

**Asarco Inc. and United Steelworkers of America,
Local 5613, AFL-CIO.** Case 16-CA-16127

March 8, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

The questions presented here are whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jerry Halford; and violated Section 8(a)(5) and (1) by refusing to deal with Halford as the Union's representative after his discharge and by refusing to provide information requested by the Union in connection with processing a grievance against Halford's discharge.¹ The Board has considered the decision and record in light of the exceptions and brief 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, Asarco, Incorporated, Amarillo, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER STEPHENS, dissenting.

I would find that the General Counsel did not establish by a preponderance of the evidence that employee Jerry Halford was discharged for unlawful reasons and therefore would dismiss the complaint allegation that his discharge violated Section 8(a)(3) and (1). I join my colleagues in adopting the administrative law judge's findings with regard to the other complaint allegations.

¹On June 24, 1994, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

J. O. Dodson, Esq., for the General Counsel.
Robert L. Thompson, Esq. (Elarbee, Thompson & Trapnell),
of Atlanta, Georgia, and *Brian P. Boylan, Esq.*, of New
York, New York, for the Respondent.
Jerry Halford, of Amarillo, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Amarillo, Texas, on October 26, 27, and 28, 1993. It is based on a charge filed on June 2, 1993,¹ by United Steelworkers of America, Local 5613, AFL-CIO (the Union), alleging generally that Asarco, Incorporated (Respondent), committed certain violations of Section 8(a)(1),² (3),³ and (4)⁴ of the National Labor Relations Act (the Act). The charge was later amended to allege violations of Section 8(a)(5)⁵ of the Act, as well. On July 9, the Regional Director for Region 16 of the National Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1), (3), (4), and (5) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that, at all times material, Respondent is now, and has been, a New Jersey corporation, with an office and principal place of business in Amarillo, Texas, where it is engaged in operating a facility at which it refines nonferrous metals; during the 12 months preceding the issuance of the complaint here-

¹Unless otherwise noted, all dates herein shall refer to the calendar year 1993.

²Sec. 8(a)(1) of the Act provides that,
It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Sec. 7 of the Act provides that,
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

³Sec. 8(a)(3) of the Act provides that,
It shall be an unfair labor practice for an employer—
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

⁴Sec. 8(a)(4) of the Act provides that, It shall be an unfair labor practice for an employer—
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

⁵Sec. 8(a)(5) of the Act provides that,
It shall be an unfair labor practice for an employer—
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

in, Respondent, in conducting its business at the facility purchased and received at its Amarillo, Texas facility, goods, products, and materials valued in excess of \$50,000 directly from points located outside the State of Texas.

Accordingly, I find and conclude that, at all times material, Respondent is, and has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section (2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that, at all times material, the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Labor Relations History

In Respondent's business of refining nonferrous metals, Respondent's plant in Amarillo, Texas, employs about 590 workers, of whom about 460 are in the unit. The process involves bringing unrefined copper, primarily from smelters operated by Respondent at other locations into the plant for refining, to rid the "anodes" of impurities and bring the product up to an average of 99.9-percent copper. Following its refinement, the product is shipped in the form of cathodes, wire bars, cake, billets, and continuous cast rods.

Since May 5, 1976, when the Union was certified and recognized as the exclusive collective-bargaining representative of the unit, the following employees of Respondent at the Amarillo, Texas facility mentioned above have constituted, and now constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included:

All production and maintenance employees employed by the Employer.

Excluded:

Office, clerical employees, clerk weighers, counter clerks, shipping and receiving clerk, technical, and laboratory employees, instrument technicians, fire equipment inspectors, professional employees, skilled and apprentice electricians, guards and supervisors as defined in the Act.

Such recognition has been embodied in successive collective agreements, the most recent of which has a term of July 1, 1992, to June 30, 1995. It is admitted, and I find, that at all times material, the Union has been the exclusive collective-bargaining representative of the employees in the above described unit.

In fact, besides its Amarillo facility, Respondent has collective-bargaining relationships with the Union at facilities it owns in El Paso, Texas; Hayden, Ray, and Tucson, Arizona; East Helena, Montana; Omaha, Nebraska; and Denver, Colorado. Respondent also has a collective-bargaining relationship with the International Chemical Workers Union in Mascot, Tennessee. Counsel for the General Counsel conceded that Respondent has no history of having violated the Act.

B. The Issues

The primary issues in this case are:

(1) Whether or not, when Respondent discharged its employee, Jerry Halford, the Union's long-time president, it discriminated against him because of his union activities within the meaning of Section 8(a)(3) and (1) of the Act.

(2) Whether or not, when Respondent discharged its employee, Jerry Halford, it discriminated against him because he'd given testimony in a previous Board proceeding, within the meaning of Section 8(a)(4) and (1) of the Act.

(3) Whether Respondent violated Section 8(a)(5) of the Act by:

(a) Failing and refusing to provide the Union with certain information requested by the Union and which was necessary to enable it to process a pending grievance.

(b) Failing and refusing to deal with Halford in matters of collective bargaining, even though Halford remained the Union's president following his discharge.

Respondent admitted at trial that W. T. J. McLean, Curtis Bates, Dave Woodbury, Larry Johnson, Stu Bryant, M. D. Owsley, M. G. DeBord, and Gene Thompson are, and at all times material have been, agents and supervisors of Respondent within the meaning of the Act. Respondent continues to deny, however, that Bruce Powell and Rylan Phelps are either supervisors or agents within the meaning of the Act.

C. Contentions of the Parties

Counsel for the General Counsel contends that Halford, an employee since April 1977, and a long-time and quite active president of the Union, came to be viewed as a thorn in the side of Respondent, was discharged because of his union activities and/or because he gave testimony under the Act. While counsel for the General Counsel concedes much of the factual claims made by Respondent regarding alleged misconduct by Halford, especially as they surround the incident of May 12 involving a "baggie" with some water in it, counsel for the General Counsel urges me to find that Halford has been the victim of disparate treatment by Respondent. Counsel for the General Counsel goes on to argue that Respondent's temporary failure to deal with Halford, to provide the Union with certain information requested by the Union, or to afford Halford access to the facility, constitutes a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

Counsel for Respondent, on the other hand, scoffs and claims that Halford was discharged for no such reason. Indeed, Respondent asserts that Halford's position with the Union was considered as a *mitigating* factor when a decision was being reached as to what discipline should properly be given Halford for engaging in dangerous conduct, resulting in injury to another employee, and, in being untruthful when asked about the matter. Respondent claims that the General Counsel has failed to prove that Respondent's official who decided upon the discipline to be administered to Halford had any knowledge of the sort of conduct claimed by the General Counsel to demonstrate disparate treatment. Respondent contends that the alleged refusal to deal with Halford or afford him access either did not happen or was *de minimis*, and that all information necessary to the Union's performance of its duties, or which was not equally available to it, was provided to the Union in a timely fashion.

D. *The Facts*

All parties agree that Halford threw a baggie with some water in it over the charge floor's railing on August 12. Their versions of the incident follow.

1. Respondent's version of the baggie incident

The area of Respondent's plant where it melts down the unrefined product for production of cast rods is known as the "casting area." About 33 feet above the casting area is another area, configured as a sort of gigantic loft overhanging the casting area, known as the "charge floor." That is where Halford did his work, as a "chargeman," responsible for making sure that the furnace which melted the product was properly fueled, or charged, at all times.

That is where Halford was located on the morning of August 12, as casting began, and as it continued until the caster "went down" about 10:50 a.m. Respondent responded to the situation by deciding to keep the furnace running on low, in order to allow a quick restart. This decision meant that there was extremely hot metal remaining in the dump pot. Metal so hot will vaporize and "explode" if water is thrown upon it. Such hot metal, when thrown about by the sudden vaporization, or "explosion," is dangerous to anyone within range of being struck by it.

As the process was being restarted, and while Supervisor Thompson was at the casting booth to watch the startup, Thompson noticed an employee named Mike Sanchez walk in front of the casting booth's window. He further noted that Sanchez did not have his hardhat or his face shield on. Thompson stated that Sanchez appeared dazed.

Thompson's recital continued, and he said that he noticed Halford suddenly appear and put his arm around Sanchez. Thompson found this unusual, since Halford's post was on the charge floor, high above. According to Thompson, he asked what had happened to the casting operator, Leal. Leal responded, "That son of a bitch threw a water balloon from the charge floor and hit Mike." Halford, seeing Thompson, then returned to the charge floor.

Thompson caught up to Sanchez as Sanchez, instead of returning to his post, was leaving the building. Thompson asked if he was OK Sanchez replied that he had some pain in his neck. Thompson sent Sanchez to the nurse's office, where he was treated for temporary pain in his head and neck.

According to Respondent,⁶ in reporting on the incident later, Sanchez claimed to have been at his post, awaiting the startup, when he was hit on the top of his hardhat with a sandwich bag at least partially filled with water. Sanchez stated that it came from the charge floor, knocking him down, knocking his hardhat and face mask off. Sanchez claimed that he was dazed for a couple of minutes, and next noted that he was being helped up by Halford.

Thompson, meanwhile, talked to those nearby about what had happened. Leal and employee Wayland Huddleston told him that Halford had thrown things from the charge floor in the past, striking them. Crane operator Don Warren said he'd seen Halford throw things from the charge floor and hit employees below. Thompson reported all this to his superior, Stu Bryant.

⁶ Sanchez' own version of these events is reported below.

2. Halford's version of the baggie incident

Halford was at work that morning, participating in the casting. That day, as was usual for him, he ate his lunch "on the fly," since he couldn't leave his post due to the casting in process.

In this particular lunch, Halford had a plastic sandwich "baggie" containing grapes, which he ate with his lunch. When finished, he walked to a nearby water cooler. He went there to wash out his baggie. He habitually did so, reusing them for such things as pickles or onions.

However, on this occasion, he noted that the baggie was leaking. Having no use for a leaking baggie, he proceeded to toss it underhanded toward a dumpster located near the charge floor's railing overlooking the casting floor. Though Halford intended that the baggie go into the dumpster, it did not. Instead, missing the dumpster, the baggie, with an estimated 4-5 ounces of water still in it, sailed over the rail toward the casting floor below. When he tossed the baggie toward the dumpster he was about 15 feet from the dumpster, which he estimated to be about 3 feet by 3 feet by 4 feet high.

Halford, thinking nothing of it, went on with work. Halford claimed that it did not occur to him that the baggie had hit anyone, or that, had it done so, it would have inflicted injury.

However, Halford continued, on looking down again, he noted Sanchez sitting down, with a puddle of water by his feet. So, Halford left the charge floor and proceeded down to the casting floor to Sanchez. He asked Sanchez what had happened and was told that something "hit me [Sanchez]." Halford returned to work then.

Halford acknowledged that an hour or so later, having seen the baggie being retrieved from the trash, he went to McLean and confessed that he'd thrown the baggie. McLean responded that was really dumb. Halford was then questioned about the incident by McLean and Bryant, during which he denied that he'd done anything like that before. Further talk about securing a union safety representative, or a grievance representative led to Bryant telling Halford that he was suspended pending further investigation of suspected horseplay and a safety violation. McLean escorted Halford out of the building.

⁷ Sanchez' version of the incident is that he was waiting to startup, facing the holding furnace, when he was hit. He claimed that the force of the impact was enough to hurt, and that it knocked him to his knees, "almost" to the floor, and knocked off his hat and shield. After that, he laid down, "partly exaggerating." A couple of minutes later Halford came up to him and asked if he was OK, and told him to say how many fingers Halford was holding up. Sanchez, a credible witness, recalls that he told Halford that he was OK and asked, "What happened? Did Waylon hit me?" He recited that Halford responded that it was he, Halford, who had hit him, and that he was sorry. Sanchez told Halford that Thompson was watching, and that he'd better get back to work. Halford left.

According to Sanchez, he felt like he'd been "slugged," so he went to the nurse's office for treatment. He reported that he was given no medicine other than an aspirin, and that he had temporary pain to his neck and head.

Sanchez claimed that he had seen lots of horseplay in the past, though not of the type claimed by counsel for the General Counsel, i.e., reported to management.

Sanchez also claimed that, later in the week, he told Owsley that McLean was making too much of the incident.

Halford claimed, contrary to Respondent, that there was no hot, or molten, copper when he tossed the baggie.⁸ He also claimed that, in any event, it wouldn't have hurt anybody.⁹ He acknowledged at trial that he, like others, had from time-to-time in the past thrown baggies on the molten or hot copper "just to see what would happen." He also admitted that he'd thrown other objects over the railing in the past. Both such admissions are contrary to the information he provided Respondent immediately following the incident.

3. Halford is discharged as a result of the baggie incident

Bryant and McLean proceeded to conduct an investigation of the incident. Employees Leal and Huddleston¹⁰ reported that objects had been previously thrown from the charge floor. Employee Warren, a crane operator, stated that he'd seen Halford drop the bag from the charge floor which hit Sanchez, and, further, had also seen Halford hit Leal with a waterbag about a month before. Employee Rachel San Miguel stated that Halford had hit her with a 1-inch stone, with sufficient force to cause a mark on her neck and shoulder.¹¹

Bryant and McLean's investigative results were reported to Unit Manager Mike Owsley.

As shown above, Halford was suspended shortly after the incident. Halford filed a grievance over his suspension. A grievance meeting was held, at which time Halford asked that Owsley, new to the facility, personally investigate the incident.

⁸A statement which I find incredible, in view of the fact that all were agreed that the line was just about to startup again.

⁹He admitted to knowing, however, that Respondent's safety rules specifically mentioned that if water came into contact with hot or molten copper it could result in an explosion.

¹⁰Huddleston apparently told differing versions about this and other incidents. For example, while it is not clear that Huddleston shared the version of the incident which he testified to with McLean and/or Bryant, Huddleston testified that he thought that Sanchez was not hurt, that Sanchez "staged" the appearance of being hurt, and that the entire matter was funny. Huddleston claimed that Sanchez took a full 10-15 seconds from the time he was hit in his hardhat, knocking his face shield off, to fall, or "flop" on the floor. He couldn't say whether Sanchez was dazed, but claimed that Sanchez appeared to have full control of his faculties.

Huddleston, a 17-year employee, admitted that he'd seen others throw things off the charge floor in the past, and, indeed, that he'd been hit with a snowball from above. Huddleston denied that he'd ever seen Halford throw anything off the charge floor, though he readily acknowledged that horseplay was commonplace, and that he'd participated in it himself, dumping a watercooler of ice on a supervisor from a catwalk. He stated that Leal has participated in such incidents as those he described, i.e., putting water into contact with hot copper (which he claimed posed no danger), banging a sledgehammer behind someone to startle them, water or ice fights, or putting "dummy bars" through the process too fast.

According to Huddleston, supervisory and/or management officials have witnessed such incidents routinely, without any discipline following. He did admit, however, that no one was ever hurt before, aside from skinned knees being caused by people being startled by the sound of a sledgehammer being struck behind them.

¹¹While Halford categorically denied this incident, I found San Miguel to be an extraordinarily convincing witness, easily superior in her demeanor to Halford. Accordingly, I do not credit Halford's denial.

Owsley did so on May 18, and generally received evidence from employees, and from his own observation of the site of the incident, which led him to believe that Halford had lied about the incident, and had purposely tossed the baggie down from the railing of the charge floor on Sanchez. Owsley decided to discharge Halford, and directed McLean to draft a letter so informing Halford.

On May 19, Owsley and various officials of Respondent met with Halford and the Union's vice president, Muehling, in the presence of the Board's Regional Director for Region 16, at the Board's offices in Fort Worth. They met for the purposes of attempting to settle another matter. Owsley states that he had already decided to discharge Halford, but was persuaded by another official of Respondent to meet with Halford again, so that he could be told Halford's story directly by Halford. Owsley agreed to do so the next morning, back in Amarillo. While counsel for the General Counsel argues that this meeting resulted in a heated discussion between Halford and Owsley, my own sense of the matter is that it was no different than any such meeting, where disagreements are vigorously argued. In fact, Owsley made a concession in Halford's favor, by agreeing to meet with him personally the following morning.

Halford and Owsley, each with a companion, met the following morning. Halford essentially recited the incident as he saw it, and Halford denied that he'd done anything similar in the past. Owsley responded that he had knowledge that Halford's statement was not true. Owsley claimed that he heard nothing on which to base any change in his decision of May 18 to discharge Halford.

Accordingly, on May 20 Respondent sent Halford a letter, signed by Owsley, stating:

This is to advise you that upon completion of our investigation of your conduct on May 13, [sic] 1993, the decision has been made to terminate your employment, effective that date. The bases for your termination include violation of both the Plant Safety Rules and General Rules of Conduct related to unsafe acts, dishonesty and unsatisfactory work performance.¹² Each of these offenses is a separate and distinct basis for your termination.¹³

The grievance mentioned above is pending arbitration.

4. The request for information and the response

On May 25, for the stated reason of allowing it to prepare for the hearing of the grievance relative to Halford's discharge, the Union sent Owsley a letter requesting, the following information:

¹²McLean testified without contradiction that Respondent has promulgated plant rules pursuant to the provisions of the collective-bargaining agreement, and that such rules were republicized on February 11, 1993. He also affirmed that the rules are prominently posted through the facility, and that new employees are educated about the rules.

¹³There are an abundance of "rules" in evidence. Some are in an "Employee Handbook," for which Halford signed a receipt for in 1982. Some are in a "General Plant Work and Safety Rules" booklet, for which Halford signed a receipt in 1985. Some are enumerated in a sheet posted in the facility in February 1993, entitled "General Company Rules."

1. Specification of charges.
 - a. Time, Date and brief description of each charge (3 are listed).
 - b. Complete statement of events leading to discipline including a factual narrative of all related information.
2. Names and telephone numbers of all witnesses.
3. Any and all factual statements made during investigation (written, electronically recorded, transcribed by computer, or otherwise reproduced in any form, written or otherwise).
4. Map, pictures and print or diagram of the area involved.
5. The RCCD log book entries for the entire day of 5/12/93.
6. Jerry Halford's disciplinary records, including copies of general disciplinary notices.

On June 7, Respondent replied by letter, enclosing a copy of Halford's disciplinary record, as requested. Respondent denied the request for the remaining documents on grounds that the information requested either did not presently exist, is unavailable, is attorney-client privileged, or is otherwise not discoverable in arbitration.

At trial, Owsley elaborated upon these reasons, saying that the logbook was not relevant to the discharge decision or any facts relating to it, and that the remaining information was equally accessible to the Union.¹⁴

The complaint's allegations in paragraphs 13 and 15 are limited to the failure and refusal to furnish the information requested in paragraph 2 of the letter of May 25, i.e., names and telephone numbers of all witnesses.

5. The refusal to deal with Halford

On May 24, Owsley wrote to Raymond D. Muehling, the vice president of Local 5613, United Steelworkers of America. His letter begins by referring to the fact that he is responding to a previous letter from Jerry Halford. It then went on to discuss a business matter between the Union and the Respondent.

On May 26, McLean called the union hall, and asked for Muehling after Halford answered the phone. Muehling was called to the phone.

Later that day McLean called again, and again Halford answered. McLean asked for Muehling, and Muehling was again called to the phone. According to Muehling, McLean told him that Halford was no longer an employee and would not be allowed on the premises to attend the meeting, notwithstanding the fact that he'd been previously approved for attendance by Respondent, along with a number of other nominees of the Union.

Still later that day, Owsley called, saying he wanted to speak to Muehling. Halford, having answered the phone, stat-

¹⁴ Counsel for the General Counsel placed another request for information into evidence, but, counsel for the General Counsel disavowed any intent to utilize it as a separate basis for a finding of a violation of Sec. 8(a)(5), since it was never discovered by counsel for the General Counsel until after the trial began, and had not been disclosed to Respondent. However, I consider such evidence, as I announced at trial, for a full consideration of the issues raised by the request of May 25.

ed that he was aware of what had happened and could handle the matter. He went on to say that Muehling had been told that Halford would not be allowed onto the facility on the following day, to meet with one Frank McAlister, the vice president in charge of the Amarillo plant, who was to be present then. According to Halford he was repeatedly told by Owsley that he couldn't come on the premises since he wasn't an employee, and would only be allowed on the premises in order to discuss grievances.

The meeting with McAlister had been previously arranged, at the request of the Union, for the purpose of meeting McAlister, who was new to the facility, and to discuss problems that the Union was having at the plant, how to correct those problems, and what kind of support the Union would receive from upper management in resolving those problems.

In fact, Halford was not allowed to participate in the meeting of May 27.

On June 14, McLean called the hall and told Muehling that OSHA was at the plant, and asked if he wanted to come out to meet with them. Muehling, in turn, conveyed this information to Halford. Halford telephoned McLean and protested that he was still president of the Union, and should be involved in any meeting with OSHA. McLean responded, according to Halford, that he wasn't allowed on the premises, and he would only give Halford the motel name and phone number of the OSHA representative. Halford also testified that the past practice had been for him to accompany the OSHA representative around the plant.

Halford was not allowed to come to the plant to accompany the OSHA representative, and he had to designate someone else to do it.

McLean was not asked about, and did not deny the testimony of Muehling or Halford regarding the events of May 24, 26, or 27. Nor was he asked about, and did not deny, the matters set forth above concerning the failure to permit Halford to participate in the customary activity with the OSHA official. I am convinced that these failures to deny, or to elicit evidence from McLean about these matters, was not unintentional.

Owsley very generally denied that the Respondent has refused to recognize Halford as the Union's legal representative since his termination, or that he has issued instructions to "cut Halford out of the loop." The failure of Owsley to deny any of the specifics of Halford's testimony concerning the events of May 24, 26, or 27 was quite striking, however. I am convinced that such failure was not mere accident or omission.

Accordingly, I draw negative inferences from the failures to deny, or to elicit evidence, set forth in the two preceding paragraphs.¹⁵

E. Discussion and Conclusions

1. Halford engaged in misconduct

As established earlier, it cannot be denied that Halford did toss or throw a baggie containing some 4-5 ounces of water

¹⁵ An adverse inference is warranted from the failure of a party to elicit testimony about a matter concerning which its witness would normally testify. *Advanced Installations*, 257 NLRB 845 (1981). As it is from the failure of a party to question its own witness about matters which would normally be thought reasonable. *Colorflo Decorator Products*, 228 NLRB 408, 410 (1977).

from the charge floor down to the casting area during the morning of May 12. Counsel for the General Counsel would have it that Halford's act was merely accidental, and was the result of inaccuracy while Halford was attempting to hit the dumpster from a distance of about 15 feet.

I don't believe that to have been the case, however. Instead, I find and conclude that Halford's action was not merely accidental, but instead that he deliberately threw the baggie down from the charge floor, quite likely succeeding in his intent to strike Sanchez. Thus, I agree with the conclusions of Owsley and McLean about this incident.

While I make no claims of expertise in the field of physics, beyond dim and distant memories of high school and college courses in the subject, I cannot view the diagram and pictures of the charge floor and the casting area without forming a firm conclusion that it is impossible for the incident to have taken place as described by Halford.

If, as claimed, Halford had been 10–15 feet away from the dumpster and the railing, when he tossed it, there is simply no way that the baggie could have struck Sanchez without defying the laws of physics, i.e., by doing a 90-degree turn straight down in midflight. For, at that place where the charge floor's railing was cleared by the baggie, in order to clear the railing, yet still strike Sanchez as he stood facing the holding furnace, the baggie would have had to fall straight down after clearing the railing. But that wouldn't have been possible if, as claimed by Halford, the baggie had first been flying through a trajectory starting 10–15 feet back from the railing. The baggie could not have fallen so straight down or close to the railing unless it has been thrown in a very high arc. But, that too is simply impossible, given the fact that the ceiling is not high enough to accommodate such an arc. Since I find that what Halford testified to is impossible, I discredit his testimony about this incident. I think it most likely that Halford fabricated the story about the incident being accidental, in an effort to avoid punishment for it. I believe that, instead of "an errant toss," the baggie's flight was deliberately caused by a hard throw directly down by Halford as he stood adjacent to the railing.

This conclusion is reinforced in my mind by the fact that it seems the only thing consistent with the force of the baggie's impact upon Sanchez. At trial I formed the conclusion that both Sanchez and Respondent were exaggerating the force of the blow struck upon Sanchez. I still believe that to be the case. Sanchez because he'd gone along with Halford's horseplay, and feigned injury in apparent "reverse horseplay," and has since felt compelled to speak consistently. Respondent because it is consistent with the defense of this case. I believe that Sanchez, who I found to be a generally credible witness, essentially admitted as much, when he admitted that he partially feigned his reaction to being struck.

Indeed, I could find no reasonable explanation for the obvious force of the impact when first presented with this evidence. I inquired as to the possibility that something else, something additional, something of more weight or substance than a flimsy, half-filled baggie containing only 4–5 ounces of water, might have also been thrown or tossed. That possibility was never shown to be anything more than a possibility however. I am left to conclude that nothing other than the baggie struck Sanchez.

Given the various accounts of the effect that the impact of the baggie had upon Sanchez, I conclude that the baggie must have been traveling at a substantially greater speed when it struck Sanchez than would have been possible had it simply been tossed, and left to the forces of gravity. Instead, I find that I must conclude that the force with which Sanchez was struck could have been generated only if the baggie was thrown, and thrown quite hard, directly down from the railing above. That is precisely what I find and believe that Halford did in this instance.

In fact, I believe that this account is consistent with the reactions of several of the witnesses to the incident, including Sanchez. Why, if he didn't believe that someone had thrown the baggie on purpose, did Sanchez first ask Halford if "Wayland" did it? Why would Sanchez pretend anything if he did not initially believe that the act had been intentional, as horseplay? Why would Sanchez have warned Halford about the fact that he was being watched by Thompson had Sanchez not been of the initial impression that Halford, or Wayland Huddleston, had thrown the baggie? Why would Halford have been impelled to rush down a long flight of stairs if the entire incident been so accidental as he sought to portray?

Thus, I have concluded that Halford's act which resulted in Sanchez being slightly injured was horseplay.

As a consequence, it is clear that Halford engaged in unsafe conduct, that he lied about what he did, as well as about the fact of whether or not he'd done the same sort of thing in the past, and that, perforce, he wasn't doing his job if he was engaging in horseplay when he should have been doing his work.

Thus, Halford furnished the Respondent with a perfect excuse for discipline, up to and including discharge. This is so because each of these sorts of misconduct is included at some point in the litany of written rules published by Respondent at the facility. Falsification of information, horseplay, dereliction of duty, unauthorized absence from duty area, disobeying safety regulations, or creating or contributing to any unsafe condition are all among the list of reasons stated in the rules as warranting discharge.

2. Credibility assessments of witnesses

Of course, in arriving at these conclusions I have taken into account the relative testimonial demeanor for credibility, or lack thereof, exhibited by Halford, and others such as Huddleston and Muehling.

Halford routinely equivocated, fenced, hedged, prevaricated, and dissembled when testifying about the baggie incident, and his reports thereof to management. Concerning these matters, I find myself believing nothing he testified to except that which was corroborated or is not in dispute. Yet, when testifying about the refusal to supply information, or the refusal to deal with him, Halford seemed credible enough.

Huddleston and Muehling both seemed to be generally honest men, trying to speak truthfully. However, I tend to downgrade each man's credibility somewhat because of the perception I gained from each that his testimony might have been somewhat affected by partisanship and bias in favor of Halford.

Thompson, while certainly less than perfect in his demeanor, was superior to any of the trio of Halford, Huddleston, and Muehling.

McLean, though clearly an extremely self-righteous man, given to seeing the world in simple black and white terms, appeared to be absolutely truthful. Yet, because of his clear inability to see things except in one dimension, I tend to give more credit to his testimony concerning simple factual matters than I do when he testified about matters calling for judgment and opinion.

Finally, Owsley made a relatively good, if not perfect, impression for veracity and credibility.

However, it should be borne in mind that neither Owsley nor McLean can be credited with denying that which they so obviously did not deny, as previously shown by the testimony of Halford and Muehling. Nor can the testimony of McLean in any way detract from that of employee Lowell Farmer, a witness whose testimony had the very ring of truth to it.

In arriving at my credibility determinations, I am not unmindful that rarely do witnesses perceive or hear the same events in the same fashion. Also, that testimony purported to be truthful and accurate is often influenced by the interest the witness has in the outcome of the proceeding in which the testimony is given.

Bearing this in mind, and having closely observed the demeanor of all of the witnesses while testifying, I find the accurate and truthful account of what occurred regarding the baggie incident, or the alleged failures and refusals to deal with Halford, does not completely conform with the versions given by the witnesses for either side. Rather, I find the truth lies somewhere in between. Thus, while I find portions of the testimony given here to be reliable and trustworthy, I find other portions of the testimony of the same witnesses to be unworthy of belief. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950); *Herrick & Smith*, 275 NLRB 398 (1985); *Enterprise Products Co.*, 265 NLRB 544 (1982).

3. Disparate treatment

However, despite Halford's having afforded the Respondent an opportunity to lawfully discharge him, had it wanted, it does not automatically follow that such discharge was lawful. If Respondent merely waited for some infraction of the Respondent's rules to serve as an excuse to discipline Halford, and, if in doing so, Respondent seized on conduct by Halford which it had countenanced by others, then Respondent's conduct would be deemed illegal.

That is precisely what counsel for the General Counsel contends has been done in this case. According to counsel for the General Counsel, Respondent has engaged in disparate treatment of Halford by disciplining him for breaking rules which are commonly broken at the facility, and which have for years been widely known to be broken by both Respondent's employees and by Respondent's supervisors.

In my opinion, counsel for the General Counsel has succeeded in making out a case of disparate treatment. In the process, together with the violations of Section 8(a)(5) found below, he has supplied the element of animus necessary to complete his case of a violation of Section 8(a)(3) of the Act.

Counsel for the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If

the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209 NLRB 1122 (1974). The General Counsel has produced no direct evidence that Respondent harbored any animus against the union members, or officers who performed their jobs zealously, as Halford undoubtedly did. However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988).

Halford, Huddleston, and Muehling each recited long litanies of horseplay at the facility of Respondent, going on for years and years. Many and varied instances of the sorts of horseplay were given. Many instances were recited where supervisory personnel were either present and knew of, or actually participated in the horseplay themselves. Some of the incidents involved objects much more substantial and heavier than a baggie of water being thrown from some high place in the plant to a lower place (e.g., a dead rat, a dead pigeon, snowballs, a rock, ice (sometimes by the ice chest full)). Many involved placing water directly on molten or hot metal, just to see what would happen. There were reports of "stickball" or "softball" games with wadded up tape serving as a ball. The record is filled with references to a practice of employees and supervisors playing a prank on one another by dropping, or smashing, an object to the floor directly behind another person, in order to startle the other person with the loud and sudden noise which resulted. Other pastimes included "hosing down" others in the plant, using what is apparently a garden hose.

The listing of such incidents went on and on. It included, as participants, each of the area supervisors at the facility. Respondent, of course, takes the view that each of the witnesses just named had an interest in playing up the prevalence of such practices. That may be true.

Respondent further argues that all such evidence is both inconsequential and irrelevant. It points to the fact that the facility had a new person in charge, Owsley, and that there is no direct evidence that he had knowledge of the practices noted above. Respondent argues that only the knowledge of Owsley, the person who made the decision to discharge Halford, should properly be at issue or considered relevant.

That view is incorrect in my opinion.

First of all, given the totality of evidence in this case that virtually all the lower supervisors at the facility had knowledge of such antics as set forth above, and that more than a few had participated there, it may well be possible to infer knowledge of such activities on the part of upper management, no matter how new the top man may have been to the scene.

But, in this case there is no need to draw such an inference. For the testimony of employee Lowell Farmer, as stated above, had the ring of truth about it in every respect. In the face of it, the general denial of McLean that he knew of such activities or tolerated them will not be credited. Instead, I find that the credible testimony of Farmer, brought out in examination by Respondent's counsel, establishes that McLean, the man widely reputed to actually run the facility, was fully apprised of such incidents, and, so far as appears, he did nothing.

Thus, Respondent cannot have it that Owsley was the decision maker alone, for he admittedly acted upon the input of others, prominently including the report of McLean. And, as shown, McLean, Owsley's immediate assistant, did have knowledge of the fact that such incidents of horseplay occurred in the facility.

Instead, contrary to the position of Respondent, since Halford was the only employee ever discharged for engaging in horseplay, I find and conclude that the sudden decline in the level of tolerance for longstanding practices of employees, coinciding with union activities of Halford, gives rise to the inference that the Respondent's stated reasons for discharge were false, and masked a discriminatory intent. *All Brite Window Cleaning*, 235 NLRB 596, 602 (1977). This is especially true where the action taken against the employee is based on a report by a supervisor, such as McLean, who was discriminatorily motivated in making the report, in the sense that he knew full well when reporting to Owsley that horseplay had long been common in the facility. *Bechtel Corp.*, 195 NLRB 1013, 1020 (1972).

Based on all the above, plus the finding of violative conduct regarding Section 8(a)(5) of the Act, below, establishes animus sufficiently to serve as a predicate of a violation of Section 8(a)(3).

I so find and conclude, and shall include an appropriate remedy therefor.

4. The alleged violation of Section 8(a)(4)

In 1982, Respondent suspended Halford. An unfair labor practice charge and trial ensued. The decision of the administrative law judge, in JD-311-83, resulted in a finding that Halford's suspension was unlawful. Halford was reinstated, and the compliance aspects of that case were unremarkable.

However, I find that case memorializes facts and matters too remote to have relevancy to this case. An allegation that Respondent violated Section 8(a)(4) is not automatically supported, in my opinion by a finding made in an unfair labor practice case 11 years preceding this one. Especially where, as here, counsel for the General Counsel has conceded that Respondent has not shown a proclivity to violate the Act.

Nor do I find persuasive the argument of counsel for the General Counsel to the effect that the meeting at the Regional Office of the Board led to such ill feelings as to warrant a finding that the discharge of Halford was in any way predicated upon it.

Accordingly, I find and conclude that this portion of the complaint has not been proved, and shall dismiss it.

5. The violation of Section 8(a)(5)

In dealing with a certified or recognized collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal*, 224 NLRB 1505 (1976). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Processing grievances is, as argued by counsel

for the General Counsel, clearly a responsibility of a union, and an employer must provide information requested by the union for the purposes of handling grievances. *TRW, Inc.*, 202 NLRB 729 (1973). The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272 NLRB 1128 (1984). The Board's standard, in determining which requests for information must be honored, is a liberal discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979). The Board, in determining that information is producible, does not pass on the merits of the grievance underlying a request such as was made in this case; and the union is not required to demonstrate that the information sought is accurate, nonhearsay, or even ultimately reliable. *W. L. Molding Co.*, 272 NLRB 1239 (1984).

Counsel for the General Counsel argues that Respondent failed and refused to provide the Union with scarcely any of the information sought in the Union's request, and seeks a remedy for a number of refusals. However, as shown above, the complaint's allegations are limited to the Respondent's failure and refusal to list the names and telephone numbers of witnesses who were or would be involved in the grievance referred to in paragraph 12 of the complaint.

As shown above, Owsley sought to portray this matter as involving information as readily available to the Union as to the Respondent. That's not correct. For all that the Union is requesting is the identity of and a means of locating, witnesses whom Respondent intends to utilize in the handling of the grievance. That information, which exists only in the minds of Respondent's officials, is easily listed, and is of no hardship to Respondent to supply to the Union.

In failing and refusing to do so in this case, it violated Section 8(a)(5) of the Act.

Nor can I excuse Respondent's obvious gamesmanship with Halford, following his discharge. Unlike Respondent's argument in brief, which seeks to trivialize and scoff at this failure, it seems at least as likely that the failure and refusal of Respondent to continue dealing with the representative of the collective-bargaining representative of its employees, just as it had done for years, could be seen as an effort to denigrate and humiliate. For, it is absolutely clear that it is the right of each party to a collective-bargaining relationship to select its representative for bargaining and negotiations, just as it is the duty of each party to deal with the chosen representative of the other party. *Fitzsimmons Mfg. Co.*, 251 NLRB 375 (1980).

Here, Respondent failed to allow the Union's chosen representative to take part in routine inspections by OSHA inspectors, as had been done for years. It also failed and refused to allow the Union's chosen representative to come onto its premises in order to meet with a high level official of Respondent, as had been previously arranged.

I find and conclude that by such conduct, Respondent violated Section 8(a)(5) of the Act.

Summarizing, I find and conclude that counsel for the General Counsel has failed to prove the allegation of a violation of Section 8(a)(4) of the Act. Accordingly, that allegation shall be dismissed. However, I further find and conclude that counsel for the General Counsel has proven each of the

allegations of violations of Section 8(a)(3) and (5) of the Act made and contained in the complaint against Respondent, and I shall order an appropriate remedy for all such illegal actions.

CONCLUSIONS OF LAW

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

2. The Union, United Steelworkers of America, Local 5613, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about May 24, 1993, Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union's chosen representative, and, since on or about May 25, 1993, by failing and refusing to provide information as requested by the Union which is reasonably necessary to the performance of its duties as a grievance representative, specifically the names and telephone numbers of witnesses in the grievance mentioned in paragraph 12 of the complaint.

4. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

Included:

All production and maintenance employees employed by the Respondent at its Amarillo, Texas facility;

Excluded:

Office, clerical employees, clerk weighers, counter clerks, shipping and receiving clerk, technical, and laboratory employees, instrument technicians, fire equipment inspectors, professional employees, skilled and apprentice electricians, guards and supervisors as defined in the Act.

5. Since on or about May 20, 1993, Respondent has violated Section 8(a)(1) and (3) of the Act by discharging its employee, Jerry Halford, because he had engaged in union or other protected, concerted activities.

6. The above unfair labor practices have an effect upon commerce as defined in the Act.

7. Respondent has not violated the Act in any other respect.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that employee Jerry Halford was unlawfully discharged, Respondent shall be ordered to offer him immediate reinstatement to his former position, displacing if necessary any replacement, or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It shall be further ordered that Jerry Halford be made whole for lost earning resulting from his discharge, by payment to him of a sum of money equal to that he would have earned from the date of his discharge to the date of his return to work, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W.*

Woolworth Co., 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁶ Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It shall be further ordered that the Respondent remove from its records any references to the discharge mentioned, and provide Jerry Halford written notice of such expunction, and inform him that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.¹⁷

The Order will require Respondent to furnish the Union with the information which it has unlawfully failed and refused to furnish, and, if requested by the Union, to deal with Jerry Halford as the chosen representative of the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Asarco, Incorporated, Amarillo, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below, by refusing to deal with or recognize the Union's chosen representative, or by failing and refusing to provide information necessary to the Union's performance of its duty to process grievances.

(b) Discharging or otherwise discriminating against employees for having engaged in union or other protected, concerted activities.

(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) Furnish the above-named labor organization with the information requested in its letter of May 25, 1993, as specified in paragraph 12 of the complaint herein, and recognize and deal with the chosen representative of the Union.

(b) Offer, if not already accomplished, Jerry Halford immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharge, and notify Jerry Halford in writing that this has been done and that none of these records will ever be used against him in any way.

(d) 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

¹⁶ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹⁷ See *Sterling Sugars*, 261 NLRB 472 (1982).

¹⁸ All outstanding motions, if any, inconsistent with this recommended Order are denied. 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.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its office and facility in Amarillo, Texas, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 16, 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.

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

¹⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 fail or refuse to bargain collectively in good faith with United Steelworkers of America, Local 5613, AFL-CIO in the following unit which is appropriate for the purposes of collective bargaining:

Included:

All production and maintenance employees employed by us at our Amarillo, Texas facility;

Excluded:

Office, clerical employees, clerk weighers, counter clerks, shipping and receiving clerk, technical, and laboratory employees, instrument technicians, fire equipment inspectors, professional employees, skilled and apprentice electricians, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to provide the above-named labor organization with information requested by it which is reasonably necessary or useful to it in representing employees in collective bargaining, including the processing of grievances, with us, and WE WILL, if requested by the labor organization named above, recognize and deal with its chosen representative, Jerry Halford.

WE WILL NOT discharge employees because they have engaged in activities in support of the above-named labor organization, or because they engaged in other activities protected by the Act.

WE WILL, on request, recognize and bargain collectively in good faith with the above-named labor organization as the exclusive collective-bargaining representative of our employees in the unit described above with respect to the wages, hours, and working conditions of all the employees in the above-described unit.

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

WE WILL offer Jerry Halford immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Jerry Halford, in writing, that we have removed from our files any reference to his discharge, and WE WILL assure him that none of these records will ever be used against him in any way.

ASARCO, INCORPORATED