

**Fredon Corporation and John Zelenak.** Case 8-CA-27797

April 28, 1997

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On January 3, 1997, Administrative Law Judge Marvin Roth issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a brief in response to the Charging Party's exceptions.

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,<sup>1</sup> and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent did not discharge John Zelenak because of his union activity, we do not rely on the judge's speculative statements that Zelenak was a chronic complainer who probably had been praising the virtues of union shops since he returned to work for the Company, notwithstanding his admission that he quit jobs with union firms because of his own dissatisfaction; that Zelenak had probably talked about the virtues of nonunion shops while working at other jobs; that Zelenak saw employment as a means of obtaining unemployment compensation; and that Zelenak generated a union campaign in order to provide a cause of action in the event he was discharged for poor performance.

*Iva Y. Choe, Esq.*, for the General Counsel.

*James M. Lyons, Esq. (Lyons & O'Donnell)*, of Fairport Harbor, Ohio, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Cleveland, Ohio, on November 13, 1996. The charge and amended charge were filed respectively on October 27, 1995, and April 25, 1996, by John Zelenak, an individual. The complaint, which issued on May 31, 1996, and was amended at the hearing, alleges that Fredon Corporation (the Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly terminated employee Zelenak because he formed, joined, and assisted a union and engaged in concerted activities, and to discourage employees from engaging in those activities. The

Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, and to argue orally. Pursuant to Section 102.42 of the Board's Rules and Regulations, I heard oral argument in lieu of briefs.

On the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of the parties, I make the following

## FINDINGS OF FACT

## I. BUSINESS OF THE COMPANY

The Company, an Ohio corporation, with an office and place of business in Mentor, Ohio, is engaged in the manufacture and production of specialized machine parts. In the operation of its business, the Company annually ships products and goods directly from its Mentor facility to points outside the State of Ohio. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Iron Workers Shopman's Local Union No. 468, a/w International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

John Zelenak, a machinist, worked for the Company from April to September 1993, when he quit his job. He again applied at the Company and was rehired in April 1994. He remained with the Company until discharged on September 8, 1995. That discharge is the subject of this case. Following his discharge, Zelenak, in addition to the present charge, also filed a claim for unemployment compensation with the Ohio Bureau of Employment Services, which was contested by the Company.

Company Manufacturing Supervisor Richard Ditto discharged Zelenak at a meeting in his office at which Leadman Edward Kunas, a supervisor, was also present. The parties agree that what transpired at that meeting is critical to the merits of this case, although they differ as to what was said at the meeting. The substance of that meeting was also critical to the merits of the unemployment compensation case.

During the past 10 years, Zelenak has worked at some 20 different jobs, including employment with major, nationally known unionized firms. Zelenak testified that he quit nearly all of those jobs because he was unhappy for some reason or another.

Zelenak also operates what he conceded to be "a business on the side." Operating from a large bay and storage at his home, under the name of Zelenak Firearms Company, Zelenak fabricates and sells sights for rifles and target stalks. He advertises his products, including wearing of T-shirts with his company name. Supervisor Ditto has performed work for Zelenak, fabricating parts for Zelenak's sights in Ditto's garage. Leadman Kunas procured gun parts for Zelenak. In August 1995, Zelenak told Kunas that he was making a lot of money in his business, and showed him a wad of money. Zelenak said that he wanted a layoff so he could go and make gun parts. It is evident that Zelenak was trying to impress Kunas that he did not need his job.

Nevertheless, in his application for unemployment compensation dated September 12, 1995, Zelenak stated that he

had not been an officer of a corporation or owned or operated a business within the past 18 months. In his testimony, Zelenak professed to explain this answer by asserting that his business was only a "hobby," although at points he conceded that it was a business. In fact, the evidence described above demonstrates that Zelenak was engaged in a business. As will be discussed, this was not the only instance in which Zelenak made shifting or conflicting statements under oath or certification, in order to accommodate what he regarded as his needs of the moment.

The Company's plant is a relatively small operation, having from 32 to 38 employees, who work in close proximity to each other. The plant operates on two shifts, with most employees working on the first shift. Manufacturing Supervisor Ditto has overall charge of the operation, and reports directly to Company Owner Roger Sustar. Ditto normally works days, and spends most of his time on the shop floor. He is assisted in supervision by Leadman Kunas. George "Doug" Kastner supervises the second shift, and reports to Ditto.

The Company is nonunion. The Company's employee handbook states that: "[W]e are a non-union company and we believe it is in the best interest of both our company and employees to remain union-free." Supervisor Ditto testified with regard to that philosophy, "It doesn't matter to me either way." He testified that he regarded his responsibility as "tak[ing] care of getting the jobs out and shipping them on time and making money on it."

Ditto rehired Zelenak in April 1994. In addition to doing work for Zelenak, he socialized with Zelenak at gun clubs, and considered him a friend. Ditto told Zelenak he was rehiring him as a favor, because Zelenak couldn't get employment elsewhere. Ditto believed that Zelenak was capable of performing the work, and good machinists were hard to find. He started Zelenak at \$10 per hour, which was a low rate of pay. Most company machinists were paid \$12 per hour.

During his 1993 tenure with the Company, Zelenak worked on the first shift. On his rehire, Ditto assigned him to the second shift, under the supervision of Doug Kastner.

Kastner testified in sum as follows: Zelenak's job performance was terrible. Kastner regarded him as the worst employee he ever had. Kastner could not get him to do anything. Zelenak was a "slacker," who wanted things to go his way and "to get by with as little work as possible." He refused to work overtime. He would punch out after 8 hours when other employees were working 12 hours a day. He would leave work without cleaning his machine or work area. His productivity was extremely low, and quality of work marginal.

Kastner further testified in sum as follows: He repeatedly discussed Zelenak's performance with him, but to no avail. Zelenak demonstrated an attitude of complete indifference. On occasion, he asked Zelenak to sweep his work area before leaving, if he didn't mind. When Kastner again noted that Zelenak failed to clean his work area before leaving, Zelenak commented: "You told me if I didn't mind and I did mind, so I didn't." On another occasion, when Zelenak was slowly making parts, Kastner told him that they had to turn out six of the parts per hour in order for the Company to make money. Zelenak responded: "Yeah, like I care if we're going to make money."

Ditto and Kastner testified in sum as follows: On several occasions Kastner complained to Ditto about Zelenak's performance. Ditto made suggestions for improvement, but nothing worked. Ditto tolerated the situation, because he believed Zelenak was preoccupied with his business, and had difficulty in getting along with others, that he was "strange with the people."

Ditto and Kastner further testified in sum as follows: In December 1994, Ditto decided to transfer Zelenak to the first shift. Ditto believed that with more supervision, they might determine Zelenak's problem and his performance might thereby improve. Ditto told Zelenak that he was transferred because Kastner was not pleased with him. Ditto instructed Kastner to write up a performance evaluation on Zelenak, in order for Zelenak to understand their concerns, and where he needed to improve.

On January 2, 1995, Zelenak began working on the first shift.<sup>1</sup> On January 4, Kastner signed a performance appraisal, which Ditto showed to Zelenak. Kastner rated Zelenak's overall performance as unsatisfactory (the lowest of six possible ratings). Kastner testified that he would have given Zelenak an even lower rating if that were possible. He rated Zelenak as unsatisfactory in initiative, cooperation, industriousness, adaptability, and housekeeping, marginal in quantity and quality of work (the next lowest rating), satisfactory in knowledge of job planning and organizing and judgment, and well above average in safety. Kastner wrote that Zelenak had the ability but not the initiative. He added that Zelenak's quality and quantity were far below that of his first-shift counterpart. Kastner wrote that Zelenak prided himself on doing the least amount possible and that: "Trying to get him to work is like trying to get a cat to swim, it can be done but it's tough." Kastner added: "With Fredon being a smaller shop everyone must wear many different hats. Having a background in union shops John feels he shouldn't have to do anything above and beyond his title (mach. operator). He thinks someone else should inspect his parts, deliver his parts, empty his chips, and sweep his area." Kastner concluded his evaluation by stating: "John has been placed on 1st shift, with the hope that the extra supervision might improve his work and attitude."

Supervisor Ditto observed Zelenak's performance during the week of January 2. On January 5 he gave Zelenak a writeup which he captioned as "verbal warning." Ditto informed Zelenak that he was put on the first shift due to his unsatisfactory performance on the second shift, and that his performance thus far on the first shift indicated that Kastner's review was correct. Ditto rated Zelenak as poor in quantity of work, initiative, cooperation, and housekeeping. Ditto wrote that he was disappointed in Zelenak, because he knew Zelenak could do better if he wanted. He added that the Company rehired him in hopes he would improve with time and supervision, but this didn't seem to be happening. Ditto concluded that his writeup should be considered a verbal warning, and if Zelenak's performance did not improve, the Company would "consider this a lack of interest in retaining employment at Fredon and we will terminate your employment." Ditto testified that the writeup correctly reflected his observations.

<sup>1</sup> All dates are for 1995 unless otherwise indicated.

By memo dated February 13, Ditto gave Zelenak a written warning, captioned "progress on performance," for allegedly running parts which were out of tolerance, including 15 pieces which had to be scrapped. Ditto questioned whether Zelenak's mind was on his work or whether he cared, but again asserted that Zelenak was capable of doing better work. Ditto admonished Zelenak that if poor performance continues, "I will be forced to take action," and that "running scrap parts will not be tolerated."

Ditto testified in sum as follows: He determined that the parts were unsatisfactory. He was surprised that Zelenak ran scrap, because Zelenak had performed that type of job many times. The Company's parts necessitate close tolerances. The parts can be inspected only by checking samples. Therefore, the Company must rely on its machinists to perform their work correctly. Fortunately, another operator checked the first part and found it out of tolerance. Ditto did not give Zelenak any written warnings after February 13, although he spoke to Zelenak about his work. After February 13, Zelenak seemed to improve but then "went downhill again." Ditto assumed he was again preoccupied and doing well in his business.

Leadman Edward Kunas spends nearly all of his working time on the shop floor. Kunas testified that Zelenak's production was bad and getting worse. Machinist William Keyser, who worked on the first shift, was also presented as a company witness. Keyser testified in sum as follows: He was able to observe Zelenak's work. Zelenak basically knew what he was doing, but never seemed to do it. He tended to work needlessly slow or backwards and would needlessly duplicate tasks, take unnecessary steps or otherwise waste time. He would suddenly profess inability to perform a routine task. He seemed not to care how long he took on a job or if he scrapped parts.

On his direct testimony, Zelenak testified that no one told him why he was transferred from second to first shift. At his unemployment compensation hearing, Zelenak testified that Ditto told him he was transferred because Kastner didn't like him. On being confronted with this contradiction, Zelenak calculatedly explained that he "probably surmised it." As discussed, in their respective writeups of January 4 and 5, Kastner and Ditto gave Zelenak the same explanation for his transfer which they gave in their present testimony. Zelenak admittedly read both writeups. However, Zelenak testified that "the only thing I could see that stood out was where the second-shift supervisor, Doug, had mentioned the union." In sum, Zelenak seized upon Kastner's passing reference to Zelenak's experience in union shops, as demonstrating that the Company was out to get him as a union adherent, and chose to disregard the rest of Kastner's evaluation.

In his statement in support of his claim for unemployment compensation, Zelenak categorically asserted: "Nothing had ever been said since I have been with the Company that I had done anything wrong." At the present hearing, Zelenak testified that the Company never told him that a job was not done within the Company's specifications. In light of the writeups by Ditto on January 5 and February 13, and by Kastner on January 4, both assertions were plainly false.

Among Zelenak's various explanations or defenses concerning his work performance, Zelenak asserted in his unemployment compensation proceeding that the Company may

have wanted to get rid of him because, by reason of his knees, he could work only 40 hours per week. In the present proceeding, Zelenak testified that between February 13 and September 8, the Company disciplined him because of his union activities by assigning him to the bridge port machine, which required him to stand although he had arthritis in both knees. However, in his application for unemployment compensation he stated that he had no disability, illness, injury, or handicap which might influence the type of work he could perform. Zelenak testified that he gave this answer because he wanted a job. The inference is warranted that if Zelenak were willing to make a false statement in order to obtain unemployment through the Ohio Bureau of Employment Services, he would also not hesitate to give false testimony in order to regain employment through a Board proceeding.

At the September 8 meeting which resulted in Zelenak's termination, Supervisor Ditto told him that he took too long on three jobs. Zelenak asked Ditto to call in another employee, and ask that employee about Zelenak's performance. Ditto denied the request. At the present hearing, the Company presented in evidence, cost sheets for the three jobs, upon which Ditto determined to have his discussion with Zelenak. The sheets indicated that by company standards, the Company's labor costs for the jobs, i.e., the amount of working time, was excessive. Pursuant to General Counsel's subpoena, the Company made available at the hearing, comparable records of other employees over a 3-year period. General Counsel did not offer any of the records in evidence, and did not present any witnesses, other than Zelenak, concerning Zelenak's work performance.

Zelenak testified that in his opinion, he should have been rated as a satisfactory or more than satisfactory employee. As discussed, the Company presented three supervisors and one machinist employee who testified concerning Zelenak's substandard work performance. The Company also presented documentary evidence (the three cost sheets) in corroboration of their testimony. General Counsel's evidence concerning Zelenak's work performance was based solely on Zelenak's own questionable and constantly shifting testimony.

Zelenak testified in sum as follows: In mid-December 1994, he engaged in conversations with other second-shift employees at which Supervisor Kastner was present. Zelenak complained about work rules, speedups, and unsafe conditions. The other employees said there was nothing they could do about it. Zelenak said he had worked in union shops and: "maybe we should get a union." He said unions would get them more money, and better safety and other working conditions.

On January 6, Zelenak gave Supervisor Ditto a lengthy written response to Ditto's "verbal warning" of January 5. He recited his history of employment with the Company. He asserted that he was one of the lowest paid employees and was being held to a higher standard than others. Zelenak stated that he told the employees they needed a union. He added that he was sorry he mentioned the union, and he would not do it again.

Zelenak testified that after receiving the writeups of January 4 and 5, he decided to get a union. He contacted the local AFL-CIO, and was directed to Robert Scheibli, who is district representative of the Union's International, and president of Lake County AFL-CIO.

Scheibli testified concerning his contacts with Zelenak. He was the only witness, other than Zelenak and the company supervisors, to testify concerning Zelenak's union activity, or alleged union activity. Scheibli met with Zelenak on February 9, 10, 14, 20, and 24, March 7, April 11 and 26, May 23, and June 6. They usually met at a Burger King. At their first meeting on February 9, Scheibli was accompanied by another union official, and Zelenak was accompanied by another employee. Thereafter Scheibli and Zelenak always met alone, although Scheibli told Zelenak to bring other interested employees with him. At their second meeting on February 10, Scheibli gave Zelenak union literature and authorization cards, and instructed him as to proper organizing methods. At their third meeting on February 14, he gave Zelenak two caps with union logos. Zelenak signed a union authorization card dated February 17. Scheibli had no further contact with Zelenak between June 6 and Zelenak's discharge on September 8. He testified that he was unaware of any union activity during that period. Zelenak testified that he "just lost contact" with the Union after June 6.

Zelenak initially testified that that the day after receiving union cards and literature from Scheibli, he distributed them at the plant during breaktime, in Ditto's presence. According to Zelenak, Ditto asked him: "Why are you stabbing me in the back?" Zelenak subsequently variously testified that he began distributing them within 10 days of first meeting Scheibli, that he did not know when he began distributing them or wearing union caps at work, and that he first met with Scheibli after receiving the February 13 written warning (which, he contended, was falsely dated).

After Zelenak's claim for unemployment compensation was initially administratively disallowed (prior to hearing) Zelenak submitted a typewritten request for reconsideration. In that request, Zelenak stated that the foremen and leadman constantly told him that unions were bad and would not be allowed at the Company, instructed him not to wear his union hat and shirt, and told him he would be fired the first chance they got. At the present hearing, Zelenak made no such contentions, although if true, they plainly would be evidentiary on the merits of his case. In both the present hearing and the unemployment compensation hearing, Zelenak testified that Ditto and Kunas did not tell him not to wear a union hat. Rather, Zelenak vaguely asserted that they "harassed" him about the hat. It is undisputed that Zelenak openly wore union hats and shirts during his alleged union organizational campaign.

Zelenak testified that after he lost contact with the Union, he continued to distribute union literature (without indicating how he got any new literature), and talked to the employees about the Union. On General Counsel's rebuttal, Zelenak testified that during the entire time he worked at the Company he talked to employee William Keyser only twice. If this is illustrative, then it would hardly indicate that Zelenak engaged in any significant organizational activity during the last 3 months of his employment. However, at his unemployment compensation hearing, Zelenak testified that prior to his discharge, when an employee allegedly had his finger cut off at work, Zelenak told Ditto that if that happened to him, he would sue the Company.

Supervisor Ditto testified in sum as follows: He first learned about Zelenak's union activity when employees told him that Zelenak was distributing union literature and cards.

Zelenak also began wearing a union hat and shirt, instead of his firearms company attire. He came up to Ditto, laughing, and said, "What, no response?" Ditto assumed he was referring to the union activity. Ditto replied: "response to what?" All I know, John, is I gave you a job when nobody would give you a job." At some point Zelenak stopped wearing his union hat. "[W]e kidded with him about where was his hat because he didn't have it on." Ditto heard that Zelenak and another employee had met with a union representative at Burger King. He did not know about any other meetings between Zelenak and a union representative.

Ditto further testified in sum as follows: Zelenak's union activity did not bother him. "It wasn't a big deal." There was no sign of a union coming in. Zelenak was the only employee who wore a union hat and shirt at work. He did not get along with the other employees and had only one friend among the employees at the plant. Ditto personally had no objection to the employees joining a union. The Company did not have a "policy" of being nonunion. (As indicated, the Company's employee handbook states its view in this regard.) He did not tell Zelenak to take off his union hat or shirt, or harass him about wearing them, or take any action against him because of his union activity. He was only concerned about Zelenak's failure to improve the quality and quantity of his work.

Leadman Kunas testified in sum as follows: He learned that Zelenak was trying to organize a union when he saw Zelenak distributing union literature on his breaktime. Prior to September 8, Zelenak referred to an employee who had cut off the tip of his finger while working. Zelenak said that if it happened to him he would have sued the Company for a lot of money. Zelenak also asserted that employee Keyser got a hernia from lifting pieces in a machine. Kunas replied this was not true. Zelenak also said that the work was unsafe.

Regarding the meeting of September 8 at which Ditto terminated Zelenak, Ditto testified in sum as follows: He summoned Zelenak to his office after reviewing the three cost sheets. He wanted to try again to improve Zelenak's production. He tried to review the records with Zelenak, and explained to him that the Company had to be profitable, so they could have their jobs. Zelenak kept responding that he didn't care. No other employee had ever responded to Ditto that way. Finally, Zelenak said that he didn't "give a shit." At this point Ditto told him to leave. Ditto concluded there was no way he could make Zelenak care about his work. He terminated Zelenak because of his poor performance and attitude as demonstrated at the meeting. Zelenak appeared pleased with the outcome. There was no discussion of unions or safety concerns. The discharge had nothing to do with union activity.

The Company's employee handbook provides for a "usual" four-step disciplinary procedure: oral warning, 1-day suspension, 3-day suspension, and termination. However, the handbook further states that: "In addition to discharges under the disciplinary procedure, the company reserves the right to discharge an employee for any reason it deems sufficient. . . . without prior notification or warning." Ditto testified that he regarded Zelenak's situation as appropriate for summary termination, because Zelenak was insubordinate. Ditto testified without contradiction that he made the decision on his own, but promptly informed Owner Sustar of the discharge.

Leadman Kunas corroborated Ditto's version of the September 8 meeting, except in one respect. Kunas testified that he did not recall Zelenak saying he didn't "give a shit," although his attitude was "like he didn't give a crap about it." In his investigatory affidavit, Kunas stated that: "The last thing Zelenak said was that he did not give a shit about anything."

Zelenak testified in sum as follows concerning the September 8 meeting: Ditto told him the three jobs ran too long. Zelenak had previously complained that they needed cobalt drills. On the first job, Zelenak said they should call in employee "Ollie," who had previously run that job, to see how long he took. When Ditto said the second job took too long, Zelenak said that the employee working next to him had complimented him on his speed. When Ditto said he took too long on the third job, Zelenak said that setting up each job took the same amount of time regardless of how many parts were run. Zelenak then complained that the supervisors were pushing the employees too fast, and two employees were injured. Kunas replied that they were not talking about that, and it wasn't Zelenak's job. Zelenak retorted: "Well, that's the reason we're trying to get a union in here." At this point Ditto said: "Well, you have a lot of good ideas for running jobs faster, but it's no union shop. Get your toolbox and get out."

Zelenak testified that the conversation got heated, although he did not raise his voice or say that he did not "give a shit." He testified that he didn't remember saying that he didn't care what they said. However, at the unemployment compensation hearing, he testified that he probably said something like "I don't care what you say." Upon being confronted with this testimony at the present hearing, Zelenak, with considerable equivocation, admitted that this was true.

In his application for unemployment compensation, Zelenak gave a different version of the September 8 meeting. Zelenak described the meeting in sum as follows: He was called into the office and told to get out of the building. The Company had started a policy where everyone ran two machines. As a result, two employees were injured in the last 2 weeks. Zelenak had been saying they should do something about it. This was the reason for his discharge. "*Nothing had been ever been said since I have been with the Company that I had done anything wrong.*" (Emphasis added.)

In his application, Zelenak said nothing about either a union or the three jobs which he ran. Rather, as indicated by his narrative, Zelenak alleged that he was summarily discharged, without discussion, because of safety complaints which he made during the proceeding 2 weeks.

On October 2, the Ohio Bureau of Employment Services disallowed Zelenak's claim, on the ground that he was discharged for insubordination. On October 10, Zelenak filed a request for reconsideration. For the first time, Zelenak alleged that he was discharged at least in part because of union activity which began in December 1994, when he spoke in favor of unionization. As indicated, in his request, Zelenak made accusations concerning alleging threats or other coercive statements by his supervisors, which he was unable or unwilling to substantiate at the present hearing.

On December 7, the Ohio Bureau of Employment Services administratively affirmed the initial denial of benefits. Zelenak appealed this determination, and the matter was set

down for hearing, which took place on January 8, 1996. Following the hearing, the Bureau's board of review allowed Zelenak's claim, and granted him unemployment benefits. The review board's decision was not offered in evidence in this proceeding. However, the Company filed an appeal with the court of common pleas for Lake County, Ohio. The Company presented the court's decision in evidence.

The court reversed the decision of the review board, and entered judgment in favor of the Company. The court held upon consideration of the record, that the hearing officer's decision was contrary to the weight of the evidence, and he improperly failed to take into consideration the job performance cost sheets. The court determined Zelenak was insubordinate, that the Company meet with him to discuss his job performance, that Zelenak "was not receptive at all to this issue," and that his belated claim that he was fired for union activity was "not credible."

The General Counsel argues in sum that: (1) Zelenak's various statements and testimony to the Ohio Bureau of Employment Services should not be taken into consideration in assessing his credibility; and (2) that I should also not take into consideration the decision of the court of common pleas. The General Counsel further argues that I should attach controlling weight, or at least significance, to the fact that Zelenak was not represented by counsel in the unemployment compensation proceeding.

I am not persuaded by these arguments. It is settled law that inconsistent or contradictory statements by a party, whether in or out of court, or in the same or another forum, are ordinarily admissible either as substantive evidence, or (as with any witness), to impeach the party's testimony. Federal Rules of Evidence 801. See also *NLRB v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289 (2d Cir. 1950), cert. denied 342 U.S. 812 (1951); 3A Wigmore, *Evidence* § 1040 (Chadborn rev. 1970). Moreover, under Board policy, the decision of a state unemployment compensation agency (and consequently that of a reviewing court) may be judicially noticed, although such decisions are not controlling. *Duquesne Electric*, 212 NLRB 142 fn. 1 (1974).

As indicated, the present case and the unemployment compensation proceeding involved substantially the same factual questions. I do not have the benefit of the hearing officer who actually heard the testimony. The court of common pleas simply reviewed the record. Therefore, I cannot attach significance to its decision for purposes of the present proceeding. However, on my consideration of the present case, I find myself in agreement with much of the court's decision. I do not agree with the court's intimation that Zelenak had no legitimate interest in safety matters involving other employees. However, I agree with the court's assessment regarding Zelenak's credibility, namely: "He seems to change position as he sees the need to develop his testimony."

Zelenak was not represented by counsel at the unemployment compensation hearing. The Company also was not represented by counsel. The Company was represented by the owner's sister, who is not a lawyer. However, lack of counsel is not a valid excuse for intentionally false statements, at least not in a civil proceeding. Moreover, Zelenak demonstrated himself to be a calculating individual who considered himself knowledgeable in the ways of litigation. On cross-examination, Zelenak made such remarks to company

counsel as: "I know what you're getting at," and "That's a good point."

Zelenak demonstrated himself to be a witness whose testimony is unworthy of belief. I do not credit his testimony as to any matter pertinent to the merits of this case, whether or not expressly contradicted by another witness, except insofar as such testimony constituted an admission against interest, or was corroborated by another witness or witnesses, or by reliable objective evidence. Whatever reservations I have concerning Ditto's testimony, they pale into insignificance when compared to Zelenak's demonstrated lack of overall credibility. Ditto impressed me as a generally credible witness, who bore no ill will toward Zelenak because of his union activity or for any other reason.

I credit Ditto's testimony concerning the September 8 meeting, including his testimony that Zelenak said he didn't "give a shit." As indicated Leadman Kunas testified that he did not recall Zelenak making such a remark. However in his investigative affidavit, Kunas stated that Zelenak did make that remark.

Apart from Zelenak's demonstrated lack of credibility, his version of the September 8 meeting makes no sense. As indicated by the testimony of all three participants, Ditto summoned Zelenak and commenced the meeting for the purpose of reviewing Zelenak's work performance. He did not do so with an intent to discharge Zelenak. Rather, Zelenak said something which caused Ditto to fire him. Under Zelenak's version, Ditto did not hear or learn anything which he did not already know. Ditto knew for at least 9 months that Zelenak was outspokenly pronion. He knew that since February, Zelenak had been actively and openly trying to organize the employees. He also knew that Zelenak had been loudly complaining about allegedly unsafe working conditions and advising employees to sue the company because of actual or perceived on-the-job injuries. The only thing Ditto could have learned was, as indicated by the testimony of Ditto and Kunas, that Zelenak's poor work performance was attributable to his own indifference and hostile attitude. Zelenak in effect threw down the gauntlet by telling Ditto that he didn't care, thereby leaving Ditto no alternative but to terminate his friend and patron.

Zelenak was a chronic complainer who probably had been praising the virtues of union shops since he returned to work for the Company. This, notwithstanding his own admission that he quit his jobs with such firms because of his own dissatisfaction. At union firms, he probably talked about the virtues of nonunion shops. Zelenak was preoccupied with his own business, and saw employment as a means toward obtaining unemployment or other compensation if, hopefully, he was laid off. After Kastner and Ditto criticized his poor performance and warned him he might be discharged, Zelenak generated a union organizational campaign in order to provide a cause of action in the event he was discharged for poor performance.

As indicated, the Company was opposed to unionization. The Company, in disagreement with Zelenak, also believed that because it was a small shop, employees should be willing and available to perform tasks beyond their immediate assigned jobs. General Counsel failed to prevent any credible evidence, e.g., express or implied threats or other coercive

statements, which would indicate that the Company's opposition to unionization extended to a willingness to engage in discriminatory personnel actions. Because of his friendship and lucrative relationship with Zelenak, Ditto long tolerated Zelenak's poor work performance, until he realized that Zelenak was inviting a discharge.

By the summer of 1995, it was evident to Ditto that Zelenak's one-man union campaign was going nowhere. If Ditto had been motivated to terminate Zelenak because of his union activity, he probably would have done so in February (after Zelenak received warnings for poor performance), when Zelenak began his personal organizational campaign. I also find significant the fact that Ditto discharged Zelenak on his own initiative. If the Company were motivated to discharge Zelenak because of his union activity, the decision probably would have been made by or in consultation with Owner Sustar. As credibly testified by Ditto, he was indifferent to whether the employees decided to join a union. Rather he regarded his responsibility as that of taking care of getting the jobs out and shipping them on time and making money on it.

For the foregoing reasons, I find that the Company discharged Zelenak because of his poor work performance and outspoken indifference to the quantity and quality of his work and for no other reasons. General Counsel failed to demonstrate by credible evidence that antiunion sentiment or opposition to concerted protected activity was a substantial or motivating factor in Ditto's decision to terminate Zelenak. Assuming that the evidence presented by General Counsel met this burden of persuasion, I would find that the Company met its burden of establishing that it would have terminated Zelenak in the absence of his union and concerted activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To borrow a phrase from history: "It was very difficult to make him work, but to get him to tell the truth was well-nigh impossible."<sup>2</sup>

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company has not engaged in any unfair labor practices alleged in the complaint.

On the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended<sup>3</sup>

#### ORDER

The complaint is dismissed.

<sup>2</sup> Barbara W. Tuchman, *The Guns of August* (N.Y. 1962) (Description of Russian War Minister at the outbreak of World War I).

<sup>3</sup> If no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.