

Saint Luke's Hospital and Anthony Yates and Thomas Blythewood. Cases 8-CA-23302, 8-CA-23524, 8-CA-23637, 8-CA-23685, and 8-CA-24126

September 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issues presented in this case are whether employee Anthony Yates was disciplined and discharged in violation of Section 8(a)(3), (4), and (1) of the Act and whether the Respondent threatened Yates because of his grievance-filing activity in violation of Section 8(a)(1) of the Act.¹

The National Labor Relations 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 conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Saint Luke's Hospital, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ On March 24, 1993, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief.

² No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by issuing warning notices to Anthony Yates on September 11, 1990, and February 7, 1991, because of his union or protected concerted activities and by issuing a disciplinary memorandum to Thomas Blythewood on October 10, 1991, and by suspending Blythewood for a period of 3 days on October 14, 1991, because of his union or protected concerted activities and that the Respondent violated Sec. 8(a)(1) by threatening Blythewood with discharge because he filed a grievance.

The General Counsel and the Respondent have 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Catherine A. Modic, Esq., for the General Counsel.
Joseph A. Rotolo, Esq., of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me on August 31 and September 1-2, 1992, in Cleve-

land, Ohio. The case was initiated by charges that were filed by Anthony Yates and Thomas Blythewood, as individuals, against Saint Luke's Hospital (the Respondent).¹ On those charges, General Counsel issued a series of complaints, the last of which is a consolidated complaint dated February 28, 1992 (the complaint). Respondent duly filed answers admitting that this matter is properly before the National Labor Relations Board (the Board), but denying the commission of any unfair labor practices.

As the answer admits, Respondent is a corporate health care institution located at Cleveland, Ohio, where it provides inpatient and outpatient professional medical care services. The answer further admits that, in the course and conduct of those business operations, Respondent annually derives gross revenues in excess of \$250,000, and it annually purchases and receives at its facility, directly from suppliers located at points outside Ohio, products, goods, and materials valued in excess of \$50,000. On these admissions, I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As the answers further admit, I find and conclude that International Union of Operating Engineers, AFL-CIO, Local 589 (the Union) is a labor organization under Section 2(5) of the Act.

There are approximately 2100 employees employed at Respondent's hospital; the 25 employees of the maintenance department are represented by the Union. Respondent and the Union are parties to a collective-bargaining agreement that has grievance-and-arbitration provisions. Charging Party Yates was, and Charging Party Blythewood still is, employed in Respondent's maintenance department.

The complaint alleges that, in violation of Section 8(a)(3) and (4), Yates and Blythewood received warning notices and suspensions and, in the case of Yates, discharge, because of their grievance-filing activities and because of their filing unfair labor practice charges under the Act. The complaint further alleges that, in violation of Section 8(a)(1), agents of Respondent threatened employees (meaning Yates and Blythewood) because of their protected concerted activities, and that those agents also promised an employee (Blythewood) benefits to forgo exercise of his Section 7 rights.

Respondent denies that the alleged 8(a)(1) conduct occurred. Respondent also contends that the warning notices and suspensions and Yates' discharge were caused solely by the misconduct of the two employees.

I. FACTS

Persons admitted to be Respondent's supervisors, within Section 2(11) of the Act, are:

James Amie, plant engineer
Roland Burke, maintenance department assistant director
Jacqueline Forrestall, labor relations vice president
Joseph Kajder, foreman
Edward May, institutional services vice president

¹ Yates filed the charges in Cases 8-CA-23302, 8-CA-23524, 8-CA-23637, and 8-CA-23685, on December 26, 1990, and April 5, May 21, and June 17, 1991, respectively. Blythewood filed the charge in Case 8-CA-24126 on November 26, 1991.

Kenneth McGraw, maintenance department director (until December 1990)
 Govind Thakkar, maintenance department director (since February 27, 1991)
 Robert Wachtl, maintenance department assistant director

- Insubordination
- Uniform Regulations/Grooming
- Unethical Actions
- Other (specify)_____

Yates' case (as I shall call the set of facts surrounding his discipline and discharge) involves two instances of alleged violations of established attendance policy. Attached to the current collective-bargaining agreement is an Appendix D which is introduced by a statement that:

The following offenses and statements on absenteeism and tardiness are here listed for the convenience of the employees, are not part of the collective-bargaining agreement, and do not preclude the Hospital from establishing other rules.²

In a section entitled "Attendance," Appendix D states:

Notice of Absence

At least one hour before scheduled starting time on each day of absence, an employee finding it impossible to report for duty at the assigned time must so inform their supervisor or department by telephone or message.

Tardiness

The procedure for informing the supervisor or department head of expected tardiness is the same as in the case of an absence.

Both Yates' case and Blythewood's case involve the issuance of warning notices. In a section entitled "Warnings," Appendix D of the collective-bargaining agreement states that warnings may not necessarily be given before the ultimate penalty of discharge, and whether warnings will be given depends on the circumstances "as determined solely by the Hospital."

Respondent utilizes forms entitled "Saint Luke's Hospital—Record of Warning or Disciplinary Action." On each form there is a box entitled "Action"; it includes (with indicated blanks for checkmarks and required information):

- Counseling only
- Warnings—# 1, 2, 3 [one to be circled]
- Other (specify)_____
- Suspension: (length)_____
- Layoff; termination
- Other action (specify)_____

Then follow spaces for "Date of Incident" and "Date of Conference." Then, under "Reason for Discipline":

- Absenteeism
- Tardiness
- Unsatisfactory Job Performance
- Uncooperative Attitude
- Discourtesy
- Failure to Follow Instructions

²Where I have found it appropriate and possible, rather than using "(sic)," I have entered, without notation, some minor grammatical corrections of exhibits and testimony. Also, punctuation is supplied for some quotations of transcript (mostly where one witness is quoting himself or others).

Then follow spaces for "Short Factual Explanation of Above Incident." After those spaces follow other spaces for the supervisor's and employee's signatures.

A. Yates' Case

At the time of his discharge on June 10, 1991, Anthony Yates had been employed by Respondent as an incinerator operator for 12-1/2 years. During his first 10 years of his employment, Yates filed eight grievances. In his 11th year of employment, Yates filed some 47 grievances. At some point during September 10, 1990, Yates became an assistant steward for the Union. September 11, 1990, is the date of the first alleged discrimination against Yates because of his grievance-filing activity.

As an incinerator operator, Yates reported directly to Joe Kajder.³ Kajder reported to Wachtl; Wachtl reported directly to Kenneth McGraw until McGraw left Respondent's employ in December 1990. McGraw was succeeded on February 27, 1991, by Govind Thakkar. Between McGraw's leaving and Thakkar's arrival, Institutional Services Vice President Edward May also served as director of the maintenance department.

The complaint alleges that: (1) on September 11, 1990, Yates was issued a written warning notice in violation of Section 8(a)(3); (2) on February 7, 1991, Yates was issued a second written warning notice in violation of Section 8(a)(3) and (4); (3) on May 20, 1991, Yates was threatened by Wachtl in violation of Section 8(a)(1), and on May 21 Yates was given a third written warning notice and a 3-day suspension in violation of Section 8(a)(3) and (4); and (4) on June 10, 1991, Yates was discharged in violation of Section 8(a)(3) and (4).

- 1. September 11, 1990; first warning notice; smoking and covering interior windows

The incinerator operators have the use of an office on a mezzanine in Respondent's building. The office is air-conditioned, and the operators use it for escape from the incinerator's heat. When doing so, the operators can continue to monitor the incinerator through two windows, one in the door and one on the side of the office.

On August 30, 1990, then Maintenance Department Supervisor McGraw issued to the incinerator operators a memorandum stating that he had observed some items that had blocked the interior windows of the incinerator operators' office and:

From a safety standpoint it is essential that these windows present a view of the mezzanine area. Please be advised that effective immediately any materials blocking these windows will be removed and not replaced.

On September 10, Yates worked the 7 a.m. to 3:10 p.m. shift. The first event in question was about 8 a.m. At that

³Kajder was classified as a "general foreman," but there were no foremen subordinate to him at the time of these events.

time, as Yates admits, the view from the incinerator operators' office windows was blocked by a bulletin board and a locker that had been placed before them and memoranda that were on the windows (apparently taped there). Yates testified that, around 8 to 8:30 a.m., he and Plant Engineer James Amie and painter Herman Robinson was in the incinerator operators' office, with the door closed, when May knocked on the door. According to Yates, May first said that he smelled cigarette smoke and May

asked "was I smoking?" He asked me, were those my cigarettes on the table? I told him yes, they were my cigarettes.

Amie and Robinson excused themselves. May then said what he had seen was visible chimney smoke from outside the building. (There should have been no smoke, or at least no visible smoke, because of pollution control devices on the incinerator, as discussed infra.) Amie asked Yates if he knew why there was chimney smoke; Yates did not.

Yates then testified that May commented about the windows of the incinerator operators' office being blocked. Yates testified that May said he wanted the lockers, the memoranda, and the bulletin board away from the windows by the end of the day. (Yates testified that the items were removed by the end of the day, and this is not disputed.)

Further according to Yates, May and Yates then went to check the furnace controls in an effort to determine the cause of the chimney smoke. As they were checking a newer set of controls, May asked if Yates had had an "in-service" or training class on those particular controls. Yates replied that he did not need an in-service because he had been working that control panel for a year. May asked assistant maintenance department director Burke to join them; Yates then stated that he wanted union representation. May and Burke walked away.

On cross-examination, Yates admitted that smoking is not permitted in the hospital except in designated areas, and that the incinerator operators' office is not a designated smoking area. Yates further admitted receiving McGraw's August 30 memorandum that is quoted above.

At some point on September 10, Yates filed grievances over May's mention of the in-service and May's instruction to clear the windows of the incinerator operators' office. On the grievance over May's mention of an in-service, Yates wrote:

Nature of grievance

Harassment—Ed May tried to intimidate me [Anthony Yates] because of my new position as alternate Union steward and because I filed complaints w/O.S.H.A. and various agencies. Mr. May then drilled me on the new equipment. Asked did I know how to read the panel board.⁴

Robinson and Amie were called as witnesses for General Counsel. (Supervisor Amie was called under Rule 611(c).) Both Robinson and Amie testified that on September 10 they, together, met May shortly after they left the company of Yates and May in the incinerators' office. According to

⁴Yates testified that "alternate steward" and "assistant steward" are equivalent terms.

both, May told them that he had smelled cigarette smoke in the incinerator operators' office but that he was going to do nothing about it.

On September 11, Burke issued a warning notice to Yates that May had drafted. September 11 is listed as the date of a conference and September 10 as the date of the subject incident. The warning notice indicates that it was Yates' first warning and that it was for insubordination, uncooperative attitude, and failure to follow instructions. As the factual explanation, the warning notice recites:

Failure to follow previous instructions to remove window covering from incinerator operator's office windows. Smoking or allowing smoking to occur in the incinerator operator's office.

These observations were made by Ed May on Sept. 10, 1990 at approximately 8:45 A.M.

May testified that on the morning of September 10, as he came to work, he noticed black smoke pouring from a chimney. According to May:

So I went down to the incinerator room to the mezzanine area to find out what was happening. When I went down I didn't see anybody in the mezzanine area attending the incinerator. And I went over to a small office area. And the door was locked, and the windows were all blocked over. I knocked on the door, and the door was ultimately opened. And Tony Yates and Herman Robinson and James Amie were in the room. I asked Tony Yates who was the incinerator operator, if he knew what was occurring with the incinerator—that it was smoking and just billowing black smoke. And he said, no, he didn't know what was happening. And concurrently with that as I was in the office I noticed that there was a pack of cigarettes and an ashtray filled with cigarette butts, and the room just reeked of smoke. And I, maybe concurrently with that, said, "And what are you guys doing in here? Are you smoking?" And I said, "There's somebody's cigarettes on the table; who belongs to those [sic]?"

And Tony said, "I belong to them [sic], but I wasn't smoking," or something like that. . . . I believe he said he was not smoking.

May denied that he had any knowledge that Amie or Robinson was smoking.

Further, according to May

After I left the area I went back to the maintenance office and I wrote the discipline—the warning.

May was asked on direct examination, and he testified:

Q. Where did you get the disciplinary action form? Did you ask somebody for it or did you go and get it yourself?

A. No, I went back to the maintenance offices. And the secretary had it in the files.

May was also asked on direct examination:

Q. Is there a reason why you dated the date of conference September 11, 1990?

A. He had left for the day.

Q. On September 10th?

A. Yes. So the soonest we could do the conference was the next day. So I dated it the next day and gave it to Roland and said when he comes in the next day, you sit down with him and you do the discipline.

May denied knowledge of Yates' September 10 grievances when he decided to discipline Yates.

Regarding what he had said to Amie and Robinson after he left the Company of Yates on September 10, May was asked, and he testified:

Q. What did you say to them [Robinson and Amie] as opposed to characterizing it? Can you recall what you said to them?

A. I said that I'm really not going to do anything regarding the incident that occurred. And that I didn't see them smoking or didn't have any knowledge that they were doing anything there. And that was about it; it was a very brief conversation.

Burke, who had retired from Respondent's employ by the time of the hearing, testified that he issued the warning notice to Yates on September 11, after May presented him on September 10, "after 3:00 or 3:30 in the afternoon—someplace in that area." Burke acknowledged that, around noon on September 10, Yates attempted to file two grievances with him. However, before that, according to Burke, May had told him that he intended to give Yates a warning notice for smoking in the incinerator operators' office. Burke was asked specifically when May had said such; Burke replied, "[i]t was in the early part of the morning. I mean, we started about 8:00, so it had to be somewhere between 8:00, 9:00—someplace in there."

General Counsel introduced, as evidence of discriminatory treatment of Yates, testimony by Blythewood that, on the Saturday before he testified (on a Wednesday), the windows of the incinerator operators' office looked like:

You got documents going across concerning the scrubber and the incinerators—document [sic] concerning, it'd be the testing of the equipment and certification papers. You also have some papers that I guess Bob Wachtl put up on the window, concerning when the EPA was coming out to inspect it, and how much trash we was supposed to have and—letters that have me and Govind and everybody's name on it. So I guess everybody is supposed to have a copy of that paper.

On cross-examination, Blythewood acknowledged that, by his description of the windows, "I'm not saying completely blocked."

Credibility Resolutions

On October 10, when May came to the incinerators' office, the windows were blocked and Yates was allowing smoking in that office, and there is no factual issue to that extent. Also there is no question that May told Amie and Robinson that he had smelled cigarette smoke, but that he was not going to do anything about "the incident" (May's testimony).

However, May also testified that he qualified his statement to Amie and Robinson by saying that he was not going to

do anything about the incident, because "I didn't see them smoking or didn't have any knowledge that they were doing anything there." This testimony was undoubtedly false. If there had been any truth to it, Supervisor Amie would have been given full opportunity to include it when he testified for Respondent. I find that May did not qualify his statement to Amie and Robinson to say that he was not going to do anything about whatever they, and only they, had been doing in the incinerators' operators office.

The only remaining relevant conflict is between two of Respondent's witnesses, May and Burke. May testified that, "After I left the area I went back to the maintenance office and I wrote the discipline—the warning." That would necessarily been between 8 and 9 p.m. However, Burke testified that during that hour May said he was going to write up Yates.

Although he has retired and does not have the usual reasons for lying, I simply cannot credit Burke. If there had been any truth to that testimony, May would have come up with the same, or at least similar, testimony. Instead, May gave testimony that would permit only the conclusion that he went straight to the maintenance department office and wrote out the warning notice at that point; he did not go there, or anywhere else, and announce that he intended to write it out at some later time.

(May did see Burke early in the day. As Yates testified, May called Burke over as May was mentioning the in-service. May and Burke left the presence of Yates when Yates asked for a steward. May could then have said to Burke that he was going to discipline Yates, but he did not. Again, May would have so testified. Moreover, the point at which May asked Burke to join him and Yates was necessarily before May told Amie and Robinson that he was going to do nothing about "the incident.")

Accordingly, I discredit Burke's testimony that May said, early on September 10, 1990, that he intended to discipline Yates. Nor do I believe May's testimony that he went straight to the maintenance department office and wrote out the warning notice. If he had done that, there were still 6 hours left in Yates' workday to get the warning notice delivered. The suggestion that Yates had already left for the day was, necessarily, false.

I find that the warning notice that was issued to Yates on September 11 was composed on September 11 or, at least, at some point after Yates filed grievance with Burke about noon on September 10.⁵

2. February 7, 1991; second warning notice; not calling in absence or tardiness

Yates received a second written warning notice on February 7, 1991.⁶ The complaint alleges that issuance of the warning notice constituted a violation of Section 8(a)(4) and another violation of Section 8(a)(3). General Counsel's theory on the former allegation is that it was issued because, on February 1, the Respondent received the first complaint issued herein. The 8(a)(3) allegation is generally based on Yates' grievance-filing activities.

⁵In evasive, and incredible, testimony, Burke hinted that he did not read the grievances; I find that he did.

⁶All subsequent dates are in 1991 unless otherwise indicated.

Yates testified that on February 4, he asked May for permission to take two emergency vacation days to attend to his sick wife. May agreed. Yates testified that he called the office on February 6; he asked for May, but May was not available; he told the office clerical employee who answered the telephone "to let Mr. May know that I was taking another vacation time." Yates testified that he made this February 6 call, even though he had been granted 2 days off (February 5 and 6) because "I did not know what day he thought it was, so, to cover myself, I called in another day."

Yates acknowledged that he was due at work at 7 a.m. on February 7. Yates testified that "I had a rough night with my wife, and I overslept" on February 7. May called Yates' home shortly after 7 a.m. and asked Yates if he intended to come to work. Yates responded that, "I would like to have another vacation day off." May told Yates that he was needed at work. Yates testified that he responded to May that "let me talk with my wife and see if it would be okay." When asked on direct examination what he did next, Yates replied, "Talked with my wife—and by 10 o'clock, I was there."

Yates further testified that, after he got to work on February 7, he was approached by May who handed him the following second warning notice. It is checked at "Absenteeism" and "Failure to Follow Instructions." As the factual explanation, May wrote:

On 2/4/91 Tony Yates asked if he could have an emergency leave of 2 days on 2/4 & 2/5 because of personal reasons. He indicated that he would return the morning of 2/6. On the morning of 2/6 Tony called in & said that he needed another vacation day & would return to work on 2/7. At approximately 9:00 AM on 2/7 I called Tony Yates at his home & questioned why he didn't report for work or call in to report his absence. He had no acceptable explanation other than he needed another day off. Tony did report to work at approximately 10:00 AM on 2/7.

Yates testified, "I tried to explain myself—that I wasn't absent but tardy." Yates further testified that, a few days later, he made the same argument in a third-step grievance meeting, with May and Labor Relations Vice President Forrestall present, but to no avail.

May testified that on or before February 4 (while he was serving as acting director of the maintenance department, as well as vice president of institutional services), Yates asked for February 4 and 5 off. He further agreed that, on February 6, Yates called the office, but he testified that it was he who spoke to Yates. Yates asked permission to be off a third day.

And I . . . said "Hey, it's really difficult now and you've got to be back the next day." He said, "fine," he would be coming into work the next morning.

May further testified that on the morning of February 7, he went to the incinerator area and saw a backup. He asked where Yates was, but no one knew. He called Yates' home; Yates asked for another day off. He agrees that Yates appeared about 10 a.m.

May did not dispute Yates' testimony that, when presented with the warning notice, and at a subsequent grievance meeting, Yates argued that he was merely tardy, not absent.

General Counsel contends that discriminatory motive is demonstrated because Yates was only tardy, not absent, on February 7. General Counsel also placed in evidence a portion of a personnel manual. It states that an employee guilty of "a combination of 3 unexcused absence days in a 3-month period may be discharged." The manual further provides that five instances of unexcused tardiness in a 3-month period "shall be deemed grounds for discharge."

On cross-examination, Yates acknowledged that he did not call in on February 7, and he acknowledged being aware of the requirement of calling in beforehand when an absence or tardiness is expected.

As evidence of discriminatory treatment of Yates, for this and a subsequent occurrence (that of June 6, as discussed infra), General Counsel further points to the record of maintenance department employee Dan May, Edward May's son. On March 7, 1987, Kajder issued to Dan May a first warning; "Tardiness" is marked; the explanation was that Dan May was scheduled to be at work at 4 p.m., and that he had not appeared by 4:35 p.m. on that date. On October 19, 1987, Edward May issued to Dan May a warning notice marked "Counseling"; "Absenteeism" is checked. As the explanation, Edward May wrote: "Excessive absenteeism 8 occurrences of absence—9 total sick days." On September 30, 1988, McGraw gave May a second warning for a 1-day absence. On November 5, 1988, McGraw suspended May for 3 days because he was absent on the preceding Saturday without calling in properly; McGraw noted that May had done the same thing the Saturday previous to that; McGraw recited that May was being warned that further infractions could result in discharge. On September 19, 1990, McGraw gave Dan May another 3-day suspension and a "final" warning for having taken 16 days of sick leave since the first of the year.

Credibility Resolutions

The testimony of Yates conflicts with the warning notice's stated explanation, and the testimony of May, in two respects. (1) Yates' version is that, on February 4 he was asked for February 5 and 6 off; May's version is that Yates had asked for February 4 and 5 off. (2) Yates testified that he spoke only to an office clerical on February 6; May testified that it was he who spoke to Yates on February 6, and at the time, he emphasized to Yates that Yates must be present on February 7.

I do not believe that Yates called in on February 6 simply to confirm that he would be off for a second day. I believe that the purpose of the February 6 telephone call was, as he originally testified, "to let Mr. May know that I was taking another vacation time." I believe that the confirmation call to a clerical did not occur. I believe, and find, that Yates spoke to May on February 6, that Yates asked May for a third day off, and that May granted the request with the admonition about coming in on February 7, as May described. Then, on February 7, Yates simply overslept, despite the admonition by May. (However, under either version, May did give Yates permission to be absent on February 6.)

3. May 21, 1991; third warning notice and suspension; excess overtime and early reporting; alleged threat by Wachtl

As noted, the complaint alleges that Yates was threatened in violation of Section 8(a)(1) on May 20; it further alleges that he was issued a warning notice and 3-day suspension, in violation of Section 8(a)(3) and (4), on May 21.

The 8(a)(4) allegation is based, in part, on timing; the charge in Case 8-CA-23524⁷ was amended by Yates on May 20,⁸ and Yates was issued a third warning and suspension on May 21. General Counsel predicates a causal relationship on the representation that the amended charge “was served upon the Respondent on May 20, 1991.”⁹ General Counsel needs a finding in this regard because, by a telephone call to his home on the evening of May 20, Yates was notified of impending discipline, as discussed infra.

Although the return receipts were attached to other charges and complaints, counsel for the General Counsel did not attach the return receipt to the amended charge in Case 8-CA-23524 when she submitted the formal documents for this case. There being no evidence that same-day, actual, service was accomplished by mail, and no evidence that the charge was otherwise served on Respondent on May 20, I find that the earliest that Respondent could have received the amended charge was May 21. Accordingly, I shall not consider this “timing” contention further.

On February 22 all hospital employees were issued a memorandum stating:

please pay attention to the following timecard/payroll items when filling in your time cards

All overtime must be approved by a supervisor prior¹⁰ to working the hours.

[Six paragraphs on filling out timecards follow.]

On May 3, Wachtl issued to Yates a memorandum stating:

Schedule Change:

Effective May 12, 1991 your new duty hours are Sunday through Thursday, 5:00 a.m. to 1:10 p.m.

Yates admits having received both of these memoranda. Prior to May 12, Yates’ hours were 7 a.m. to 3:10 p.m., Mondays through Thursdays, and Saturdays; he had Fridays and Sundays off.¹¹

The furnace operator has two cleaning functions in issue here. The furnace itself has to be cleaned; and the furnace has a “scrubber,” a pollution-control mechanism, that has spray nozzles that are cleaned in a separate operation. The furnace is cleaned on the day after a day that it is not used; before May 12, it was not used on Sundays, one of Yates’ days off.

⁷That charge was filed on April 5; it alleged that Yates’ February 7 warning notice violated Sec. 8(a)(3).

⁸The amendment added an allegation that Yates’ February 7 warning notice also violated Sec. 8(a)(4).

⁹Br. 14. Contrast this language with that at Br. 12, where counsel cites the date that the complaint in Case 8-CA-23302 “was received” by Respondent.

¹⁰Emphasis in original.

¹¹See R. Exh. 39-5.

Yates testified that prior to May 12 he performed the cleaning of the incinerator on Mondays, on overtime, and he performed the cleaning of the scrubber’s spray nozzles on Tuesdays, also on overtime. Yates further testified that both tasks were done in the mornings, before his regular shift, because the trash-loading which he was required to do took 8 hours each day; he would take 2 to 4 hours, all on overtime, to do each cleaning task. By May 12, according to Yates, this practice had been in effect for 12 years, in the case of the furnace, and 1 year, in the case of the scrubber. Specifically, this practice continued between February 22 (when employees were notified that they had to have prior approval for each overtime assignment) and May 12. Yates testified that he was not told to clean the incinerator and scrubber during regular time, only, when his schedule changed on May 12. However, Yates did acknowledge on cross-examination that his pretrial affidavit admits that, after the February 12 memorandum was issued he told Wachtl before he worked any overtime. I find this admission to be the fact.¹²

On direct examination, Yates was asked, and he testified:

Q. [W]hen your schedule [changed on May 12], when did you perform the functions that you described previously, concerning the weekly clean out and the scrubber nozzles?

A. It changed, since there was [then] no burning on Saturdays, the incinerator was at its coldest point on Sunday, so I decided to make Sunday my clean out days of the incinerator. And Monday would be the clean out day . . . of the spray nozzles [of the scrubber].

It is undisputed that Yates did not discuss his decision with anyone in supervision.

(At trial, no question was raised about how Sunday, May 12, was handled, and there is no evidence of which 8 hours Yates worked on that date. Probably the lack of dispute is because the furnace was operated on Saturday, May 11 (under the prior schedule), and it therefore could not be cleaned on the next day. If so, on May 12, Yates would have worked hours that created no issue because he did not clean the furnace on that date).

In early May, before the May 12 memorandum was issued, Wachtl and Yates discussed the coming schedules. Yates testified that Wachtl told him that he could work any 8 hours on Sundays that he saw fit, “long as I do eight hours.”

On May 19, Yates arrived at work at 4 a.m. He first cleaned out the incinerator. Then Yates worked until 2 p.m., for a total of 10 hours, or 2 hours of overtime. General Counsel did not ask Yates why he stayed beyond noon.

On Monday, May 20, Yates arrived at work at 1 a.m. At 8 a.m., he was approached by Wachtl. Further according to Yates, Wachtl told him that he had not been authorized to come in at 4 a.m. on Sunday, or 1 a.m. on that morning, and that Yates should leave at 9 a.m. Yates responded to Wachtl, “I always work overtime cleaning out the incinerator and the spray nozzles.”

Yates testified that as he left for the day, he handed Wachtl two grievances. One grievance alleged the failure of Respondent to pay plumber’s wages for his fixing a faucet at some unindicated point in time; the other grievance al-

¹²See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

leged Respondent's use of an independent contractor to do other work at another unindicated point in time. Yates was further asked, and he testified:

Q. And when you saw Bob Wachtl on May 20th, and you handed him these two grievances, what if anything did he say?

A. He told me, "Don't go over my head; you don't know what you're getting into."

Yates testified that he asked Wachtl what he meant, and that Wachtl refused to respond. The complaint alleges that this statement by Wachtl to Yates was a threat in violation of Section 8(a)(1).

(As a date/hour stamp on the form indicates, Yates then went to the Regional Office and filed the amended charge in Case 8-CA-23524, as discussed supra.)

On the evening of May 20, Yates' wife received a telephone call from Respondent's office; the caller stated that Yates should report at 9 a.m. (rather than 5 a.m.) on the next day. When Yates reported as directed, Wachtl and Thakkar presented him with a disciplinary notice. Attached to the notice were the February 22 and May 3 memoranda which are quoted above. The notice indicates that it is a third and "Final" warning notice and that a 3-day suspension was also being imposed. The reason checked was "Failure to Follow Instructions," and the explanation was:

1. On 5/19/91 Mr. Yates worked two (2) hrs. unauthorized overtime. (See [the February 22 memorandum].)

2. On 5/20/91 Mr. Yates punched in at 0057 hrs. He's been notified of his duty hours. (See [the May 3 memorandum].) He had no authorization to come to work early.

Yates testified that Wachtl said, as he presented the notice, that the maintenance functions were supposed to be done during regular hours. Yates testified that "I told him [a second time] that we had been doing this maintenance on the system, since both of their existence, on overtime."

Apparently no supervisors were present when Yates worked on Sunday, May 19, and in the early morning hours of May 20. (If supervisors had been present, and observed Yates, and nothing had been said to him, General Counsel would assuredly have brought out the facts.)

Wachtl testified that Respondent tries to be lenient¹³ about Sunday scheduling. He admitted that he did tell Yates, when his schedule changed to include Sundays, that he could perform his duties during any 8 hours that he chose on Sundays; however, he denied that he granted Yates permission to work more than 8 hours on Sundays, and he denied that he granted Yates permission to appear for work early on any other day of the week.

Wachtl was asked about his alleged statement to Yates after Yates presented grievances as Yates left the premises on May 20:

Q. And then what occurred?

A. When we were finished, Tony had all of his paperwork spread out on the desk in front of me—a lot

of paperwork—and he was just gathering up all the paperwork. He was standing, and he gathered up all the paperwork, and—

Q. Did he say to you anything with regard to why he was gathering up all the paperwork?

A. Well, I was just putting it all together, and I just sort of rocked back in my chair. And I said, "Tony, why are you doing all of this?"

And he looked at me and he said, "Oh, don't take this personal, Bob; I'm just making my case. Someday I'm going to own this hospital."

Q. And what did you say at that point if anything?

A. Again I just looked at him awestruck. And I said, "Tony, all you're going to do is dig yourself a hole you're never going to get out of."

Q. As he left your office—do you recall him leaving your office after that, or did he say something to you in response?

A. No, he just finished gathering up his papers and then asked if he could use the copy machine which was right outside my door. He wanted to make some copies of the things that we had gone through that day.

Q. Do you recall anything that occurred at that point, then?

A. He started making his copies. I went back to doing whatever I was doing, and he stuck his head back in the door. And I remember he said, "Bob, just what did you mean by that statement?"

And in being preoccupied or whatever, I said just [said], "Tony, take it however you want to take it. I can't tell you; just take it however you want to take it."

Wachtl further gave an extremely long narration to describe what he was thinking about when he told Yates that he was digging "a hole you're never going to get out of."

Wachtl did not deny that, between February 22 and May 12, Yates worked Mondays and Tuesdays, on overtime, to clean out the furnace and scrubbers.

On redirect examination, Wachtl was asked, and he testified:

Q. When you informed Mr. Yates that you had not authorized the overtime on Sunday the 19th, did you have a particular time in mind when you expected him to clean out the incinerator and the spray nozzles?

A. He was told he would clean them out during his routine eight-hour shift.

Credibility Resolutions

I do not believe Wachtl's testimony that, at some point, Yates "was told he would clean them out during his routine eight-hour shift." If that had been the truth, Wachtl would have mentioned the fact when Yates twice protested that he had "always" cleaned out the furnaces on overtime; he did not. Also this testimony was offered only on redirect examination, in response to a question about what he "in mind" about when Yates should do the cleaning. That is, it came late in the testimony, as an afterthought; it was not responsive to the question before him; and Wachtl suspiciously indulged in the passive voice to make the point (rather than

¹³Tr. 349, L. 22, is corrected to change "lean" to "lenient."

saying who told Yates thus). I believe, and find, that the cleaning of the incinerator and scrubber, on overtime or otherwise, was not mentioned when Wachtl told Yates about the coming change in schedule.

Regarding the alleged threat, although Wachtl was asked to respond to what Yates had said in his grievance over his discipline of May 21, he was not asked to respond to what Yates had said at trial. What Yates had testified to at trial was the imperative by Wachtl: "Don't go over my head; you don't know what you're getting into." This statement, which is the one in issue before me, is not denied. To the extent Wachtl's testimony can be construed to constitute a denial, I discredit it. I believe, and find, that both statements were made: Wachtl told Yates that he should not go over Wachtl's head because he did not know what he was getting into; I further believe, and find, that Wachtl asked Yates why he was doing what he was doing (filing many grievances), and Wachtl told Yates "all you're going to do is dig yourself a hole you're never going to get out of."

There is another matter that requires no credibility resolution. Respondent produced no records that would have disproved Yates' claim that he worked, and was paid for, overtime on Mondays and Tuesdays for at least a year, including specifically the period between February 22 (when the prior overtime approval requirement was stated in the Hospital's memorandum of that date) and May 12 (when his schedule changed). If the records (such as Yates' timecards or pay stubs) no longer existed, Respondent would have explained that. If they existed and would have Yates untruthful in this regard, they would have been produced by Respondent. Further, if Yates was untruthful on the point, he would have been contradicted by Wachtl.

(Respondent did have a system to record prior approvals of overtime. By time of trial, those records had been destroyed (innocently, I find). However, Donna M. Wojtowicz, the maintenance department payroll clerk at the time of the events in question, testified that prior supervisory approval was not always required; if an employee claimed overtime on his timecard, and she had not previously received a memorandum from a supervisor that such overtime had been authorized, she went to the supervisor and got the supervisor to initial the request (if the initials were not already on the timecard when the employee submitted it). Respondent did not ask Wachtl (or any other of Yates' supervisors) if, from February 22 through May 12, they had (or had not) subsequently initialed timecards of Yates to give him credit for the Monday-Tuesday overtime work that he described).

Therefore, again, left unchallenged is Yates' testimony that, between February 22 and May 12, he reported early on Mondays and Tuesdays to do incinerator and scrubber cleanings, and he was paid for the overtime. I find this to be the fact.

4. June 10, 1991; discharge; not filling a chemical tank, and not calling in absence

Yates was discharged on June 10. The complaint alleges that the discharge was imposed in violation of Section 8(a)(3) and (4) of the Act. As a theory for the 8(a)(4) allegation, General Counsel also relies, in part, on timing. On May 31 Respondent received an order consolidating cases with an amended consolidated complaint and notice of hearing; that

complaint alleged, and realleged, violations as discussed above.

Respondent contends that Yates was discharged because of his prior misconduct and because, (a) on June 4 Yates failed to follow an order to fill a caustic chemical tank, and (b) on June 6 Yates failed to call in to report that he would be absent for the day.

a. Yates' failure to fill a chemical tank

On the first floor of its building, below the mezzanine level where the incinerator operators' office is located, Respondent maintains a tank that holds a caustic chemical, LB18. The chemical is used in the pollution-control function of the furnaces' scrubber. It was a duty of the incinerator operators to keep the tank adequately filled. If the tank is drained below a certain level, an alarm goes off. The alarm can be silenced for a few minutes, but it will go off again if the tank is not attended to, sort of like a "snooze alarm" clock. However, again like an alarm clock, the alarm can also be turned off so that it will not restart itself, even if the tank has not been refilled.

Yates testified that on June 4, Charging Party Blythewood appeared at the incinerator operators' office to relieve him at 12:40 p.m. (before Yates' 1:10 p.m. quitting time). At 12:45 p.m. Foreman Kajder appeared at the office and said that he had received a message from a clerical in the maintenance office that the alarm on the LB18 tank had sounded. Yates testified that he had not heard the alarm because Bill Perry, a mechanic, had silenced the alarm. (That Perry had done so was acknowledged by Respondent's witnesses.)

Yates testified that Kajder did not tell him to do anything, nor did Kajder write out a work order,¹⁴ but he and Blythewood "ran downstairs and investigated the alarm." Yates was asked, and he testified:

Q. After you went down and looked at the area, saw that the alarm had been silenced, what did you decide to do?

A. Well, after I reset the button, and I saw that [Perry] had shut the pump off—which it has to be purged and all that, which takes time—I decided to replenish the tank the next day.

Q. How long does it take to purge the system?

A. It would take anywhere from a half an hour to an hour; it depends on how lucky you get.

Q. Any particular reason why you determined to do it the next day?

A. It wouldn't hurt. We had been out of LB18 for six to seven days at a time, and for me to work overtime at that time—I just felt I could do it first thing in the morning.

Yates went to the locker room, changed into street clothes, and punched out at his regular quitting time, 1:10 p.m. Yates went back to the maintenance office (not the incinerator operators' office) and met Kajder. Yates told Kajder that Perry should not have silenced the LB18 tank alarm without notifying him. As Yates and Kajder were talking, Thakkar came to the office; Yates was asked, and he testified:

¹⁴That a written work order would have been required before a supervisory order was effective is not argued by General Counsel.

Q. And what, if anything, did Mr. Thakkar say?

A. He asked Joe Kajder—he asked, “What’s going on?” And Joe Kajder told him that he told me to—that I had an alarm system, that the chemical tank was low. And Govind asked Joe Kajder, “Did you tell him . . . to replenish the tank?”

Q. And what did Joe Kajder say in response to that question?

A. I remember—well, I can’t say what he really said.

Yates testified that Thakkar then told him to punch back in and fill the LB18 tank, which Yates did, on overtime; Yates testified (on rebuttal) that it took him an hour to replenish the tank.

General Counsel also called Blythewood to testify about the tank-filling issue. Blythewood testified in accord with Yates that Kajder did not tell Yates to fill the tank, only that an alarm had sounded. Blythewood testified that after he and Yates got to the tank area:

I told . . . Tony [Anthony Yates], “I know you’re not going to work overtime. You just made up for it¹⁵ last week so it’s unauthorized because nobody said ‘work overtime.’”

So [Yates] . . . said he was going to get dressed and going to tell them in the office he was going home.

Blythewood testified that either he or Perry could have filled the tank that time.

Respondent called Thakkar, Burke, Kajder, and Wachtl to testify about the events of June 4.

On direct examination, Thakkar testified:

On June 4, around 12:30 p.m., I had heard Joe Kajder, our maintenance foreman, the manager, and Tony talking to each other as if they were arguing in the entrance of our [maintenance] office area. And there was a talk about caustic alarm going off, and Perry had—Bill Perry, who had silenced the alarm, had informed the office several times that the caustic alarm is going off, and someone should replenish it. And someone meant, the operator should replenish the tank.

Joe Kajder was asking Tony why he didn’t fill the caustic. He was out there to tell him, in his mezzanine office, but why he hasn’t done so, and why is he ready to go home? And I thought this may flare up into something more—argument or something—so I pulled both of them in my office And Tony had indicated that he checked it out, and there was enough—but when the alarm sounds, it’s not enough. I mean, it’s low. That’s why the alarm is provided for, and he should have filled it. Also, there was a pump that needs to be borrowed out of the parts room. That pump was signed out by Tony, with his intention to fill it, in the morning around 10:00 a.m. That pump was signed out by Tony, so he had intended to fill that tank. But somehow, he didn’t.

On cross-examination Thakkar added that, when Kajder was asking Yates why Yates had not filled the tank, Kajder also said to Yates, “why didn’t you do it? I told you to do [it].”

¹⁵ Apparently, Blythewood meant, “disciplined for it.”

Burke testified that he was with Kajder when Kajder first approached Yates in the incinerator operators’ office. Burke testified:

Mr. Kajder and I went over to the mezzanine at a later point in time. Tony was in his office, and we asked him if he had changed the caustic, and he said he had checked it—if he’d added the caustic, and he said he’d already checked it. And then we left the mezzanine.

Burke was asked, specifically if Yates had said that he “checked it” or “filled it”; Burke reaffirmed that Yates said “checked.”

Kajder testified that Perry made “the” call to the office “probably after 12:45” p.m. Kajder got to the office after that, an office clerical employee, Georgette, told him that Perry had called and reported that the caustic tank alarm had sounded. Kajder testified, “I walked over to the mezzanine where we put our trash into the thing and I asked him [Yates] to pump in the caustic for me.” After doing so, Kajder went back to the office area the office. Then, further according to Kajder:

Georgette said Bill Perry called again and said that the caustic wasn’t filled and the alarm was off again. Before I could go over there, Mr. Yates came back into our office area, into where we have this counter built, and he was dressed in street clothes. And I asked him, you know, “Did you change the caustic?” He said, no; he couldn’t do it because he didn’t have his authorized overtime.

I think I got a little loud and Mr. Thakkar came up and said, “Well, we’ll authorize the overtime”—right there on the spot.

Yates then went back to fill the tank, on overtime.

Credibility Resolutions

Kajder did not tell (or ask) Yates to “pump in the caustic for me” when Kajder went to the incinerator operators’ office. Burke’s testimony proves that Kajder did not, in haec verba, tell Yates to do anything. Kajder only told Yates that the alarm had gone off. Yates replied to Kajder that he had checked the tank. Kajder, who was unfamiliar with the operation, accepted that representation as an indication that the entire matter was a “false alarm” (which Yates was running to check out).¹⁶

b. Yates’ failure to call in absence

Yates testified about 6:30 a.m. on the next day, Wednesday, June 5, he hurt his back while pushing trash into the incinerator. He went to Respondent’s emergency room where he was X-rayed and diagnosed as having acute lumbar strain.

Yates testified that, after being released from the emergency room, he went back to the incinerator operators’ office

¹⁶ When Kajder, Yates, and Thakkar were later together, Kajder did tell Thakkar that he had previously told Yates to fill the tank (as Yates’ evasiveness on the point acknowledges). At best, Kajder was then relying on what he conceived to be implicit in his notifying Yates that the alarm had sounded.

where he left the emergency room physician's report. That report was marked "off duty with treatment"; and on the report the physician had filled in a blank stating: "You should be seen within 1-2 days for follow-up care." The form has a box to be checked for a directive to consult a private physician; that box is not checked; "Health Service" is written in, instead. The report also states that Yates should "rest [injured] area," he should ice the area for 24 hours, and he should not engage in twisting or heavy lifting (for an unspecified period of time).

Yates did not report to work the next day. He admitted on direct examination that he did not call in, as per the written rules quoted above (that on each day's absence an employee must call in at least 1 hour before scheduled to appear) because "I felt I was covered on the context of section 12 of our [collective-bargaining agreement]."

Article XII of the agreement, "Authorized Leaves of Absence Without Pay" provides, at Section 1, that:

(i) The employee must report the illness or injury to his immediate supervisor upon his first day of absence unless his failure to do so is due to reasons beyond his control and he does so as soon as possible;

(ii) The employee must make application for the leave of absence on forms furnished by the Hospital.

Yates saw his personal physician on Thursday, August 6; that physician told him, in writing, to stay off from work until June 9. (June 7 and 8 were his regular days off.) Yates worked his regular shift on Sunday, June 9. Yates was paid sick pay for missing one-half day on June 5, and a full day for June 6.

On June 10, Yates was called into Thakkar's office where, with Thakkar present, Wachtl handed Yates disciplinary notice marked "Termination." The categories of misconduct marked were "Absenteeism" and "Unsatisfactory Job Performance." The explanation was:

On 6/4/91, approximately 30 minutes prior to the end of your shift, you were instructed to replenish the caustic tank prior to departing for the day. Your failure to do so resulted in the tank's low level alarm to energize as the liquid was below the pump [word obliterated]. Consequently, this resulted in [obliterated; probably "having"] to utilize unscheduled overtime for you to replenish the tank.

Also, on 6/6/91, you failed to follow the established hospital call-in policy to report your anticipated absence from work which caused the incinerator operation to be unmanned. This action caused the department to be 3 hours behind schedule in waste disposal.

Thakkar testified that Yates' failure to call in on June 6 did, in fact, cause the backup of trash-burning as the discharge notice described. General Counsel does not dispute that testimony, and there are no credibility resolutions to be made at this point.

B. Blythewood's Case

The complaint alleges that: (1) on October 4, Blythewood was orally warned in violation of Section 8(a)(3); (2) on October 10, Blythewood was issued a written counseling in violation of Section 8(a)(3); (3) on October 11, Blythewood was

issued a written warning notice and given a 3-day suspension, both in violation of Section 8(a)(3) and threatened at the same time¹⁷; and (4) on October 30, by Thakkar, Respondent impliedly promised Blythewood benefits in violation of Section 8(a)(1).

1. October 4, 1991; washroom incident; alleged oral warning

Thomas Blythewood has been employed by Respondent for 14 years. He is now classified as a "maintenance helper/incinerator operator." Before July 1991, he and Clarence Kittrells were classified solely as a "maintenance helpers." In a maintenance department meeting that month, Thakkar told Blythewood and Kittrells that they would thereafter assume Yates' duties as operators of the incinerator, in addition to their other duties.

On September 23, by letters of that date, Wachtl notified Blythewood and Kittrells that, starting October 15, their shift hours, and days off, were changed.

On October 1, Blythewood filed a grievance stating that neither he nor Kittrells had been informed about the award of a previously posted job, "senior maintenance man." On October 3, Blythewood filed another grievance alleging that the rescheduling of Kittrells and himself was a violation of the collective-bargaining agreement.

Blythewood testified that, on October 4, he was scheduled for a half-hour lunchbreak at noon. Before noon, he had been burning infectious waste. He went to the washroom at 11:50 a.m. to thoroughly wash his hands, as per standing instructions. Before he left the incinerator area, he left more than one-half hour's work of burning to be done.

Blythewood testified that, after eating his lunch, he went back to the washroom at 12:25 p.m. While he was in the washroom, Robinson was in an adjacent locker room. He and Robinson exited the combination washroom/locker room door "between 12:35 and 12:40" p.m. They were met by Thakkar. Thakkar asked Blythewood where he had been for the last 13 minutes, and why was he not burning trash; Blythewood replied that he had been in the washroom. Further according to Blythewood, when they were later in Thakkar's office, Thakkar "was concerned about why I wasn't burning trash. . . . I should have been over there burning trash." Blythewood replied to Thakkar that it was lunchtime when he went to the washroom, and "I had put enough in to cover the lunch hour." Thakkar called Wachtl into Thakkar's office. With Wachtl present, Thakkar and Blythewood repeated what they had said before. Blythewood then asked if Thakkar was "trying to make it this a departmental issue," and that he should confront all employees if he were doing so. Thakkar turned to Wachtl and said, "Maybe we should." The meeting ended at that point; Blythewood was given no notice of disciplinary action at that time.

Blythewood testified that the incinerator often goes unattended for periods of 13 minutes, and that no employee that he ever heard of had ever been admonished about the amount of time he or she spent in the washroom.

Thakkar testified that, on October 4, he had been making rounds and noticed that the incinerator was unattended. He

¹⁷As discussed *infra*, the complaint alleges that this threat occurred "on or about October 10."

looked around for "several minutes" and then saw Blythewood leaving the washroom. Thakkar asked Blythewood where he had been; then he took Blythewood into his office. Thakkar was not asked what was then said between him (and Wachtl) and Blythewood's testimony in that regard is therefore undenied.

The complaint alleges that Thakkar's October 4 verbal remarks, as testified to by Blythewood, constituted an oral warning to Blythewood in violation of Section 8(a)(3). The complaint further alleges that, also in violation of Section 8(a)(3), Thakkar issued a written counseling to Blythewood on October 10. The content of that "counseling," or memorandum, is reproduced below (in the discussion of the events of October 10); its stated basis is the just-described washroom incident of October 4.

2. October 10, 1991; grievance meeting incident;
memorandum to Blythewood on washroom incident

On October 10 a second-step grievance meeting was held in Thakkar's office; the subject was Blythewood's October 1 and 3 grievances over scheduling and posting. The meeting began about 8 a.m. At the start of the meeting only Kittrells, Blythewood, Wachtl, and Thakkar were present. Blythewood was asked, and he testified:

Q. When you arrived at this meeting, was there a union representative present?

A. No. Govind [Thakkar] asked me and Clarence [Kittrells], did we want our union representative present? And we both said, "No." But he proceeded to tell Bob [Wachtl] that he thought that the steward should be there. . . . So he told Bob to go get him.

Union Steward Guy Spina arrived shortly. Blythewood testified:

And I was reading a section out of the contract, and Spina kind of was coming in the door. So I said, "Spina, go get the contract because I'm reading from mine, and you're going to need yours in order to follow along." So Spina replied back to me that I didn't tell him what to do . . . that I didn't mess with him first thing in the morning. And he said it twice.

So . . . I said, "Spina, what the hell is wrong with you?"

And I looked at Clarence, and we looked at each other, and we just shook our heads.

Then, further according to Blythewood, he told Thakkar that there was no point in continuing the meeting.

Before the men left the room, Thakkar gave Blythewood a memorandum concerning the washroom incident of October 4. On hospital stationery it states:

Subject: Memo for the Record
Re: Tom Blythewood

On 10/4/91, at approximately 12:34 p.m., I visited the mezzanine area to check the status of the daily burning. Mr. Blythewood, the helper assigned to the incineration duty for the day, was not on the job. Upon further checking, Tom was seen coming out of the locker room at about 12:43 p.m. Tom was called into my office to meet with me and Bob [Wachtl] to explain

as to where he was for the last 13 minutes when he should have been on the job. Upon asking, Tom indicated that he left for lunch at 5 minutes to 12:00. Tom's answer to account for 13 minutes lost time was that he had to go to the bathroom like anybody else. While he had all lunch time to go to the bathroom, why did he go to the bathroom right after lunch hour? He was also instructed that if he had a medical emergency, he should have informed someone in the office so we did not have to look for him.

Unauthorized absence from post of duty, during regularly scheduled tour of duty, is an infraction against hospital policy and cannot go unnoticed.

Below this paragraph were spaces for Thakkar and "Tom Blythewood" (i.e., not a boilerplate "Employee") to sign and date. Above the space for Blythewood's signature is the typed sentence:

I have seen this memo and have discussed it with the management.

As discussed below, Respondent denies that issuance of the October 10 memorandum constituted discipline of Blythewood.

Blythewood examined the memorandum and then told Thakkar that, if he was to be disciplined for spending too much time in the washroom, so should all other maintenance department employees. Blythewood began giving examples of employees who spent "excessive" time in the washroom by reading the names of maintenance department employees from some list that Blythewood had brought to the meeting. When Blythewood got to Spina's name, further according to Blythewood:

Spina looked over at me told me to shut up—that this matter didn't concern anybody else but me.

And I . . . said, "Well, Spina, you can shut up and you can leave because I didn't ask you to be here." And Spina said, "No, I'm not here for you; I'm here for Govind."

Thakkar said nothing during this exchange.¹⁸

On direct examination, Thakkar agreed that Blythewood objected to the presence of Spina at the October 10 meeting, but management called him anyway. Thakkar was asked, and he testified:

Q. What occurred that led you to give the disciplinary action that we're talking about—the three-day suspension?

A. When Spina was coming into the office, Tom was laid back in the chair with a contract, union contract in his hand. And he asked Spina right away, "Spina, do you have your contract with you?" Spina said "No." [Blythewood said,] "Then go get it." Then Guy said, "You don't order me to do things." [Blythewood said,] "What the hell; go get your contract. You can't be here if you don't have your contract with you; you're a Union steward." And Spina said, "Hey, you don't order me to do things; I don't order you to do things."

¹⁸Neither Spina nor Kittrells testified.

And then it was going on. And then Tom just got angry and he started talking—[saying], “What the hell, what is the matter with you, Spina? Go get your contract or get the fuck out of here.” That’s exactly—that’s the words he used. And then I was making some [palms forward] hand signs to [indicate], “Hey, take it easy; take it easy.” And there were some exchanges about “you shut up,” [and] “you shut up.” It went that far.

Q. Did Mr. Blythewood ever come up out of his reclining position?

A. He was—it appeared to me that he was ready to attack Spina; he was that angry.

Q. Fine. You heard Mr. Blythewood testify yesterday with regard to that incident. Was that the tone and the level of his voice on the occasion that we’re talking about?

A. No, that was—that was—

Q. Would you describe what the tone of his voice was, and whether it was loud or not?

A. He was angry. He said, “Go get the hell out of here. Go get the fuck out of here. Go get your contract.” I mean, he was shaking and he was—I was almost afraid that there might be a problem there.

The just-quoted testimony was offered by Respondent on the second day of the hearing. However, pursuant to Rule 611(c), counsel for General Counsel had called Thakkar on the first day. Thakkar was asked, if, during the grievance meeting of October 10, Blythewood had used any word stronger than “hell.” Thakkar responded that Blythewood had. Thakkar was asked, and he testified:

Q. (By Ms. Modic): What word would that be?

A. I don’t remember what they were. But there was, yes.

In his direct examination, Thakkar was asked why he had denied, on the day before, that he could remember any word used by Blythewood stronger than “hell.” Thakkar answered:

Well, with women sitting here, I’m not—I mean, it’s not—I don’t use those kind of language—we are not—I mean it’s my religion that—I mean with women sitting, you don’t use those kind of words. And I mean, it’s beyond me.

Respondent also called Wachtl to testify on what happened on October 10. Wachtl testified:

Kittrells was excused, and Tom was asked to stay, along with Spina—at which time Govind had given Tom a memo of record, a memo for record of an incident that had happened some days earlier. Tom was very nonchalant; Tom approaches everything sort of nonchalant. He was just sort of sitting back in the chair, and he read the document and he looked at Govind and he said something about that—“Yeah, a lot of other people come back from lunch late.” And he started naming names

Mr. Spina, who was the union steward said now, just—he turned to Tom; he said, “Tom, wait a minute now; you don’t go telling things about your union brothers. That’s not what the issue is here.”

And Tom sort of sat up in his chair and he looked at Spina and he said, “Spina, just shut the fuck up and get the hell out of here.”

Voices [were] raised—at which time Govind, who was sitting across the desk sat forward and said, “Tom, just calm down. Just shut up and listen; just be quiet.”

And Tom said, “You shut up and listen; you listen.” He just got real vocal with Govind. I was sitting off to the side, and as an observer, you see things that maybe people in the actual action don’t see or recall what they did—or realize.

Wachtl added that Blythewood “looked like he was capable of just getting a hold of somebody, anybody,” but he did not testify that Blythewood touched, or threatened to touch, or tried to touch, anybody.

On rebuttal, Blythewood denied using the word “fuck” in the October 10 meeting.

General Counsel contends that the fact that the above-quoted October 10 memorandum concerning the October 4 washroom incident was given to Blythewood after a week’s delay, and after the grievance meeting was scheduled, demonstrates an unlawful discriminatory motive. While on direct examination, Thakkar was asked, and he testified:

Q. (By Mr. Rotolo): Now Mr. Thakkar, there was a—I’m not going to use the word delay, but there was a passage of time between October 4th, when the incident occurred, and the date of this memo for record, which was 10–10–91. Do you recall why?

A. Scheduling. And when the letter was ready, maybe Tom wasn’t on duty, or I didn’t check into that, but that—usually it happens, scheduling, that we don’t get together right away.

Q. Did you feel there was a particular rush on this?

A. No, no. Remember, I want to add something, that Tom—he’s a good worker. I mean, I would not, you know, do anything otherwise for him. I just wanted to make sure that we talked about this thing, but—I mean I want to say that.

On the copy of October 10 memorandum that was received in evidence, below the space for Blythewood’s signature, is written: “Tom refuses to sign this.” Then follows Thakkar’s signature.

Credibility Resolution (Deferred)

As discussed below, on October 11, Blythewood was issued a warning notice and a 3-day suspension over his alleged conduct at the October 10 meeting; there was some discussion of Blythewood’s October 10 conduct when the suspension was imposed on October 11; Blythewood filed a grievance over the suspension on October 23; and, on October 30, there was a meeting between Thakkar, Wachtl, and Blythewood over Blythewood’s October 23 grievance. The content of the October 11 discussion, and the content of October 30 grievance meeting, shed light on the credibility issue immediately before me (whether Blythewood used a curse word stronger than “hell” in the October 10 meeting). Therefore, I shall defer entering the credibility resolution at this point.

3. October 11, 1991; warning notice and suspension over grievance meeting conduct; alleged threat by Thakkar

On October 11, according to Blythewood, he told Amie, in the earshot of Thakkar, that he was going to the personnel office to file a grievance over the October 10 written counseling that Thakkar had given him. When he got to personnel, a clerical employee told Blythewood that Thakkar had called and told him to report back to maintenance department immediately.

Blythewood went to Thakkar's office where he was met by Thakkar, Amie, and Wachtl. Thakkar presented Blythewood with a disciplinary action form. It was marked to indicate that a 3-day suspension was being imposed; the offenses checked were "Uncooperative Attitude," "Discourtesy," and as "Other" Thakkar filled the blank by writing "Inappropriate language." As the explanation, Thakkar had written:

On October 10, 1991, at approximately 8:45 a.m., while discussing a 2nd step grievance regarding change of duty hours and a memo for record issued you regarding absence from place of duty, you displayed behavior inappropriate for the situation. You became unruly and extremely disruptive. Your abusive language directed towards your union steward, by cursing and telling him to "shut up," was totally uncalled for. I had to instruct you several times to take it easy but you persisted. This type action has no place in our profession, cannot be condoned nor will it be tolerated. You are hereby given a 3-day suspension effective 10/14/91. Any recurrence of this type behavior in the future will result in immediate termination.

Blythewood asked if, by "abusive language," Thakkar was referring to his use of the word "hell." Thakkar would not answer.

Blythewood said he was being discriminated against because he had filed grievances. Thakkar responded, according to Blythewood, "that I had an attitude; he didn't like my attitude." Blythewood asked Amie and Wachtl if they had a problem with his work or his attitude; they replied that they did not. Further according to Blythewood:

He [Thakkar] kept emphasizing that I needed to take these three days and go home and think about it and learn how to be "a team player." He repeated those words three times.

General Counsel contends that Thakkar's repeated references to "team player" was a threat in violation of Section 8(a)(1). Neither Amie nor Wachtl nor Thakkar disputed Blythewood's account of the October 11 meeting.

To show discriminatory treatment, General Counsel introduced evidence of how Respondent handled similar misconduct by employee Wayne Fisher. May identified his January 14, 1991 first warning to Fisher for engaging in a shouting match with another employee. The document states that Fisher had been warned about such conduct in the past.

4. October 30, 1991; second grievance meeting; Thakkar's alleged promise

On October 23, after he had served the 3-day suspension, Blythewood filed a grievance over the warning and suspension; in the grievance, Blythewood states, *inter alia*, that Spina had told him during the October 10 meeting to "shut up," and Blythewood's grievance further stated that there had been "no cursing" in the meeting.

On October 30, Blythewood was again called to Thakkar's office. There, in the presence of Wachtl, Thakkar asked Blythewood how his October 23 grievance could be resolved without the matter going any further. Blythewood replied that he had already served the suspension, and it was up to Thakkar to suggest a way. Thakkar told Blythewood to think about it. General Counsel contends that Thakkar's asking Blythewood how the grievance could be resolved was an implicit promise of benefit in violation of Section 8(a)(1).

After this exchange between Blythewood and Thakkar, according to Blythewood, Wachtl pointed to the October 23 grievance and said that some statements in it were true and some were not. Blythewood asked which statements were not true. Wachtl replied, "the part about Spina telling you to shut up—that's not true. You told Spina to shut the hell up." Then, further according to Blythewood, Wachtl and he repeated themselves several times. Thakkar stopped the exchanges by stating to Wachtl, "Bob, we're not here for that; we don't want to get into that."

Thakkar was not asked about the October 30 meeting; on direct examination Wachtl was asked about it, but his testimony did not differ from Blythewood's about what was said. That is, Wachtl did not deny that, when Thakkar asked what parts of the grievance were inaccurate, Wachtl replied only that Spina had not told him (Blythewood) to "shut up," and that he (Blythewood) had told Spina to "shut the hell up."

Credibility Resolution for October 10 Incident

Thakkar, on the second day that he testified, said that Blythewood said "fuck" while the contract issues were being discussed. Wachtl testified that Blythewood said "fuck" after the contract discussions were completed, Kittrells was excused, and discipline was being dispensed. The meeting had distinct parts; if the word had been used by Blythewood in either, there would not be this conflict between Respondent's witnesses about when.

Moreover, it is undisputed that, when Thakkar presented Blythewood with the warning and suspension notice on October 11, Blythewood responded by asking Thakkar if the notice was referring to his use of "hell." Thakkar did not reply. With all due deference to Thakkar's religious sensitivities about when profanity can be repeated, there were no women present at that time; if there actually had been more than "hell" said by Blythewood, Thakkar would have mentioned it when challenged by Blythewood on October 11.

Finally, regarding what was said in the October 30 meeting, conspicuous in its absence was any reply by Wachtl to Blythewood that Blythewood said worse than "hell" on October 10. Even if Thakkar was too squeamish to quote the f-word (or any of its many euphemisms, like "f-word") at trial, Wachtl was not. Wachtl freely quoted it at trial, and he assuredly would have quoted it at the October 30 meeting if

Blythewood had used it on October 10, as Wachtl and Thakkar (the second time he testified) described.

That is, even though he asked (on October 11), and asked again (on October 30), what he had said that was so bad, Blythewood was not told that he stood accused of anything worse than the use of “hell,” until the trial testimony of Wachtl and Thakkar (the second time). I cannot find other than that the testimony of Wachtl and Thakkar was a post hoc concoction. I find that, in the October 10 meeting, Blythewood did not say “fuck.”

II. ANALYSIS AND CONCLUSIONS

A. Alleged Violations of Section 8(a)(1)

1. May 20, 1991 threat by Wachtl to Yates

On May 20 Yates presented Wachtl with two grievances on matters unrelated to anything else that had gone on before on that day. I have found that, when he was presented with these grievances, Wachtl told Yates that Yates should not go over Wachtl’s head because Yates did not know what he was getting into; I have further found that, at the same time, Wachtl asked Yates why he was doing what he was doing (filing many grievances), and Wachtl told Yates “all you’re going to do is dig yourself a hole you’re never going to get out of.” Yates left Wachtl’s office; then he came back and asked what Wachtl had meant. Although at trial Wachtl gave a virtual soliloquy about what he had meant, he told Yates to take it, “however you want to take it.”

I need not speculate whether Wachtl was motivated by Yates’ previous grievance-filing activities, the grievances that had just been presented, or some combination of the two, or something that was totally unrelated. A reasonable employee would have been left only with the impression that Respondent intended to punish him because of his grievance-filing activities. Yates asked Wachtl to disabuse him of such an impression, but Wachtl refused, a fact that would fortify the impression in any reasonable employee. In such circumstances, the remark by Wachtl was a threat that violated Section 8(a)(1), as I find and conclude.

2. October 11, 1991 threat by Thakkar to Blythewood

It is undisputed that, when Blythewood objected to the 3-day suspension issued on October 11, Thakkar replied (three times) that Blythewood needed to be a “team player.” General Counsel argues that Thakkar’s admonition was a violative threat. On brief, Respondent does not argue the issue, stating only that there was no conceivable threat “on October 10, 1991.” The complaint alleges that Thakkar threatened an employee “[o]n or about October 10.” There is, therefore, no variance in the pleading, and no failure to give Respondent notice of what conduct was in issue. (Certainly, Respondent did not, at trial, move to strike the allegation that Section 8(a)(1) was violated on or about October 10, 1991.)

The discipline, as reflected by the warning notice that Thakkar presented to Blythewood, was premised on alleged abuse of Spina, the steward. Blythewood and Kittrells had objected to the presence of Spina; but Thakkar insisted on Spina’s presence, anyway. As Blythewood was reading from the contract to present his and Kittrells’ grievances (over scheduling and posting), Spina appeared. Blythewood asked

Spina to get his contract or leave. Spina refused stating, “No, I’m not here for you; I’m here for Govind.”

If there was a company “team,” Spina was on it, at least at that point. The union steward had, reprehensibly, abdicated his responsibility to represent employees Blythewood and Kittrells, and he was siding against their interests. Therefore, Thakkar was telling, indeed warning, Blythewood that he should be more like “team player” Spina. As such, Thakkar’s admonition to Blythewood was a threat in violation of Section 8(a)(1), as I find and conclude.

3. October 30, 1991 promise to Blythewood by Thakkar

As I have found, on October 30, Thakkar told Blythewood that he would like Blythewood’s grievance over his suspension to go no further; he also told Blythewood to think about it. On brief, General Counsel argues that these remarks were coercive, but cites no case on the point and does not suggest any reasonable basis for the conclusion. I find no element of coercion, and I shall recommend that this allegation of the complaint be dismissed.

B. Alleged Violations of Section 8(a)(3)

There are two categories of 8(a)(3) violations alleged here: (1) discipline of an employee, Blythewood, for conduct concurrent with the exercise of union, or protected concerted, activities (presenting grievances); and (2) discipline of employees, both Yates and Blythewood, because of their prior union or protected concerted activities.

1. Blythewood’s warning notice and suspension

As the October 11 warning and suspension notice states, Blythewood was disciplined for “abusive language directed towards your union steward” during the October 10 grievance meeting.

Where an employee engages in misconduct during the protected concerted activity of presenting a grievance, the activity nevertheless remains protected because “an employee’s right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer’s right to maintain order and respect.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). In that case, the employee called the employer representative, not the union representative, a crude name as a grievance meeting broke up. The Board held that the remark was made as part of the res gestae of the meeting and was thus protected.

The October 11 discipline of Blythewood falls within the *Thor Power Tool* category of protected activities.¹⁹ I have found that, at the October 10 grievance meeting, there was no misconduct, at least to the extent that Respondent contends. Assuming, however, that there was some misconduct, it occurred during the course of a grievance-presentation by Blythewood. Thakkar and Wachtl did not agree whether Blythewood’s alleged misconduct occurred before or after the issuance of the disciplinary memorandum. Assuming truth to either version, the alleged misconduct happened while Blythewood was, nevertheless, grieving; he was grieving scheduling and posting, or he was grieving the issuance

¹⁹Thus, *Wright Line*, as cited and discussed *infra*, is not the correct standard to apply. See *Mast Advertising*, 304 NLRB 819 (1991).

of the memorandum regarding the October 4 washroom incident.²⁰ Even if he was not grieving, his conduct occurred in the res gestae of a grievance meeting, as in *Thor Power Tool*.

The Board will not find that the statutory protection is lost without evidence that the employee's conduct toward an employer's representative "was so offensive, defamatory or opprobrious as to remove it from the protection of the Act." *Ben Pekin Corp.*, 181 NLRB 1025 (1970). There are no cases that establish standard by which conduct directed at a steward during a grievance meeting should be measured, but presumably it would be at least as great.

Using gross profanity while presenting a grievance has never been held, without more, to remove the Act's protection from an employee. However, even if Blythewood had used gross profanity, the profanity was directed at (the perfidious) Spina, and no one else. (The written warning notice so states; Thakkar so testified; and Wachtl's testimony that Blythewood had "got real vocal with Govind" was necessarily false.) Also, although Thakkar testified that "I was almost afraid that there might be a problem there," there is no evidence that Blythewood engaged in any physical abuse of anyone.

Therefore, because Respondent has failed to demonstrate that Blythewood engaged in unprotected conduct as he presented the grievances, the issuance of a warning notice to, and suspension of, Blythewood for his conduct (toward the steward) during the October 10 meeting constituted violations of Section 8(a)(3), as I find and conclude.²¹

2. The remaining 8(a)(3) allegations

The law dispositive of the remaining 8(a)(3) allegations is stated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other concerted activity that is protected by the Act was a motivating factor in Respondent's action that is alleged to constitute discrimination in violation of Section 8(a)(1) or (3). Once this is established, the burden shifts to Respondent to come forward with evidence that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee's protected activities."²²

To meet its burden under *Wright Line*, it is not enough for an employer to show that an employee, for whom General Counsel has presented a prima facie case of violative discrimination, engaged in misconduct for which the employee could have been discharged or otherwise disciplined. The Re-

spondent must show that it "would have" discharged, or otherwise disciplined, the employee for the misconduct in question. *Hrasco Corp.*, 304 NLRB 729 (1991).

Therefore, the first inquiry is whether the record contains a prima facie case of discrimination proscribed by the Act, or credible evidence that the alleged discriminatees have been disciplined, that the Respondent knew or suspected that the alleged discriminatees had engaged in union or other protected concerted activity at the time it decided to discipline them, and that Respondent's decision to discipline or discharge the employee was motivated, at least in part, by animus toward their union or protected concerted activities. *Chelsea Homes*, 298 NLRB 813 (1990). If such a prima facie case is held to have been established, an inquiry will be made whether the defense has been rebutted, either by showing that it is without factual basis or by a showing that it is pretextual. *Electrowire Truck Products Group*, 305 NLRB 1015 (1991).

a. The prima facie cases

(1) The discipline imposed

The first issue is which of the remaining actions by Respondent constituted discipline. There is no issue in regard to what happened to Yates; Respondent concedes that he was disciplined, and discharged, as alleged in the complaint. However, whether Blythewood suffered discipline on October 4 and 10, as alleged, is in issue.

The complaint alleges that Thakkar gave an oral warning to Blythewood on October 4, in violation of Section 8(a)(3). On brief, General Counsel does not advance any reason for holding that a warning, violative or otherwise, was issued when Thakkar told Blythewood that he should have been burning trash, as Blythewood described. This was simply a statement of a manager telling an employee to "get to work." I shall recommend dismissal of this allegation of the complaint.

However, I believe, and conclude, that Blythewood was disciplined by Thakkar's October 10 "Memo for the Record." Respondent produced Labor Relations Vice President Forrestall to testify that such memoranda have not been used for disciplinary purposes. However, no matter what purposes such memoranda have served before, this one was presented to Blythewood as discipline. It was presented in the locus of managerial authority, Thakkar's office; the steward (over the employee's protest) had been summoned; it was introduced as constituting a "record"; it was concluded with words of gravity and warning, to wit, "Unauthorized absence from post²³ . . . infraction against hospital policy . . . cannot go unnoticed"; it was presented for signature by the employee; and it was further made a matter of record that the employee refused to sign. That is, Respondent handled the memorandum as it did any acknowledged disciplinary memorandum, and any employee would reasonably have believed that he, in fact, had been disciplined by issuance of the October 10 memorandum.

²⁰ The contract provides for oral presentation of grievances as a first step. (The contract also calls for initial presentation to the first-line supervisor; however, this was the position in which Thakkar was, in effect, acting at the time.)

²¹ If it were necessary, I would also find that Respondent's treatment of Fisher's misconduct is evidence of discriminatory treatment of Blythewood.

²² 251 NLRB at 1087.

²³ In some quarters "unauthorized absence from post" is disciplined most severely.

(2) Knowledge

General Counsel contends that specific knowledge of some grievances or charges prompted the discipline in question. Respondent admits knowledge of most of such grievances and charges,²⁴ but it denies that May had knowledge of Yates' September 10, 1990 grievance when he decided to discipline Yates over the windows and smoking incident.²⁵

I do not believe that May was without knowledge of Yates' September 10 grievances when he decided to do something about the windows and smoking incident. Before the grievances were filed May told Amie and Robinson that he was going to do nothing about "the incident" (May's words); then he did something. May did not testify that he changed his mind for some reason other than the grievance filings; May testified that he did not change his mind at all. Burke admitted that he knew that Yates at least attempted to file a grievance around noon on September 10. It is too much to believe, and I do not believe, that Burke did not convey this knowledge to May. At any rate, knowledge by Burke is imputed to all of Respondent's agents²⁶ and, as found above, there is no probative evidence that May decided to discipline Yates before Burke attained such knowledge. I find that May knew of Yates' September 10 grievances, and their content, before he decided to issue the disciplinary warning notice of September 11, 1990.

(3) Animus

Animus is clear. The threats to Blythewood and Yates, as found above, constitute clear evidence of animus towards the employees' union, and protected, concerted activities of filing grievances. Even clearer evidence of animus is found in the suspension of Blythewood because he insisted on presenting his grievance without suffering the interference from Spina, who was there "for Govind" and not the employees.

Accordingly, I find and conclude that General Counsel has presented a prima facie case that the discipline issued to Yates and Blythewood violated Section 8(a)(3). The next issue is whether Respondent had demonstrated that the discipline would have been imposed absent their union or protected concerted activities of filing charges under the Act and grievances.

b. *The defenses and conclusions on the remaining 8(a)(3) allegations*

(1) Yates' first warning notice; smoking and covering interior windows

As I have found, when, on September 10, 1990, May approached the incinerator operators' office, he found that the windows were blocked by various items, and he saw (or smelled) that Yates had allowed smoking in the office.

²⁴I have previously rejected General Counsel's contention that Respondent received the amended charge in Case 8-CA-23524 before the evening of May 20, when, in a telephone call to his home, Yates was, in effect, notified of impending discipline.

²⁵Respondent also denies knowledge of Blythewood's October 11 attempt to file a grievance before Thakkar decided to issue the suspension of that date; that discipline has been found violative on an independent basis, and this question need not be decided.

²⁶See *Board Ford, Inc.*, 222 NLRB 922 (1976); *Hotel & Restaurant Employees Local 19*, 240 NLRB 240, 246 (1979).

On August 30, 1990, McGraw issued an unequivocal order that "any" materials blocking the view from the incinerator operators' office were to be removed. However, Plant Engineer Amie was present when May found the windows blocked on September 10; Amie had to have seen the materials before May did, as May assuredly realized. But May said nothing to Supervisor Amie about the window-obstruction (except, shortly thereafter, May told Amie that he was not going to do anything about it). Even down to the weekend before this trial, there were at least some articles blocking the windows, as Blythewood testified. That is, before, during, and after the fact, Respondent's supervision had condoned blockage of the windows in conflict with McGraw's memorandum.

Moreover, assuming that Yates was smoking, and Amie was not smoking, May had equal notice that Supervisor Amie was "allowing smoking to occur in the incinerator operator's office" as the warning described the offense. Again, May did no more to Amie than assure him that "I'm really not going to do anything regarding the incident that occurred."

Allowing a supervisor to do something for which an employee is disciplined is discrimination against the employee,²⁷ and I find that Yates was discriminated against when May did nothing to discipline Amie for the same alleged transgressions of allowing materials to block the window and allowing smoking in the incinerator operators' office.

Moreover, May had at least equal reason to believe that Supervisor Amie and Robinson were, in fact, smoking. When he smelled the cigarette smoke and saw the butts, May asked Yates, Robinson, and Supervisor Amie if they had been smoking. Robinson and Amie did not answer (at least according to May's testimony). Yates admitted ownership of the package of cigarettes on the table, but he denied that he had been smoking. That is, three people (including a supervisor) were asked if they were smoking; and the only person disciplined for smoking was the person who denied it, Yates.²⁸ Again, this was discriminatory treatment of Yates.

McGraw's memorandum and the general no-smoking policy, notwithstanding, if anything that Yates had been doing, or suspected of doing, really constituted a transgression otherwise warranting discipline, something would have been said to Supervisor Amie at the time to so indicate. However, nothing was said to Amie, or done to Blythewood or Robinson, until Yates filed his October 10 grievances, one of which identified him, for the first time, as an assistant steward (and one that already had a record of prolific grievance filings).²⁹

In summary, the discrimination against Yates came almost immediately after the assurance by May that "I'm really not going to do anything regarding the incident that occurred," and it did come immediately after the filing of the grievances which identified Yates as a new assistant steward. In these

²⁷*Manimark Corp.*, 307 NLRB 1059 (1992).

²⁸Robinson testified that, "at the time," he was a nonsmoker; however, there is no evidence that May knew that.

²⁹Compare *Champion Parts Rebuilders*, 260 NLRB 731, 733 (1982), in which a prolific grievance-filer engaged in certain conduct which one supervisor pronounced permissible, but another supervisor punished; a violation was found, the Board noting that there was no legitimate explanation for the reappraisal of the conduct.

circumstances, I am compelled to conclude, as I do, that Respondent has not demonstrated that it would have disciplined Yates over the incident notwithstanding his union or protected concerted activities, and that, by the issuance of the September 11, 1990 warning notice to Yates, Respondent violated Section 8(a)(3) of the Act.

(2) Yates' second warning notice, being absent or tardy, and not following instructions

As I have found, Yates was granted permission to be off February 4 and 5; then, on February 6, May granted Yates permission to be off a third day, but with an admonition to be present, at 7 a.m., on February 7. Yates overslept on February 7, and did not appear until 10 a.m.

As irresponsible as Yates' conduct appears to have been, the issue is whether Respondent would have issued Yates a warning notice for "Absenteeism" had he not engaged in his grievance-filing activities.

Yates was not absent; he was tardy, albeit extremely so. There is a difference, contrary to Respondent's statement on brief; five acts of tardiness will warrant discharge under Respondent's disciplinary system, but it takes only three absences to produce the same result.

It may not have been unreasonable for May to have made out "absence" notation before Yates finally appeared on February 7; Yates had not agreed to come in when May called Yates' home, and May would reasonably have thought that Yates was going to be absent. But then Yates did appear. The issue becomes: Why did May persevere in the categorization of the offense as an absence when it had proved to be erroneous?

Yates argued when the discipline was dispensed, and he argued again in a grievance meeting that he had not been absent, only tardy. However, neither May nor Forrestall would rescind the enhanced penalty (by simply moving the check mark on the notice, or otherwise); they did not explain to Yates why they would not do so; they attempted no explanation before me; and Respondent attempts no explanation on brief.

Under the circumstances, I find and conclude that Respondent has not come forward with evidence that it would have imposed the enhanced penalty on Yates even if he had not filed grievances, or become the assistant steward,³⁰ and the prima facie case presented by General Counsel has not been rebutted.³¹

Accordingly, I find and conclude that by issuance of the February 7 warning notice to Yates, as it applied to his "absence" violated Section 8(a)(3).

There is no evidence that specifically supports the 8(a)(4) allegation on this incident, and a finding would not add meaningfully to the remedy here. Accordingly, I shall recommend dismissal of that allegation of the complaint.

³⁰ See *Yukon Mfg. Co.*, 310 NLRB 324 (1993), in which the Board affirmed a conclusion that: "The aggrandizement of the offense is, itself, indicative of pretext."

³¹ Discriminatory treatment is also shown where any employee was issued warning notices only for being tardy when they were only tardy. This would include, for example, the first warning to Dan May.

(3) Yates' third warning notice; excess overtime and early reporting

As I have found, on Sunday, May 19, when no supervisors were present in the incinerator area, Yates worked 2 hours overtime. On Monday, May 20, he appeared for work and began working, again when no supervisors were present, at 1 a.m., and continued working until 8 a.m. when Wachtl appeared and told Yates to leave. Before he departed, Yates handed Wachtl two grievances on unrelated events that had happened at some point before May 20; Wachtl's response to being presented with these grievances, as discussed above, was a threat in violation of Section 8(a)(1). On May 21 Yates was presented with a third and "final" warning notice that imposed a 3-day suspension for failure to follow instructions by working 2 hours of unauthorized overtime on May 19, and having punched in 4 hours early on May 20.

As I have also found, Wachtl and Yates did not discuss when the incinerator and scrubber were to be cleaned when Wachtl told Yates of the coming schedule change of May 12. Between February 22 and May 12, Yates did those duties on overtime; however, as Yates' affidavit admitted, he always told Wachtl when he was going to work overtime; and presumably, this would have included overtime to clean the incinerator and scrubber. When Yates did that, he was seeking permission to work overtime, in accord with the February 22 memorandum.

Yates worked the week before May 19, but there is not the slightest suggestion of why he would not have told Wachtl during that week that he was going to work overtime on the coming Sunday. Also there is no testimony about why Yates stayed on Sunday until 2 p.m. (He testified that the chore usually took him several hours; but he did not testify that it took him that long on May 19, or that the 10 hours were required by a combination of incinerator-cleaning and his other duties.) I believe, and find, that Yates was "running the meter," attempting to accumulate overtime pay without express or implicit authorization.

Yates was scheduled to work until 1:10 p.m. on Monday, May 20. He appeared at 1 a.m., 4 hours early. Even with his generous estimates of the time required to clean the scrubber, this was outrageously early. Again, he did not tell Wachtl that he planned to come in early (as he had done from February 22 to May 12). I find, Yates was attempting, a second time, to take advantage of the situation in order to unjustifiably accumulate overtime pay without express or implicit authorization.

Therefore, some discipline was in order; the issue becomes, would Respondent have given Yates a written warning notice, "third" or otherwise, and a suspension, for that conduct. Possibly not, but there is no evidence that any other employee conducted himself as did Yates, and no evidence of discriminatory treatment against Yates in this instance. In this posture of the case, I find and conclude that the Respondent has met its burden under *Wright Line* to demonstrate that it would have warned and suspended Yates even absent his prior union or protected concerted activities.

(4) Yates' discharge; failure to fill chemical tank and not calling in absence

I have found that, when he went to the incinerator operators' office on June 4, Kajder did not expressly tell Yates to

fill the caustic chemical tank. However, Yates knew that the tank was low and that it was his duty to fill it, and to do so on that day. It is undisputed that Yates had, that morning, checked out the tank-filling equipment. Moreover, it would defy logic to conclude that Yates, in good faith, believed that Kajder had come to the incinerator operators' office to report, merely as an academic matter, that the caustic tank alarm had sounded. Yates (with Blythewood) "ran" down to the tank for no reason other than that, implicitly, if not expressly, Kajder had given them an order to do something. That is, although Kajder did not couch his statement to Yates as an order, Yates knew perfectly well that Kajder was telling him that the tank was to be filled, and Yates was the person selected to do it, and do it then. (I reject General Counsel's assertion that Respondent should have assigned someone else to do the job; this argument is an attempted substitution of General Counsel's judgment for that of Respondent.)

As he testified, when Yates got to the lower level of the building, he found that the tank needed to be purged, as well as filled. At that point, he could have called back upstairs to find if he was authorized to work the overtime. Instead of doing that, at the suggestion of Blythewood, Yates just decided to let it wait until the next day. In so doing, Yates was refusing an order (implied if not express) and Respondent has demonstrated that he would have been disciplined for this conduct, his protected concerted activities notwithstanding.

Then on, June 6, although he had been directed to come back to the Hospital's health service, Yates went to his personal physician, and he did so without calling in on that date. Counsel for General Counsel argues: "Yates did not call in absent on June 6, 1991, because he felt both the contract and the documentation he provided to the office (upon leaving on June 5) made this notification unnecessary."³² I disagree. The argument is really one that Respondent should have been able to figure it out, so there was no necessity for Yates to follow the rule about reporting a prospective absence an hour before a scheduled shift. This is a case of General Counsel's attempted substitution of her judgment of what is necessary for that of Respondent's. Moreover, the documentation left by Yates indicated that he would be limited, but whether Respondent would have accepted that statement as disqualifying Yates from all work (with or without help) was a judgment for Respondent, not Yates, to make.

The rule requiring reporting was clear; there is no conceivable argument that the quoted sections of the contract (which refer to preapproved, unpaid, leaves of absence) nullified application of the rule in Yates' absence of June 6 (for which he was claiming sick pay).³³ There is no evidence of discriminatory treatment of other employees, especially employees who had previously, validly, been suspended.

I have found that Yates was threatened by Wachtl, specifically in regard to his grievance-filing activities. And Yates received two written warnings because of such activities. But being once threatened and twice disciplined, unlawfully, hardly gives an employee license to disregard well-established, known, nondiscriminatory, disciplinary rules. Con-

³² Br. 18.

³³ Yates claimed, and received, sick pay for the 1-1/2 days that he missed that week.

versely, even if an employer bears animus toward known union or protected concerted activities of an employee, it is not estopped from issuing nondiscriminatory discipline to the employee, if that employee hands the employer a reason to do so.³⁴

In these circumstances, I find and conclude that Respondent has met its burden of proving that it would have discharged Yates, notwithstanding his prior union and protected concerted activities, including his filing of charges under the Act. Accordingly, I shall recommend that the complaint be dismissed in this regard.

(5) Blythewood's disciplinary memorandum of October 10; washroom incident of October 4

Blythewood took 13 extra minutes to return from lunch on October 4. At the time, Thakkar did nothing except tell him to get to work. But then, on October 10, when a grievance meeting was convened, Thakkar had a disciplinary memorandum waiting for him. To meet its *Wright Line* burden, counsel asked Thakkar to explain the timing of the memorandum. In prefacing his question to Thakkar, counsel for Respondent said he would not use the word "delay," but he did; he did because there was no other word for it. And the issue becomes: why did Thakkar delay in disciplining Blythewood over the October 4 washroom incident until October 10, when a meeting over prior grievances convened.

Thakkar answered that "maybe" Blythewood was not on duty during the intervening week. At minimum, this testimony was short of evidence that Blythewood was not present during the week.

No other evidence on the point having been offered, I find and conclude that Respondent has not met its burden under *Wright Line*, and that by issuance of the October 10 disciplinary memorandum to Blythewood, Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By threatening employees with discharge because they filed grievances under a collective-bargaining agreement, Respondent has violated Section 8(a)(1) of the Act.

2. By the following acts and conduct, Respondent has violated Section 8(a)(3) of the Act

(a) Issuing warning notices to Anthony Yates on September 11, 1990, and February 7, 1991, because of his union or protected concerted activities.

(b) Issuing a disciplinary memorandum to Thomas Blythewood on October 10, 1991, and suspending Blythewood for a period of 3 days on October 14, 1991, because of his union or protected concerted activities.

3. Respondent's other actions, as described here, did not violate the Act.

³⁴ See generally *Klate Holte Co.*, 161 NLRB 1606, 1612 (1966). See specifically *A&T Mfg. Co.*, 276 NLRB 1183 (1985), in which the Board found nonviolative the discharge of an employee who had failed to obey a known requirement to call in an absence, even though the employer had previously announced an intention unlawfully to discriminate against him.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having unlawfully suspended Thomas Blythewood for a period of 3 days shall be required to make Blythewood whole, with interest,³⁵ for any loss of pay or other benefits that he may have suffered as a result of the suspension.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

ORDER

The Respondent, Saint Luke's Hospital, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other discrimination because they filed grievances under a collective-bargaining agreement.

(b) Suspending employees, and issuing written notices to employees, because they have filed grievances under a collective-bargaining agreement.

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

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

(a) Make Thomas Blythewood whole, with interest, for any loss in pay that he may have suffered as a result of his discriminatory suspension on or about October 14, 1991.

(b) Remove from its files any reference to the unlawful written warning notices issued to Anthony Yates on September 11, 1990, and February 7, 1991, and issued to Thomas Blythewood on October 10 and 11, 1991, and notify those employees, in writing, that this has been done and that the warning notices will not be used against them in any way.

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

(d) Post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."³⁷ Copies of the notice,

³⁵ Interest shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

³⁶ If 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.

³⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge or other discrimination because you have filed grievances under a collective-bargaining agreement.

WE WILL NOT suspend you, or issue written notices to you, because you have filed grievances under a collective-bargaining agreement.

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

WE WILL make Thomas Blythewood whole, with interest, for any loss of pay that he may have suffered as a result of his discriminatory suspension on October 14, 1991.

WE WILL remove from our files any reference to unlawful written warning notices that we issued to Anthony Yates and Thomas Blythewood, and WE WILL notify them, in writing, that this has been done and that the warning notices will not be used against them in any way.

SAINT LUKE'S HOSPITAL