

**International Brotherhood of Teamsters, Local 101,
AFL-CIO (Allied Signal Corporation) and
David Krupp.** Case 5-CB-6583

August 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On January 31, 1992, Administrative Law Judge Joel A. Harmatz issued the attached decision.¹ The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief in opposition, and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

¹ The judge's decision is incorrectly dated "January 31, 1991."

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

The General Counsel has also excepted, inter alia, to the judge's findings concerning the percentage of unit employees in the welder and field machinist classifications who were members of the Respondent at the time of the distribution of the settlement. However, it is not possible to determine what percentage of all field machinists or welders were union members in April 1990, as the record does not disclose the total number of employees in these classifications at that time. In any event, the percentage of employees paid under the settlement who were union members is the more relevant figure for the purpose of determining whether the field machinists were included for the purpose of benefiting union members. In this regard, the record shows that 42 percent (35 of 83) of the field machinists who received money under the settlement were union members as of April 1990 (employee Hamlet, erroneously listed as a field machinist on the Respondent's list of April 1990 members, was actually a welder). The corresponding figure for the welder classification is 60 percent (6 of 10). We also note that by limiting the settlement distribution to individuals working on the day the grievance was filed, the Respondent excluded 19 of the 55 field machinists employed in April 1990 who were union members from receiving any money. Under these circumstances, and for the reasons stated by the judge, we find that the Respondent's decision to include the field machinists was not motivated by an unlawful desire to favor its members.

³ In adopting the judge's finding that the General Counsel did not establish that the Respondent was motivated by animus against non-members when it decided to include field machinists in the settlement, we find it unnecessary to rely on the judge's statement that Union Business Agent Lucas' alleged misrepresentation to Charging Party Krupp of the reasons for including the field machinists was "consistent with a personal judgment to avoid lending comfort to the opposition" [i.e., Krupp, whose intent to file an unfair labor practice charge concerning the Union's actions was known at the time]. Rather, we find that any misrepresentation to Krupp by Lucas that occurred was insufficient to establish that the Respondent's decision to add 83 other employees to the settlement was motivated by unlawful considerations, particularly in light of the credited testimony that the Union's executive board voted to include the field ma-

ORDER

The complaint is dismissed.

chinites because they too had lost work as a result of the Employer's subcontracting.

Brenda Valentine-Harris, Esq., for the General Counsel.
Jonathan G. Axelrod, Esq. (Beins, Axelrod, Osborne & Mooney, P.C.), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Chesterfield, Virginia, on August 20 and 21, and November 6, 1991, on an unfair labor practice charge filed on June 8, 1990, and a complaint issued on August 31, 1990, which, as amended, alleged that International Brotherhood of Teamsters, Local 101, AFL-CIO¹ (the Respondent or the Union) violated Section 8(b)(1)(A) of the Act by distributing proceeds from an arbitration award to a classification of employees on grounds that were unfair, and/or arbitrary and capricious, and/or invidious. 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,² 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 Employer, a Delaware corporation, from its facilities in Chesterfield, Virginia, has been engaged in the manufacture and nonretail sale and distribution of nylon and polymer products. In the course of that operation, it annually sells and ships products, goods, and materials valued in excess of \$50,000 directly to points outside the Commonwealth of Virginia. 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 the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 101, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This proceeding arises from a dispute concerning distribution of proceeds pursuant to a grievance filed by the Charging Party, David Krupp, a sheet metal worker. The grievance, one of two filed by Krupp and processed by the Respondent,

¹ The name of the Respondent appears as amended at the hearing.

² Certain errors in the transcript are noted and corrected.

was known as CP-89-88; it contested the Employer's subcontracting of the work of "drilling monomer rings." After inability to resolve the claim amicably, it was processed to, and ultimately sustained, in arbitration. Thereafter, the Employer and the Respondent attempted to determine the amounts due under the award. In doing so, at the suggestion of the Employer, the group considered eligible to share in backpay with sheet metal workers was expanded to include shop machinists and welders. These additional classifications were not mentioned in the underlying grievance or the award, but also lost work due to the subcontracting.

Because another group, "field machinists," assertedly lost work, the Union in agreeing to the Employer's proposal, insisted effectively on inclusion of this additional classification.

The complaint asserts that the Union breached the duty of fair representation and hence violated Section 8(b)(1)(A) of the Act by inducing the Employer to allow "field machinists" to share backpay under that award with the other maintenance crafts. The gravamen of the General Counsel's position, as specifically set forth in the complaint, is that the Respondent took this action despite the fact that field machinists "would not have been involved in the work that was the subject of the grievance."³ The Respondent disputes this, contending that this classification was involved in the removal and reinstallation of the monomer rings, and since this work was also contracted out, the field machinists had a rightful interest in the proceeds from the arbitration settlement, and hence their inclusion was neither unfair, arbitrary, capricious, nor invidious.

A question also exists whether the Respondent, in any event, violated Section 8(b)(1)(A) on the basis of proof showing that it included the field machinists for reasons other than their involvement in the dismantling and reinstallation on the monomer rings. In this respect, the General Counsel contends that although the evidence might disclose that the field machinists also lost work the Union was unmindful that this was the case, and did not act on this ground in deeming them eligible.

B. The Subcontracting; the Arbitral Award; and the Settlement Negotiations

Since 1969, the Respondent has represented production and maintenance workers at the Employer's facility in Chesterfield, Virginia. The most recent collective-bargaining agreement has a scheduled expiration date of March 14, 1993.

Monomer rings are among the components used in the spinning phase of nylon production at this plant. Thus, as molten nylon is forced through a dye, the monomer ring surrounds the dye and utilizes a vacuum to separate unreacted nylon fumes, while cooling the yarn.⁴ This process is designed both to preserve the yarn properties and to prevent noxious fumes from circulating elsewhere in the production areas.

³As shall be seen the case is complicated by the General Counsel's introduction of theories after the close of the hearing which displace, rather than support, the cause of action defined in the complaint.

⁴The rings have an interior diameter of 14 inches, and an exterior of 16 inches, weighing 35 to 40 pounds.

Periodically, due to design changes, the monomer rings require modification or repair. It does not appear that the modification work had been assigned to the bargaining unit prior to 1988. However, work of a similar nature had been performed in-house, utilizing the following classifications:

sheet metal mechanics
welders
shop machinists

Although the embattled field machinists did not and would not be utilized in connection with the internal modification, that group traditionally worked in production areas, with duties that included the removal, inspection, disassembly, repair, redelivery, reassembly, and installation of equipment. In contrast, the shop machinists and sheet metal workers are engaged primarily in the shop area fabricating metals in conjunction with maintenance and repair.⁵ Together, these were 4 of 11 classifications in the maintenance department.

In 1988, a number of monomer rings were modified as part of a large capital improvement project. During that timeframe, the Employer's practice of contracting out had become a "cause celebre" in the maintenance department, and would be contested through a number of grievances. That which pertained to monomer rings was filed by Charging Party Krupp strictly on behalf of sheet metal mechanics, and on article 29 of the subsisting agreement, which provided as follows:

For the purpose of preserving job opportunities for the employees covered by this Agreement, the Employer agrees that work currently performed by, or hereafter assigned to the bargaining unit shall not be subcontracted if it would result in a reduction of the workforce, by rollback or layoff in the job which would normally perform the work being subcontracted.⁶

At the Union's choice, the Krupp grievance was consolidated with at least six others, all of which advanced the Respondent's contention that the Employer was seeking, through contracting out, to eliminate a segment of the bargaining unit by hiring contractors instead of full-time maintenance workers.⁷ The matter was heard by Arbitrator Ellen M. Bussey on March 2, 3, and 22, 1989. On October 19, 1989,

⁵The sheet metal workers work with light gauged sheet metal, using shears and machinery to shape the raw stock into various forms. The shop machinists work with larger metals forging the material by cutting, grinding, and boring pursuant to specifications.

⁶G.C. Exh. 6. The protective force of this agreement was broadened by a stipulation in an earlier arbitration, which eliminated management's ability to defend subcontracting on the ground that there was no concomitant "reduction of the workforce." The settlement in this regard stated: "The mere fact that there is no rollback or layoff of qualified bargaining unit employees will not in and of itself justify the Company's subcontracting of bargaining unit work." G.C. Exh. 7 at pp. 29, 30. This was regarded by the Union as a codification, meaning that art. 29 banned subcontracting that merely produced a loss of overtime, which apparently was the only adverse impact claimable by virtue of the subcontracting of monomer modifications.

⁷The Employer opposed consolidation with a generic grievance and resisted arbitration on that ground, requiring the Union to obtain a court order compelling arbitration. G.C. Exh. 21.

the award issued, sustaining, inter alia, grievance CP-89-88, and specifying that:

Grievance CP-89-88, also filed by sheet metal worker David Krupp, concerns the subcontracting of the drilling of monomer rings, a task which itself has been undisputed bargaining unit work under normal conditions. The Company claims that in this case, conditions were not normal. The grievance was filed with respect to a situation in which the work was particularly intricate and time consuming since complex modifications had to be made. Complicated tools were required and the entire sheet metal bargaining unit workforce, working at total capacity, would not have been able to complete the drilling of the 80 rings on time. It was a situation in which the Company lacked sufficient skilled employees to complete the work in the required five weeks.

The Union's statement, however, that the Company had no emergency and actually knew 2 months ahead of time that the rings needed modification was not rebutted. No arguments other than the time limits were valid reasons for subcontracting out the work. The rings were not part of one specific capital project, but rather a separate and discrete project, theories no assertion that the tools, though complex and expensive, were not available to bargaining unit members, or that this was a situation which arose unexpectedly. It has been stated in the instant hearing that there was not enough work for the bargaining unit sheet metal workers which leads to the conclusion that they would have extra time with proper planning. Poor planning, resulting in an emergency, should not cause an adverse situation for the bargaining unit workers. The grievance is granted. The bargaining unit sheet metal workers are entitled to overtime at their customary rate.⁸

The Krupp grievance, the hearing on it, and ultimately the arbitrator's award were addressed specifically to the availability, inadequate planning, and loss of work by the sheet metal workers. However, as indicated, when the parties' attention shifted to the issue of compensation, the scope of their efforts quickly surpassed these limitations. Thus, apparently from the outset of these postarbitral deliberations, it would become apparent, at least to the Employer, that while the grievance was filed on behalf of sheet metal workers, other classifications, namely, the shop machinists and welders actually lost about 80 percent of the modification work; with the sheet metal workers, losing only 20 percent. As events unfolded, the Employer apparently was more interested in repairing injustices that inured from monomer subcontracting generally, rather than selectively on the narrow basis dictated by the award. Thus, it wittingly broadened its liability in order to compensate all crafts that at least would have worked on the ring modifications.

In estimating its initial proposals, the Employer factored the percentage of work performed by the sheet metal workers, the shop mechanics, and the welders into the formulation. Two calculations adopting this format are in evidence and there is no suggestion that others were prepared. For example, General Counsel's Exhibit 15 was an internal calculation

prepared by Maintenance Manager Burns, on request of Paul Harvey, the Respondent's superintendent of labor relations. It includes estimates of the unit hours chargeable to each classification involved in the modification process. It assumes 10.5 hours per unit, allocated as follows:

sheet metal mechanics	2 hours
welder	4.5 hours
shop machinists	4 hours ⁹

Later, apparently, in December 1989, the 10.5-hour estimate per unit, was upscaled to 12 hours, requiring Burns to increase the allotment of hours between classifications.¹⁰

There is no concrete evidence that the Respondent ever assented to the estimates in this form,¹¹ or to any formula for proportional distributional between the crafts. There also is no evidence that the Employer after December 11, 1989, ever again embarked on an effort to make such a breakdown.¹² Instead, on that date, the Employer informed the Respondent that it would allow the latter to determine who should be paid and how much. Thus, the Employer, early on, had deferred to the Union on this issue. Accordingly, from that point forward, negotiations were confined to the gross amount due and not its distribution. The dispute centered on the number of units actually contracted and the number of man hours consumed in performing the modification on each unit.

On February 1, 1990, agreement was reached on the number of hours that it would take to perform the work in-house, and the number of units contracted out, for a total sum of \$31,308.48.

C. *The Inclusion of the Field Machinists*

Ultimately, at the Union's instance, those sharing in the proceeds were expanded to include the "field machinists." However, this did not become official until well after the settlement. Thus, it was not until March 22 that the Employer was alerted, formally, to the possibility that the Respondent might be inclined to allow field machinists to share in the backpay.¹³ At that time, Union President David Whitely requested that the Employer supply certain additional data; namely, the number of sheet metal workers, field machinists, and welders employed on the date that Krupp filed the mon-

⁹This breakdown was communicated to the Respondent by telephone.

¹⁰G.C. Exh. 23.

¹¹Since the modification work was without precedent in the unit, it is not surprising that the Respondent encountered difficulty while making its own independent estimates. While waging its own investigation the various crafts provided conflicting data as to the extent of that their craft would be required for monomer ring work. Each seemed to exaggerate their contribution. The problem encountered by the Union was typified by testimony of Krupp that the sheet metal workers would be involved for between 6 and 12 hours per ring. The Company would disagree; its estimates translate into 2 to 3 hours work for that classification. Krupp agreed that there was plenty room for disagreement as to just what percentage of the work would have been done on the modification by each craft.

¹²The focus of for these estimates was the modification work, and at no point did the Employer include the field machinists in its calculations.

¹³Human Resources Manager Harvey testified that as early as January or February he had heard rumors that this was a possibility.

⁸G.C. Exh. 7.

omer ring grievance.¹⁴ Harvey responded by providing overtime listings which reflected those employed in the various classifications as of March 4, 1988.

On April 10, Whitely telephoned Harvey, requesting the estimates that the Company had provided orally on December 11, 1989, as to the hours allocated to the various crafts involved in the monomer work. Harvey again provided this information by phone.¹⁵

The next day, April 11, Whitely verbally advised Harvey that the field machinists would share in the proceeds and that the distribution would be made by dividing the total number of employees in all four classifications into the \$31,308, thus, allowing all to share equally.¹⁶ Whitely told Harvey to work through Doug Lucas in implementing this formula.

On April 17, the Union's executive board formally endorsed this form of distribution. All four crafts were included because all "possibly could be involved in the work." (R. Exh. 4.)

Having been apprised by Whitely of the Union's intent, Harvey sought clarification of those eligible for the payout, raising the matter in a conversation with Lucas on April 19. Lucas used the aforementioned March 4, 1988 overtime listings as a guide and after striking certain names, returned the document in a form permitting the Employer to identify who should be paid.¹⁷

Harvey testified that, with the information furnished by Lucas, he made the computations and prepared a document listing the names of all recipients for the Respondent's approval.¹⁸ Having been alerted by Lucas to the fact that Krupp had threatened to contest the settlement by filing an unfair labor practice charge, Harvey gave the list to Lucas on April 23, requesting written confirmation from the Respondent that this was its position, while providing the Employer with instruction that payment be made in the amount specified to those named. By letter of April 24, the Respond-

ent, through Whitely complied, confirming its position as follows:

In settlement of CP-89-88, the Union, after careful study, feels the following crafts should be paid for the work that was sub-contracted.

Sheetmetal
Shop Machinist Welders
Field Machinist

Each man in these crafts that was working on the day the grievance was filed should be paid the same amount as per the attached sheet.¹⁹

On this basis, Harvey, on April 25, instructed the payroll department to pay the listed individuals the amount indicated.²⁰ He informed Whitely and Lucas that payment could be expected on May 9.

D. Concluding Analysis

1. Breach of the duty of fair representation

a. *Facial legitimacy of the Respondent's decision*

The duty of fair representation is founded on interpretation of the Act and, in that sense, is dissimilar to the express statutory proscriptions designed to protect union activity found in Sections 8(b)(2) and 8(a)(3) of the Act. It is a doctrine essentially concerned with the protection of individuals and minorities, its source being the exclusive authority conferred by the statute upon the bargaining agent—a privilege that carries a duty to use that authority in a manner fair to all members of the bargaining unit.

Legal intervention in this area requires sensitivity toward the traditional functions of bargaining agents and the fact that negotiating decisions will not always produce equal benefits to all who are represented. This teaching was underscored by the Supreme Court in *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991), as follows:

Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive evaluation of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. . . . For that reason, the final product of the bargaining process may constitute evidence of a breach of the duty only if it can be fairly characterized as so far outside a "wide range of reasonableness . . . that it is wholly irrational" or "arbitrary." [Citations omitted.]

Thus, to assure that rightful prerogatives remain undisturbed, breach of the duty of fair representation requires credible

¹⁴G.C. Exh. 28. The shop machinists were apparently omitted by inadvertence from the Union's initial request. It later sought like data as to this group. G.C. Exh. 29.

¹⁵G.C. Exh. 23. The General Counsel's posthearing brief, in reference to this conversation, states that in the course thereof, "Harvey informed Whitely . . . that the Employer's settlement offer was based on an allocation of estimated hours worked by the sheet metal mechanics, welders and shop machinists." There is no evidence of any such comment. The record simply reveals that Whitely requested the estimates communicated earlier, and Harvey obliged by reading the breakdown over the phone. Harvey did not testify that it remained relevant or that the hours in question formed the basis for the ultimate proposal. In fact, the final settlement was 14 hours, and no estimates were ever made by either party as to how the various crafts would share in this distribution. Whatever the interpretation, the evidence does not disclose that Whitely was ever admonished by the Company that its compromise to 14 hours was linked to any form of proportionate distribution or to any combination of crafts.

¹⁶The distribution formula was on a per capita basis with all eligible receiving the identical amount irrespective of classification or share of the work. As shall be seen there is no challenge to the legitimacy of the Respondent's conduct in this regard.

¹⁷G.C. Exhs. 30(a) and (b). At the hearing, the General Counsel conceded that there is no claim that Lucas wrongfully excluded any employee entitled to compensation under the Respondent's payout formula.

¹⁸G.C. Exh. 31.

¹⁹G.C. Exh. 8. Whitely was authorized to send this letter on April 17, 1990, by action of the Respondent's executive board. R. Exh. 4.

²⁰G.C. Exh. 33.

proof that demonstrates, with reasonable preciseness, that a statutory bargaining agent has crossed the line of rationality and acted to the detriment of a member or members of the bargaining unit for reasons that are “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The fact that the negotiating process leads to a decision which does not meet everyone’s perception of fairness is not itself offensive to this standard. *Strick Corp.*, 241 NLRB 210 (1979); *Steelworkers Local 2869 (Kaiser Steel)*, 239 NLRB 982 (1978); *Humphrey v. Moore*, 375 U.S. 335 (1964). “[M]ere negligence would not state a claim for breach of the duty.” *Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990).

In this case the complaint, as written and amended, urges review of a labor organization’s judgment on a narrow, particularized ground. That which is deemed “unfair, arbitrary, capricious, and invidious,” at all times prior to close of the hearing, was limited to the following:

Respondent included, and refused to reconsider the inclusion of, field machinists in the distribution of the proceeds settling grievance CP 88–89, although field machinists would not have been involved in the work that was subject of grievance CP 88–89.²¹

Central to this assertion is the fact that the field machinists were allowed to share proceeds in the context of an arbitration proceeding which was concerned solely with the loss of monomer work by the sheet metal craft. Thus, Krupp’s grievance mentioned no other craft. The arbitration hearing was concerned only with the circumstances under which the sheet metal mechanics might have performed the contracted work. In a like vein, the rationale set forth in the arbitral award viewed the loss as limited to that group, mentioned no other classification, and specifically conferred backpay only on sheet metal workers.

Apart from the scope of the arbitration, there is little in the way of objective fact to support the complaint’s theory of impropriety. Indeed, that assertion is initially deflected by the undisputed evidence that outsiders, as an incident to the monomer contracting, were awarded the tasks of removing, transporting, and reinstalling the monomer rings—work historically performed by the field machinists. Thus, like the welders, shop machinists, and sheet metal workers, the field machinists also lost work in consequence of the “violation of Article 29 of the collective-bargaining agreement,” the predicate for Krupp’s grievance.

Firstly, the settlement negotiations under scrutiny were not tailored to the narrow limits of Krupp’s grievance. For understandable reasons the negotiating parties adopted a broader view of the problem and its solution. The Respondent describes the inclusion of the field machinists as a logical and rational consequence of this process. Direct evidence tends to support that this was the case. Secondly, the standard of eli-

²¹ The formula used in distributing the proceeds, including the degree to which field machinists were allowed to participate is not embraced by the specific language of the complaint. At the hearing, the General Counsel affirmatively stipulated that the so called “pro rata” formulation used in compensating members of the four crafts was appropriate and hence is not subject to challenge. Although, in her posthearing brief, counsel for the General Counsel was not entirely faithful to the narrow limits of the complaint, there was no attempt to alter the letter or spirit of this concession.

gibility defined in the minutes of the April 17 executive board meeting reflects an intention to include those groups that “possibly could have been involved in the work.”²² As indicated, the record demonstrates conclusively that the field machinists qualified under this standard.

However, the General Counsel attacks this measure of relief as too broad, arguing that it goes beyond the grievance and the specific subcontract entailed therein, which was limited to monomer modification. There is no question that it does. On the theory that the grievance was limited to actual modification work, the General Counsel would limit rightful participation in the arbitral proceeds to those engaged in the actual modification, viewing those engaged in support operations as ineligible even though they too lost work in consequence of the subcontracting. Far from exposing arbitrary or invidious behavior, for reasons stated below, to sanction this view is to impose an artificially grounded limitation upon the Respondent’s representational discretion.

For obvious reasons, the effort to settle sought to redress effects of the monomer contracting in a sphere more comprehensive than contemplated by the arbitrator. Thus, the Krupp grievance was only part of that process. It protested the contracting out of sheet metal work. The arbitrator’s award was responsive, tailoring reimbursement specifically to the sheet metal workers for their lost overtime. It did not, in terms, contemplate a remedy for any other segment of the bargaining unit. However, the parties were fully mindful that the Krupp grievance was one of several contesting the Employer’s right to subcontract in the face of contractual restrictions. Some of these grievances were declared arbitrable, others were not. Some were sustained by the arbitrator others were not. The sustention of the Krupp grievance, rested on the implicit premise that the contracting out of monomer modifications was unit work, and, since not subject to any acceptable defense, offended article 29 of the collective-bargaining agreement.

From the outset of the ensuing negotiations, the Respondent and the Employer recognized that the sheet metal craft held no monopoly over the work in dispute, and at no point was there an intention to adhere to the award’s directive and to compensate that group only.²³ The inclusion of the shop machinists and welders makes that clear. Neither was covered by the grievance, the award, or its precise remedy. Quite obviously, the Employer, no less than the Union, was interested in solving a problem—not by creating pockets of unrequited loss—but by redress to all who lost work in consequence of its conduct, not just Krupp and other sheet metal workers.

To this extent, the departure from the arbitrated issues was not challenged by the General Counsel and rightfully not. Thus, the Krupp grievance was predicated on a violation of article 29 of the collective-bargaining agreement. The contractual offense was by no means peculiar to sheet metal workers, and its successful prosecution did not turn on iden-

²² R. Exh. 4.

²³ As indicated, most of the modification work would have been performed by shop machinists and welders, not the sheet metal mechanics. Consistent with that understanding, the proposed and actually agreed-upon settlement figures always exceeded amounts that would have been due and owing to sheet metal workers.

tification of all who lost work,²⁴ or how much. Distinctions between the crafts affected, the sector of the work they would have performed, or the identity of the contractor, lacked relevant bearing to the narrow issue joined by the parties in arbitration.²⁵ These matters went untested and unexamined in the arbitration; for, the Employer did not deny that unit employees possessed the skill and ability to do the work, but defended solely on grounds that subcontracting was privileged; first, because the job was capital in nature rather than maintenance, and second, because the plant lacked the equipment and manpower to complete the job in timely fashion.²⁶

In sum, it was the contract violations and their effect—the Krupp grievance—that formed the framework for the negotiations. For that reason, the sheet metal workers were never considered as the only group to be made whole. The General Counsel reads too much into the arbitration process. The award was one thing, the settlement discussions were another. The award triggered the negotiations, but the latter broadened the compensatory umbrella to shield all that had lost work in consequence of the contracting of the monomer rings.

The General Counsel next contends that the final distribution legitimately could extend only to those engaged in actual *modification* of the monomers. It is true that field machinists never would have been assigned to this phase of the job. However, any distinction on this basis would be self-serving and artificially premised, while failing to grasp the nature, scope, and goals of the postarbitral discussions. Once the parties turned their attention to article 29, generally, any attempt by the Respondent to seek compensation on behalf of all who lost work was in consonance with, rather than offensive to, its duty to represent the unit fairly. Since field machinists typically dismantle, remove, and reinstall these components when shop work is required on them, this group—just as the sheet metal workers, the shop machinists, and the welders—were detrimentally affected by the monomer contracting. The adverse impact was shouldered by all four classifications, a fact hardly neutralized by the contract-

ing of the field machinists' work to a firm other than that assigned the modification work.

Yet, as the General Counsel would have it, the global effect of the subcontracting is to be ignored because the negotiations focused exclusively on the modification work. At best, from the General Counsel's point of view, the record is ambiguous on this point. The contention relies on interpretation which places too much stress on assumptions made by one party to negotiations, at the expense of the final accommodation. Thus, it is clear that during the early stages the Employer understood that only the sheet metal workers, welders, and shop machinists were involved. There is no evidence that the Respondent ever subscribed to that approach.²⁷ Moreover, the negotiations at no point bogged down in any debate, or exchange for that matter, on the issues of who did what, and how much. Indeed, if the Employer felt such matters relevant, after December 11, 1990, that view never resurfaced as a functional part of the settlement discussions. As of that date, disagreement was confined to the number of units subcontracted, and how long it would take to perform each. In the end, there was no protestation from the Employer that compensation for work lost by the field machinists was inconsistent with the equitable goals underlying the negotiations.

In a like vein, the General Counsel argues that the underlying computations that formed the basis for the Company's settlement proposals never included the field machinists, their losses were never actually assessed, and to include them diluted the entitlement of the other three crafts wrongfully. Giving the General Counsel the benefit of the doubt, it still would remain unclear that the Union was wedded to anything other than a distribution that included all who lost work.

In this regard, it is entirely possible that the Union assented to the final lump sum proposal on assumption that it took account of the interests of all four classifications. From all indications, the final figure was based on a compromise agreement as to the number of job units and the number of hours lost, not the number of crafts that would share in the proceeds. Since all craftsmen earned the same hourly rate, the record, on balance, is inconclusive on the relevance of any proportionate hourly breakdown to that which was in dispute; i.e., the number of units and the gross hours of work entailed on each. In the end, there was a rough compromise, rather than one side's ability to persuade the other as to the wisdom of any scientific calculation. Prior to agreement, only once, and that early in the negotiations, did the Employer state that its calculations were limited to the proportionate share of work estimated as to the sheet metal workers, welders, and the shop machinists. The Respondent cor-

²⁴ The General Counsel observes that no member of the bargaining unit had ever filed a grievance contesting the contracting out of the dismantling and reinstallation of the rings, nor did union representatives, during the arbitration, assert that field machinists should be included in the arbitrator's consideration of the Krupp grievance. The same could be said of the shop machinists and welders, whose participation in the proceeds is not challenged as arbitrary, discriminatory, or in bad faith. The grievance could have been filed by any of the classifications affected, not just those that would have been engaged in a support phase of the job.

²⁵ In describing the Employer's defense to the Krupp grievance, Burns testified:

There's really no issue of which craft. But the main problem was the fact that the shop machinists, which we had to have on this job, could not have done the work in time . . . that was my point in the grievance meeting that we . . . could not handle the work.

²⁶ Burns did testify before the arbitrator that the shop machinists, sheet metal workers, and welders would have performed the modification work had it not been subcontracted. However, Burns was never questioned and did not testify that others, not involved in actual modification work, did not lose work. Finally, since the arbitrator made no finding on this issue, Burns' accounting stands as raw testimony, rather than an endorsed fact, presently binding on the Respondent.

²⁷ The General Counsel adduced evidence from several witnesses that Douglas Lucas, a field machinist and, as the Union's vice president and a member of the executive board, questioned them about the other crafts, but did not mention or question them concerning work lost by the field machinists. However, it is entirely likely that his investigation was supplemental to what he already knew about his own craft and, for that reason, was confined to the solicitation of information as to contribution by the other crafts. I do not subscribe to any interpretation that this testimony suggests that, from the Union's point of view, the negotiations were of limited concern, including only the sheet metal workers, the welders, and the shop mechanics.

rectly observes that when the Employer increased its position to 12 units, it did not provide a breakdown as to how these hours would be shared and by whom. Indeed, when that figure was increased to 14 hours, this record allows no basis for ascertaining, one way or the other, whether the two additional hours factored in at that juncture did, or did not include, what the Union ultimately considered as a fair compromise of the work performed per unit by all four crafts.²⁸ Accordingly, it is easily assumed on this record that the Respondent at all times held to the view that once the hours and units were established, distribution could then be made to all who lost work in consequence of the Employer's violation of article 29.

In any event, I am not convinced that the inclusion of the field machinists could be deemed inherently unreasonable, even if the Union accepted the \$31,308.48 figure without considering the entitlement of the field machinists. Since the precise work in question had not previously been performed in the unit, and since by Krupp's own admission there was room for debate as to the contribution of each craft, the Union, having achieved an upgrade from 12 to 14 hours per unit in this final settlement, ought not be faulted for adopting a flexible stance in its effort to compensate all within the bargaining unit that lost work.

In sum, based on the foregoing, it is concluded that nothing in the grievance/arbitration process or the negotiations that followed made it unreasonable for the Union to adhere to a standard in which all who lost work shared in the compensation. In other words, once the Employer elected to expand the compensable scope of the inquiry to others who lost work, the economic realities of the situation assumed a level of primacy, and the loss sustained by field machinists was no less relevant than that by welders and shop machinists.

b. *The motive issue*

This commonality between the four classifications, apparently, does not end the inquiry. For the General Counsel insists that the actual loss by the field machinists was merely a "post-charge rationalization," and hence was not relied on by union functionaries when the decision was made. Instead, it is argued that the executive board authorized payment for arbitrary and invidious reasons on the basis of "nonexistent work" that was not even a part of the project.²⁹ The merits of this view shall be addressed with strong concern for its substantiality; for, it concedes that the Union reached a fair and just result, but presumes a breach of the duty of fair representation because it did so on an unacceptable ground.

²⁸ The General Counsel observes, correctly, that there is no credible evidence that the final settlement figure encompassed work lost by the field machinists. However, equally absent is any credible evidence that the parties reached this figure subject to mutual understanding that the field machinists were to be excluded. This was an aspect of the circumstantial chain asserted by the General Counsel, and hence the latter held the burden of proof on this score.

²⁹ The General Counsel also contends that, at times prior to the actual payment, the Union declined to reconsider its position, although provided information negating any basis for the claim that field machinists performed modification work. The issue need not be reached. Obviously, if the field machinists were properly deemed eligible to share in the proceeds on April 17, the Respondent could not be faulted for failing to reverse that decision.

Central to the General Counsel's theory is certain uncorroborated testimony by Krupp concerning one-on-one conversations with Douglas Lucas after April 17.³⁰ The latter avers that in these conversations Lucas provided an explanation for the executive board's action that was false and would not have merited any sharing in the proceeds by the field mechanics.

More specifically, Krupp testified that on April 17 he heard that the executive board had elected to compensate all four crafts. Being of the view that only those engaged in modification work would be eligible under his grievance, while holding the opinion that field mechanics would not have been used in this work, he could not understand the basis for this step and immediately sought confirmation from Lucas. On this and several subsequent occasions, his inquiries to Lucas failed to produce a specific explanation. Instead, twice, Lucas simply explained that the judgment was made by the executive board and nothing could be done about it. Finally, on April 20, Lucas broke down. According to Krupp, after the conversation became heated, voices were raised, with Lucas stating:

[T]he reason why the field machinists were on the pay-out of the money was because these monomer rings had one inch nozzles sticking out of the inside of the monomer ring and when the outside contractor milled the air baffle out, he also milled out these one inch nozzles, thereby leaving the one inch hole where these inserts would go in. . . . [T]he sheet metal department . . . wouldn't have had anything to do with this and [were] lucky to get any money at all.

Krupp asserts that he was unaware that work of this kind was involved, so he asked Lucas about the insertion of fabricated tubing into a cup; obviously, to make the point that this work belonged to sheet metal workers. He claims that Lucas replied that this work belonged to field machinists.³¹ Krupp claims that he expressed disagreement. According to Krupp, Lucas never referred to the removal and reinstallation of the rings as a consideration prompting the executive board's action.

Krupp next decided to investigate whether the monomer rings did in fact contain external nozzles. As part of this process, Krupp enlisted the assistance of Shop Steward John Cornett. Cornett never spoke to Lucas concerning the reasons for the executive board's action. However, on April 23, be-

³⁰ Lucas is since deceased, thus, precluding any direct refutation of Krupp's account.

³¹ The General Counsel cites segments of Maintenance Manager Burns' testimony before the arbitrator to further the claim that Lucas, at the time, knew that field machinists would not have worked on the modifications and hence that his remarks to Krupp were false. While the citations briefed appear to be inaccurate, it does appear that Burns later identified the crafts that he believed would be involved. He did not mention the field machinists. Nevertheless, I am unmindful of any rule that required Lucas, or any other union representative, to accept management's definition of the disputed work. At the time, the issue was wide open as suggested by Burns himself, through acknowledgment that monomer modification had not been previously performed in-house. Finally, if Lucas held to the conviction that field mechanics were involved in modification work, there was no reason to make that point during the arbitration hearing.

fore meeting with Krupp, Cornett testified that he was alerted by Lucas that Krupp would attempt to see him, and that the latter “was trying to cause some trouble and he would rather [Cornett] didn’t represent him if [Cornett] could get around it . . . because the Union did not take account of unrepresented scabs.”³² Cornett replied that he already had an appointment to see Krupp.

Krupp relates that when he met with Cornett, he informed him that Lucas said that field machinists were included because of their work related to the nozzles. Later, Krupp and Cornett obtained proof that the nozzles were nonexistent.³³ Accordingly, that same afternoon, Krupp again contacted Lucas, pointing out that there were no nozzles, and hence either Lucas had been misled or Lucas was misleading Krupp. He again demanded an explanation, but Lucas replied, “Well, that’s the Board’s decision and there’s nothing you can do about it.” At this point, Krupp indicated that he would file unfair labor practice charges.³⁴

In the meantime, Cornett was convinced that steps should be taken to reverse the executive board’s decision. As he and Krupp were considering possible options,³⁵ James Patterson, a member of the executive board, who also was a field machinist, appeared in the area. Cornett explained the discrepancy to Patterson. The latter conceded that it was possible, for it was explained at the executive board meeting “that there was some nozzles in these monomer rings and they had been removed and replaced by field machinists.” Cornett then told Patterson that they had information that the nozzles never existed, whereupon the latter suggested that he talk to Whitely. Later that day, Patterson told Cornett that he had spoken to Whitely about Krupp’s concern and that an effort would be made to set up a meeting with “some of the Union officials.”

³²The plant is in a “right to work” jurisdiction. At the time of the hearing, Krupp was not a union member. He testified that on several occasions he joined the Union, only to resign later. He claims to have opted for membership the second time in April 1988 because the Union was pressing grievances on subcontracting, including his own. The Respondent’s records, however, show that he was a member of the Union only once, having been initiated on February 25, 1988, while ceasing to pay dues on January 31, 1989. (R. Exh. 8.) The arbitration hearing on his grievance took place on March 2, 3, and 22, 1989. Although Krupp claims that he was not on friendly terms with Lucas, the record does not go further in defining the cause or nature of any will manifested between them.

³³Field machinist George Vlkjoan confirmed that during this time-frame Krupp and Cornett approached him concerning the nozzles. He testified that he never saw nozzles on a monomer ring. He also testified that he had been approached earlier on the same issue by Lucas, and that he told Lucas that nozzles were not involved.

³⁴Krupp testified that he previously had contacted the National Labor Relations Board after hearing “rumors” as to what the Union would do with the settlement proceeds. At that point, he was informed that no action could be taken based on rumor. Harvey testified on April 19, he was informed by Lucas that Krupp intended to file unfair labor practice charges if the field mechanics were included.

³⁵Krupp testified that in order to get the executive board to rethink its position based on what Krupp considered “false information,” he drafted and gave Cornett a petition, enabling supporters to declare their belief that the executive board based its decision on “misleading information.” G.C. Exh. 34. There is no evidence that this document was ever circulated.

Later that week, Cornett spoke to Whitely, who seemed very cooperative, and stated that he would attempt to set up such a meeting. The payout was effected on May 9. Prior thereto, no meeting with union officials took place. However, on May 10, Whitely met with Krupp and Cornett. According to Cornett, Whitely used this occasion to apologize and explain that schedule conflicts precluded their meeting with other union functionaries. Krupp informed Whitely of Lucas’ explanation for the inclusion of the field machinists. According to Krupp, Whitely responded that he did not think it appropriate to discuss another man’s logic, but offered no justification for compensating the machinists. Cornett testified that Whitely explained that he personally was unaware of the dispute because he was unfamiliar with maintenance work. However, Whitely did state that Krupp was entitled to an answer to his questions and that he would endeavor to obtain them and report back. Cornett adds that although Whitely did not “quite” make the statement that the field machinists removed and installed monomer rings, the latter did advise that “there was some particular things that field machinists did to these rings and they did not want to leave anybody out, so they were added in.”³⁶

After this, on June 8, Krupp filed unfair labor practice charges against the Union. He then met with Harvey in the interest of determining whether charges also should be filed against the Company. Harvey explained the negotiations leading to the final agreement.³⁷

The inference sought by the General Counsel as to the basis for the executive board’s action collides with the only witnesses called, who held personal knowledge, and hence could offer a primary accounting of the Respondent’s motivation. All confirm that the field machinists were allowed to share in the award because of their required involvement in the removal and reinstallation of the rings. Thus, on this crucial point, Whitely was corroborated by two other surviving members of the Union’s executive board; namely, David Whitely, Sandra Epps, the Respondent’s secretary-treasurer, and James Patterson, the recording secretary.³⁸

The General Counsel urges that this was not the case, and that the testimony of Whitely, Epps, and Patterson is unworthy of credence. The attack on their accounts is founded:

³⁶Whitely testified that he met out of concern that Krupp was upset. He indicated that he did not go into detail, but attempted to calm the situation down. He admittedly told Krupp that he was entitled to an explanation, but does not believe that removal and reinstallation of the rings was mentioned.

³⁷Contrary to the General Counsel, I do not interpret Krupp’s testimony concerning the nature of the settlement negotiations as establishing that Harvey told him “that the final settlement was based on an estimate of hours necessary for each of three crafts—shop machinists, welders and sheet metal mechanics.” Moreover, as indicated, the record does not support an assumption that the crafts involved were a relevant factor, once the Employer, on December 11, 1989, abnegated any interest in who should be paid.

³⁸Contrary to the General Counsel, I did not understand Patterson’s testimony to include a concession that at the time of the meeting “he did not know for sure whether the actual rings that were modified had been removed and reinstalled by the field machinists or by a contractor.” Patterson testified that he learned that contractors were used through testimony by Maintenance Manager Burns. The entire tenor of his testimony is consistent with his having acquired this information before April 17, and nothing in his account supports clear implication that this was not the case.

first, on Krupp's recollection that Lucas provided a different justification, which was false and could not offer legitimate support for the Respondent's action; and, second, by testimony on the part of Krupp and Cornett that they were not given any other justification by union officials. The General Counsel would use this indirect testimony, all of which concerned events after the April 17 determination, to demonstrate retroactively that at all times prior to the payout, the Respondent viewed eligibility as limited to those engaged in the actual modification, and that when it elected to include the field machinists, it acted on grounds that were entirely fictitious, hence confirming an "arbitrary, irrational decision."

This is one of those situations where all witnesses presented could have been telling the truth. There is no clear, direct conflict between the testimony of Whitely, Epps, and Patterson, on the one hand, and Krupp, Cornett, and Vlkovan, on the other. Indeed, there is not necessarily a conflict between testimony by the aforementioned union officials that they relied primarily on the removal/installation aspect of the job, and the remarks attributed to Lucas by Krupp.³⁹ Lucas is not here to testify or explain his actions. Krupp was in no position to contradict directly the testimony of Whitely, Epps, and Patterson. The General Counsel seeks to create the conflict by inference.

However, the testimony of the union officials stands more firmly against the test of plausibility than the General Counsel's suspicions. To discredit them is to assume that while attempting to compensate "crafts that could have possibly been involved in the work,"⁴⁰ not one of the members of the executive board raised the unassailable fact that whenever monomer rings were serviced, they were always removed and reassembled by the field machinists.

At the same time, even if Krupp were believed, the General Counsel's interpretation of his testimony is not the only allowable possibility, and Lucas' behavior toward Krupp was not necessarily at odds with perfectly lawful action by the executive board. It remains possible that Lucas' comments were not an accurate reflection of the basis for the executive board's action. He might well have been thoroughly disinterested in providing a straight answer. He knew from the outset that Krupp's inquiries were those of an adversary. Indeed, the testimony of Paul Harvey, the Employer's superintendent of human resources, suggests that Lucas knew prior to April 19 that Krupp intended to file unfair labor practice charges if the field machinists were included. In this light, his reluctance to offer information is consistent with a personal judgment to avoid lending comfort to the opposition. Moreover, if in fact Lucas referred to the nozzles as the sole justification, it is entirely possible that he intended this as a ploy to combat Krupp on the latter's own turf. Thus, unlike the removal/reinstallation phase of the job, the nozzles supported an argument, however baseless, that the field machinists had a greater entitlement than the sheet metal workers. On balance, it strikes as entirely unlikely that Lucas did not know that he, himself, as a field machinist, on many occa-

sions, had performed the removal and reinstallation work.⁴¹ This, together with the fact that an argument was in progress, heightens the likelihood that Lucas was more interested in putting down Krupp and his craft, than providing a precise accounting of the facts on which the executive board acted.

There is also the possibility that Krupp might have misunderstood, ignored, or forgotten any statement by Lucas that the field mechanics entitlement was predicated on their involvement in removal/reinstallation operations. Krupp's mind set would have robbed such an explanation any meaning and significance. Thus, his testimony, and other aspects of this overall proceeding, made it apparent that Krupp, like counsel for the General Counsel, held firm to the view that only those engaged in actual modification work were eligible. For that reason, well before April 20, it was his opinion that field machinists were not involved in this work and should have been excluded from the settlement.⁴² From this perspective, any comment Lucas might have made regarding the work historically performed by the field machinists would have been beside the point, entitled to no weight, and, as such, would lack priority in the process of storing memorable details. Moreover, the human condition often will impel a dissenting party to exalt one's own position by recalling and knocking down the weakest of the adversary's arguments when seeking aid and comfort from third parties.

These observations may or may not be true. They merely serve to demonstrate that Krupp's account is too slender a reed to force an inference at odds with direct testimony by Whitely, Epps, and Patterson—itsself bolstered by the equities stemming from undeniable evidence that all four crafts lost work in consequence of the Employer's contracting out of the monomer modifications.⁴³ Accordingly, the General Counsel has not proven by a preponderance of the evidence that the Respondent violated Section 8(b)(1)(A) of the Act by allowing, and failing to reconsider, participation by field machinists in the proceeds of negotiated grievance settlement.

⁴¹ Indeed, Maintenance Supervisor Aubrey Sculthorpe acknowledged that from Lucas' experience as a field representative and a shop steward he would have known this to be the case. Moreover, George Vlkovan, a witness called by the General Counsel to corroborate Krupp and Corbett, testified that he had either removed or installed a monomer ring on about 1500 occasions.

⁴² The following unresponsive exchange with counsel for the General Counsel was indicative of just what in Krupp's mind was the appropriate yardstick for participation in the settlement:

MS. HARRIS: Did Mr. Whitely tell you that the field machinists were included because they had installed or removed monomer rings?

MR. KRUPP: No. They had nothing to do with modification of the monomer rings.

⁴³ The General Counsel also contends that a violation is substantiated on evidence that Lucas inspired the Respondent to include the field machinists to vindicate his personal animus against nonmembers, or to secure his political position by favoring the field machinists, a far larger group than the other three crafts combined. Both contentions ascribed a union-based motivation to the Respondent, and since raising an 8(b)(2) issue are discussed below. In passing, however, it is noted that I have considered and rejected any view that the verity of the union officials was contradicted by the fact that of the four classifications, the field machinists harbored the greatest number of union members, or by alleged comments suggesting that Lucas resented nonmembers.

³⁹ I have no doubt that the nozzles played a part in the Respondent's deliberations. Whitely confirmed as much, testifying that, before the executive board, there was some discussion about the drilling of holes. He insists, however, that the decision ultimately was predicated traditional work performed by field machinists.

⁴⁰ R. Exh. 4.

c. Other unalleged theories

At page 30 of her posthearing brief, counsel the General Counsel for the the first time, offers two theoretical grounds for finding a breach of the duty of fair representation each of which is materially different from that particularized in the amended complaint. As pled, the sole factual predicate for the alleged breach of the duty of fair representation was inclusion of the field machinists in the arbitral proceeds. In her brief, counsel for the General Counsel requested findings that the “Respondent . . . has breached its duty of fair representation to Krupp by advancing a false basis for the inclusion of field machinists and by failing to meet with Krupp and address his concerns about the propriety of including field machinists in the settlement.”

It was my distinct impression that the facts on which each rests was known or should have been within the General Counsel’s knowledge prior to the instant hearing. The failure to incorporate them in the pleading is understandable only in terms of the permissive atmosphere in which redress is allowed for unalleged unfair labor practices. In due respect, this policy—itself alien to the due-process concept of “prior notice”—has produced a deterioration in the reliability of complaints as the guidepost for litigation, and, if not an inducement to “sandbagging,” it offers a convenient excuse for the failure to expend time and judgment to assure that the complaint is consistent with investigatory disclosures, while identifying the unlawful conduct for which the party charged is brought to bar.

In any event, if it is possible to describe these issues as litigated, one can assume that they would have been treated more elaborately by the Respondent had they been alleged. Neither was referred to in the latter’s posthearing brief. Indeed, the General Counsel does not bother to articulate just how either produced detrimental consequences, nor is authority cited that would warrant a violation in absence thereof. It is concluded that these matters were not the subject of adversarial concern to an extent that would obviate the need for formal notice, and both grounds are rejected.

2. The unalleged 8(b)(2) violation

In her posthearing brief, the General Counsel contends that the Respondent violated the Act “by arbitrarily and invidiously interjecting a large group of employees not contemplated by the grievance settlement based upon their union membership status.”⁴⁴ The wrongful, union related motivation is attributed to Lucas, and hence is a theory that assumes that the executive board was merely an instrumentality in efforts by Lucas either to vindicate a personal animus against nonmembers or to secure his personal political position by favoring the field machinists, a far larger group than the other three crafts combined. As indicated, this contention and facts on which it is premised does not shake my belief

⁴⁴ Obviously, this assumes that the Union “caused” the employer to discriminate on membership grounds, and to that extent a classic violation of Sec. 8(b)(2) is involved. At the hearing, the General Counsel amended the paragraph of the complaint that defined the unlawful conduct; yet, there was no attempt to add an 8(b)(2) allegation, or to supplement the motivation specifically set forth in the amendment by a specific reference to “membership status.” Here, however, the issue was briefed by the Respondent, thus, making it difficult to conclude that the matter was not “fully litigated.”

of Whitely, Epps, and Patterson, nor do they deflect my finding that the field machinists, like the sheet metal workers, welders, and shop mechanics, were included because they lost work. Nevertheless, it is necessary to comment on the evidence cited by the General Counsel in this respect.

Concerning any motivation to curry favor among union members, there was no specific evidence that Lucas, or any other incumbent union official was concerned with their political efficacy or held any proclivity to discriminate to further his or her standing in the eyes of the membership. In pursuit of any inference that this was the case, the General Counsel is relegated to a statistical argument based on the fact that the field machinists were the larger complement, with payments made to 83, while 8 shop machinists, 10 welders and 6 sheet metal mechanics were included.⁴⁵ These numbers, however, do not translate into either a presumption of illegality, or a notion that the dominant group is never entitled to favorable, nondiscriminatory action. The statistics alone do not alter my firm conclusion, on this record, that the eligibility of the field mechanics for compensation was rooted in rational, nondiscriminatory considerations.⁴⁶

The General Counsel does point to at least one conversation suggesting that the Respondent held a general hostility toward nonmembers. In this latter respect, Clyde Hamlet testified that after the award was rendered, but before he received payment, he had a conversation with Davey Walton. Hamlet, a union member, related that Walton said that while he was not speaking for the Union it was his opinion that nonmembers should not receive a payout from the grievance settlement. Hamlet testified that Walton presently is a steward, but he did not know whether Walton held that post at the time of their conversation. The General Counsel has failed to establish a reasonable predicate for imputing Walton’s remark to the Respondent.⁴⁷

In her final contention, the General Counsel seems to shift the focus from class discrimination to discrimination against an individual. It will be recalled that Cornett testified that on April 23, Lucas requested that Cornett not assist Krupp because he was a “scab,” who was “trying to cause some trouble.” The General Counsel argues that because Lucas referred to Krupp’s membership status, Lucas relied on this factor “in the disposition of the grievance.” This view, how-

⁴⁵ The General Counsel observes that the field machinists “had a higher concentration of union members as compared with the low percentage of Union membership among the 3 other classifications.” This observation is not entirely accurate. Of the 83 field machinists that shared in the proceeds, 36 or 43 percent were union members in April 1990. Of the welders, 60 percent were members at that time.

⁴⁶ The extent of their participation, on the other hand, would offer a fertile area for scrutiny. However, the General Counsel conceded away any challenge to the appropriateness of the distribution formula which was offered by the Union, and ultimately adopted. This formula enabled 83 field machinists, who had a smaller proportion of the work lost, to share the proceeds equally with 23 other maintenance department employees. Yet, as matters stand, these facial inequities have been removed from consideration. Thus, the large number of union members that shared in the proceeds was a function of the number of field machinists on the rolls, and merely incidental to their rightful compensation for the detriment they sustained.

⁴⁷ The complaint neither includes an 8(b)(1)(A) allegation based on this remark, nor names Walton as among those identified as agents of the Respondent.

ever, would seem more fitting to an allegation that Krupp individually was victimized by discrimination, than to an explanation for union conduct addressed to 24 employees (including union members) in three entire classifications.

On the entire record in this proceeding, and for the reasons set forth above, it is inconceivable that Lucas and others on the executive board were unaware that the Employer's violation of the contract impacted with respect to both the modification work and the essential preliminary/postliminary work performed by the field machinists. I conclude that the Respondent acted on this ground, that a preponderance of the evidence does not suggest otherwise, and that even if membership distinctions did not exist as between the crafts, the disposition would have been the same. See *Wright Line*, 251 NLRB 1083 (1980). Accordingly, the complaint shall be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent did not violate Section 8(b)(1)(A) of the Act by including field machinists in the proceeds of a grievance settlement, and by refusing thereafter to reverse that decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

IT IS ORDERED that the complaint is dismissed in its entirety.

⁴⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.