract, stating:

In view of the fact that the setting and changing of allowance rates on various models were motivated solely by economic considerations, did not during the period in question vary significantly in kind or degree from what had been customary under past established practice, had no demonstrable adverse impact on employees in the unit, and that the Union had the opportunity to bargain about changes in existing practices at the negotiating meetings, we conclude that the Respondent did not violate its statutory bargaining obligation under Section 8(a)(5) and (1) by failing to invite union participation in the allowance rate decisions. [Id. at 1072.]

Here, there can be no question that the Respondent conceived, revised, and maintained the bonus system over the years, while successfully fending off union efforts to memorialize it in collective bargaining. Confidence in the system was fundamental to its basic objective, namely, the creation of an efficiency minded work force. Employees could not be expected to pursue, with zeal, established productivity goals if the fruits of their efforts were compromised by factors having no relevance to ability and hard work. Management had responded in the past, as it did here, by unilaterally adjusting the basic bonus formula to root out inefficiencies of this type and to prevent them from compromising the objectives of the bonus system, by requiring management, rather than employees, to bear their cost. The adjustment was in furtherance of employee interests, rather than to their detriment.⁵⁶ The Union's current charges are nothing more than a strategy of ambush against a practice that had survived renewal negotiations in the past, and whose renewal, was unaccompanied by enlarged scope, nor adverse impact on represented employees. In these circumstances, the adjustment to bonus system inputs did not "cause . . . any change in

⁵⁶ By way of posthearing brief, the General Counsel argues that adjustments of this type do not necessarily benefit employees. Her observations are beside the point. The fact that a withholding of productivity data might prove prejudicial if, as the General Counsel observes, a department is operating under normal circumstances and above standard, constitutes an abstraction having no bearing on the issue at hand. For, in this case, there is absolutely no evidence that figures were withheld in connection with any operation unaffected by the new product, or during any timeframe in which a department was operating at levels of efficiency meeting or exceeding 100 percent.

the existing employment terms and conditions of unit employees.” *Superior Coach Corp.*, 151 NLRB 188, 190 (1965).⁵⁷

Accordingly, the 8(a)(5) and (1) allegations based on the adjustments in bonus computation derived from the introduction of the Rutland cabinet line and revived procedures in the finishing department and outplant area shall be dismissed.

(2) The posting issue

Prior to August 6, incentive data was communicated to employees through bulletin board postings of both daily and weekly reports. In a weekly report of that date, the Respondent included the following notation:

EFFECTIVE THIS WEEK, WE WILL ONLY BE POSTING WEEKEND INCENTIVE REPORTS. THESE WILL BE POSTED EVERY TUESDAY FOR THE PRIOR WEEK. THE WEEK AVERAGE INDICATES WHAT IS ACTUALLY PAID FOR THE WEEK; FOR EXAMPLE WHEN SHIPPING WORKS LATE, SOME CABINETS ARE INVOICED THE NEXT DAY CAUSING THE TOTALS FOR THE INCENTIVE TO BE INCORRECT BOTH DAYS. THE WEEK AVERAGE CORRECTS THESE FLUCTUATIONS.

DAILY CALCULATIONS WILL STILL BE AVAILABLE IN THE PERSONNEL DEPARTMENT. IF YOU HAVE QUESTIONS PLEASE ASK YOUR SUPERVISOR, JOHN KRAUSS OR DAN STEIN. [R. Exh. 1; G.C. Exh. 18.]

The General Counsel contends that this step, again taken without bargaining with the Union, violated Section 8(a)(5). Obviously, incentive earnings in no way were affected by posting on a weekly, rather than a daily basis. Weekly, not daily averages trigger recalculation of the overall bonus and bear directly on earnings. Moreover, the daily figures are prone to error and often were subject to correction after publication. In any event, the daily figures would continue to be available to employees through other means. Recently in *Jim Walters Resources*, 289 NLRB 1441, 1442 (1988); the Board reasoned:

In cases where an employer has made a decision and announced it to the employees . . . before its effective date . . . the bargaining representative must do more than merely protest the change; it must . . . request bargaining. . . . [A]ny less diligence amounts to a waiver by the bargaining representative of its right to bargain.

See also *Hartman Luggage Co.*, 173 NLRB 1254, 1256 (1968); *WPIX, Inc.*, 299 NLRB 525 (1990).

Here, the Respondent’s intention was well publicized. Although implemented when announced, the change was non-substantive, and was published several days in advance of the next payday. It was readily subject to reversal. It was a

⁵⁷ Although my views in this case are not dependent thereon, the result reached herein would be consistent within the express reservation in art. 2 of the collective-bargaining agreement, which in material part states:

Nothing in the above provision is intended to limit any other rights of the Company not specifically and expressly covered, including those exercised unilaterally in the past, provided that in the exercise of the above rights, the Company shall not violate any provision of this agreement. [G.C. Exh. 10, p. 3.]

procedural adjustment so minor as to be remedially inconsequential. Yet, the Union sat back, without requesting negotiations. In the circumstances, there is no substantive reason for excusing the Union’s inaction, and on authority of the above cases, the 8(a)(5) and (1) allegations shall be dismissed.

(3) The alleged miscalculation

The complaint states that the Respondent on or about July 27, utilized more hours than actually worked by an employee in its productivity calculations. The issue was not briefed and I have no idea as to the evidence relied on by the General Counsel, or the theory that would support an 8(a)(5) violation on this record.

Facially, the allegation seems to seek redress for an arithmetical error. As might be expected, there is no dispute that the Company had made mistakes in the past in computing bonuses, and when called to its attention, corrected them. However, there is no probative evidence that any mistake was made during any time relevant to this proceeding.

As indicated, Burns did testify that on July 26, he complained to Production Manager Knauss that a weekly report charged employee Richard Kiser of the “outplant area” with having worked 48 hours when he actually worked 40 hours. While of diminutive consequence, a discrepancy of this nature would adversely influence efficiency. Burns’ hearsay testimony was belied by the General Counsel’s offer of Kiser’s timecard, which apparently relates to the relevant timeframe; it shows that, contrary to Burns, he actually worked 37-3/4 hours that week. (G.C. Exh. 19.) Moreover, the General Counsel offered no probative evidence to substantiate that the Company charged any greater hours to the incentive system, or that an error actually had been made.

On the other hand, Personnel Manager Daniel Stein testified that he examined the weekly hours report and discovered that in the case of Richard Kiser, during the week ending July 21, the number of hours charged to the incentive system conforms precisely with the time card for that timeframe. (G.C. Exh. 19.) There is no reason why Stein’s testimony should not be accepted.

In sum, as there is no evidence of a probative nature that such an error was made, the allegation is viewed as frivolously maintained, and the 8(a)(5) and (1) allegation based thereon is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer 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. The Respondent did not threaten employees, including union officials, with discipline under conditions violative of Section 8(a)(1) of the Act.
4. The Respondent did not suspend or discharge Robert Burns for reasons proscribed by Section 8(a)(3) and (1) of the Act.
5. The Respondent did not unilaterally alter its bonus incentive system under conditions violative of Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁸

_____ ⁵⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

_____ adopted by the Board and all objections to them shall be deemed waived for all purposes.