

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**U.S. Steel, a Division of USX Corporation and United Steelworkers of America, Local Union No. 5092, AFL-CIO.** Cases 4-CA-27695-1 and 4-CA-27695-2

September 12, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 25, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, U.S. Steel, a Division of USX Corporation, Fairless Works, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The 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), enf. 188 F.2d 362 (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 violated Sec. 8(a)(1) and (3) of the Act by discharging Brian Koontz and Stanley Zuczek because of their union and other protected concerted activities, we find it unnecessary to rely on the judge's speculation that: employee Koontz likely would have simply ignored Department Manager Clair's request to return the pager in light of all that "he and Zuczek had recently been through at the hands of the Respondent"; employee Zuczek likely would have ignored Department Manager Clair's request to return the pager, and that Clair's threat to bill employee Zuczek for the pager "must have seemed inconsequential"; and regarding Department Manager Pentin's motive for attempting to hand-deliver the May 6, 1998 letters to employees Koontz and Zuczek.

<sup>2</sup> We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

Dated, Washington, D.C. September 12, 2003

---

Wilma B. Liebman, Member

---

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring.

I agree with my colleagues that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging accounting department employees Brian Koontz and Stanley Zuczek on June 4, 1998,<sup>1</sup> because of their union and other protected concerted activities.<sup>2</sup> As explained by the judge, "[t]he real issue here is whether [Koontz' and Zuczek's] failure to return [their] pagers would have resulted in [their June 4] termination if not for Koontz' and Zuczek's history of union and protected concerted activity." (Sec. II, B, par. 12.) I agree with the judge and my colleagues that the answer is "no." I write separately, however, to explain why the Respondent's argument—that given Koontz' and Zuczek's history of insubordination, the answer should be "yes," an argument to which I am not unsympathetic, must fail.

Koontz and Zuczek were longtime employees of the Respondent who had clean disciplinary records up until October 1997. Koontz and Zuczek were also longtime union officials who at all times relevant represented the bargaining unit employees as, respectively, grievance committeeman and grievance committee chairman. As part of their union responsibilities, in May 1996, Koontz and Zuczek filed grievances on behalf of two female bargaining unit members who alleged that their supervisor had engaged in sexual harassment. Koontz' and Zuczek's filing of charges and meetings with the Respondent's officials over the sexual harassment issues continued into 1997. Also in 1997, Koontz and Zuczek protested John Pentin's, the Respondent's accounting department manager, work assignments for a May 1997 physical inventory. Pentin did not appreciate Koontz' and Zuczek's perceived interference and, at a May 30, 1997 meeting to discuss the issue, called Koontz a "m—f—." Koontz and Zuczek then informed another manager of Pentin's behavior at the meeting. On the following day, May 31, Pentin told Zuczek that if Koontz and

<sup>1</sup> All dates are in 1998 unless otherwise stated.

<sup>2</sup> I also agree with my colleagues that the judge properly denied the Respondent's motion to sever and dismiss the complaint allegations relating to Koontz.

Zuczek pursued the incident any further and put a black mark on his record, he would fire them both.

It is against this background of a "history of union and protected concerted activity," that the judge considered the issue presented, i.e., whether the Respondent's June 4 discharges of Koontz and Zuczek violated the Act. The Respondent, on the other hand, asserts that the June 4 discharges can only be properly understood when viewed in the context of the Respondent's earlier discipline of Koontz and Zuczek.

As to these disciplinary actions, on October 20, 1997, Koontz and Zuczek received 5day suspensions (their first discipline) for being "absent from work without permission." Pentin had called a mandatory meeting for October 16, 1997, and employees had been informed that they would have to get excused by Pentin if they could not attend the meeting. Koontz and Zuczek neither attended the meeting nor requested excuses from Pentin. Instead, they followed their routine procedure of informing their immediate supervisor when they were called out on union business. Then, on January 5, the Respondent discharged Koontz and Zuczek for failing to report to work as directed on December 22, 1997. In brief, Koontz and Zuczek had remained at work through November 11, 1997, the last day of the disciplinary hearing over their October 20 5day suspensions. They called out sick on November 12, 1997, and their doctor sent the Respondent letters regarding their condition and explaining that they would not be able to return to work until further notice. The Respondent plainly doubted whether Koontz and Zuczek were unable to return to work for medical reasons, but it failed to follow the advice of its own doctor, Dr. Percy, that it get an independent medical evaluation of Koontz and Zuczek. Instead, on December 18, 1997, the Respondent directed that Koontz and Zuczek return to work on December 22, 1997, and then it denied the Union's December 19, 1997 request that the Respondent delay Koontz' and Zuczek's return until December 26, after the Christmas holiday, so that both men could consult their doctors. When Koontz and Zuczek failed to report to work as directed on December 22, the Respondent notified them that it had suspended them for 5 days subject to discharge. The Respondent converted their suspensions to discharges on January 5.

The Union grieved both the 5-day suspensions and the January 5 discharges. Arbitrators sustained both grievances. As to the 5-day suspensions, the arbitrator found that although Koontz and Zuczek appeared to have "misuse[d] their positions as union officials in a manipulative manner to miss the October 16 meeting," he nevertheless sustained the grievances on the grounds that his was "an isolated act of misconduct" which, given Koontz' and

Zuczek's clean disciplinary records, did not warrant the Respondent's disregard of its progressive disciplinary system. (It is unclear why, in light of his finding of a "misuse [of Koontz' and Zuczek's] positions as union officials," the arbitrator did not overrule the grievances but reduce the discipline.)

As to the January 5 discharges, the arbitrator in that proceeding found that the grievants "presented evidence of disability which on its face cannot be rejected as unreasonable" and that the Respondent had not established a convincing reason for rejecting that evidence. The arbitrator explained that the determination that the Respondent lacked proper cause to discharge Koontz and Zuczek was based on "a finding that at the time they were ordered to report to work they satisfied the eligibility requirements for sick leave and salary continuance set forth" in the contract. So much for the relevant background.

As to the June 4 discharges at issue here, the facts are relatively straightforward. Having discharged Koontz and Zuczek on January 5 for failure to report to work, the Respondent, by certified letters of January 13, instructed Koontz and Zuczek to return their pagers to the Respondent. The letters warned that failure to return the pagers within 30 days would result in their being personally billed for the cost of the pagers (the company from which the Respondent leased the pagers charged the Respondent \$99.95 for lost pagers). Both men ignored the letters' contents. Neither returned his pager within the required 30 days nor otherwise responded to Respondent's January 13 letter. The Respondent, however, took no action against them at that time. Then, on May 5, at the end of the arbitration hearings over their October 1997 suspensions, Pentin attempted to hand-deliver letters, dated May 6, to Koontz and Zuczek.<sup>3</sup> In the letters, Pentin referred to the January 13 letters and stated that this was Koontz' and Zuczek's second and final notice to return the pagers. The letters, which were identical, warned that failure to return the pagers by May 20 could result, inter alia, in the issuance of "discipline up to and including discharge." Neither responded to the May 20 letter. On May 29, the Respondent sent certified letters to Koontz and Zuczek which notified them of 5-day suspensions subject to discharge for "failure to return com-

<sup>3</sup> In finding the violations alleged, I do not rely on the judge's unsupported speculation that "Pentin's hand-delivery of these letters was a calculated strategy by him and the Respondent to ensure that Koontz and Zuczek did not know their jobs were again in jeopardy." (Sec. II,A,2, par. 14.) Indeed, it is just as, if not more, likely that the Respondent wanted to ensure that Koontz and Zuczek were aware that their jobs were in jeopardy and therefore hand-delivered the notices rather than running the risk that Koontz and Zuczek would ignore letters sent by mail, as they had the January 13 letters.

pany property as instructed.” The Respondent converted the suspensions to terminations by certified letters dated June 4.

Relying on Koontz’ and Zuczek’s filing of grievances and unfair labor practice charges on behalf of unit employees, the Respondent’s knowledge of that protected concerted activity, and the animosity exhibited by Pentin and other Respondent officials toward Koontz and Zuczek for engaging in that activity, the judge found that the General Counsel had carried its initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that the Respondent’s June 4 discharges of Koontz and Zuczek were unlawfully motivated. In finding that the General Counsel had shown that the June 4 discharges were unlawfully motivated, the judge relied in addition on the earlier arbitration awards, and on the facts that the Respondent had never previously disciplined, much less discharged, an employee for failing to return a pager, and that it had discharged Koontz and Zuczek without conducting an investigation prior to discharging them.

Having found that the General Counsel had satisfied its initial burden of showing that the discharges of Koontz and Zuczek were unlawfully motivated, the judge next considered whether the Respondent had shown on rebuttal that it would have discharged Koontz and Zuczek even absent their protected concerted activity. In finding that the Respondent failed to rebut the General Counsel’s initial showing that the discharges were unlawfully motivated, the judge found without merit the Respondent’s various defenses, including, inter alia, its defense that the June 4 discharges were justified because Koontz’ and Zuczek’s failure to return the pagers was the culmination of a pattern of defiant behavior that was evidenced by their conduct which led to their October 20, 1997 5-day suspensions and their January 5 discharges.

I agree with the judge that since the arbitrators found that the 5-day suspensions and January 5 discharges were not justified, and that the arbitration awards ordered the expunction of the disciplinary actions from Koontz’ and Zuczek’s records, the Respondent cannot rely on that discipline to justify its June 4 discharges of Koontz and Zuczek. That is not to say, however, that Koontz and Zuczek did not engage in insubordinate behavior that, in other circumstances, might have subsequently justified their June 4 discharges.

For I find that Koontz and Zuczek did engage in an act of insubordination when they deliberately failed both to attend the October 16 mandatory meeting and to notify Pentin, as required, that they would be absent. Indeed, the arbitrator concluded as much when he found that

Koontz and Zuczek appeared to have “misuse[d] their positions as union officials in a manipulative manner to miss the October 16 meeting.” I also find that Koontz and Zuczek may have engaged in insubordinate behavior by failing to report to work as ordered on December 22, 1997. Assuming such acts of insubordination, in my view the Respondent would have been justified in discharging Koontz and Zuczek for another, third, act of insubordination, the failure to return their pagers as instructed.

The problem with the Respondent’s “insubordination” defense, however, is that the Respondent did not discipline Koontz and Zuczek for insubordination. Rather, it gave them 5-day suspensions on October 20, 1997, for being “absent from work without permission”; it discharged them on January 5 for failing to report to work as directed on December 22, 1997; and it discharged them a second time on June 4 for “failure to return company property [i.e., the pagers] as instructed.” Thus, the Respondent itself tied its discipline and discharges of Koontz and Zuczek to specific individual acts of alleged misconduct. Further, it is significant that the Respondent’s June 4 discharge of Koontz and Zuczek was inconsistent even with the initial disciplinary action it first notified them it would take if the pagers were not returned, the deduction of the cost of the pagers from their salaries. For although the Respondent set out this initial disciplinary action in its January 13 letter, i.e., after the October 20, 1997 5-day suspensions and after the January 5 discharges, it made no reference to the earlier suspensions and discharges in the January 13 letter. Nor at that time did it to rely on those suspensions and discharges to justify a more severe disciplinary action. For these reasons, it is too late in the day for the Respondent to justify its June 4 discharges of Koontz and Zuczek by asserting that it discharged them for a reason other than the reason it gave at the time.

In sum, the Respondent’s “insubordination” defense must fail. If, however, the Respondent had actually disciplined Koontz and Zuczek for insubordination, and had applied its own progressive disciplinary system, rather than an escalating one, to each act of misconduct, the result might be different.

Dated, Washington, D.C. September 12, 2003

---

Peter C. Schaumber

Member

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 Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Steelworkers of America, Local Union No. 5092, AFL-CIO, or any other union, or for engaging in any other concerted activities that are protected by the Act.

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, within 14 days from the date of the Board's Order, offer Stanley Zuczek 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.

WE WILL make Brian Koontz and Stanley Zuczek whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Koontz and Zuczek, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

## U.S. STEEL, A DIVISION OF USX CORPORATION

*Barbara C. Joseph, Esq.*, for the General Counsel.  
*Thomas G. Servodidio* and *Joseph N. Fabrizio, Esqs. (Duane, Morris & Heckscher LLP)*, for the Respondent.  
*Wayne Hamilton, Esq. (Galfand, Berger, LLP)*, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Philadelphia, Pennsylvania, on June 6 and 7, August 14-18, and September 6, 2000. United Steelworkers of America, Local Union No. 5092, AFL-CIO (the Union) filed the unfair labor practice charges on November 27, 1998.<sup>1</sup> Based on these charges, a corrected order consolidating cases, consolidated complaint and notice of hearing issued on July 8, 1999. The complaint alleges that the Respondent, U.S. Steel, a Division of USX Corporation, violated Section 8(a)(1) and (3) of the Act by discharging employees Brian Koontz and Stanley Zuczek on June 4, 1998.<sup>2</sup> The Respondent filed its answer to the complaint on July 23, 1999, denying the unfair labor practice allegations and asserting several affirmative defenses. The Respondent asserted that its actions were motivated by a good-faith belief that Koontz and Zuczek had committed offenses warranting discipline; that, assuming protected concerted activity were found to have motivated the Respondent's actions, it would have taken the same action in the absence of protected activity; and that the Respondent had already rescinded the June 4 discharge of Koontz.<sup>3</sup>

The June 4 terminations of Koontz and Zuczek occurred in the context of a protracted dispute between these two long-term employees, both active union representatives, and the Respondent's management. The story that unfolded at the hearing began in the spring of 1996, if not earlier, when employees complained to Koontz and Zuczek about perceived sexual harassment by their supervisor, and continued beyond the specific unfair labor practice alleged in the complaint. The June 4 terminations of Koontz and Zuczek were the second attempt by the Respondent to terminate them in a 6-month period. The Respondent initially terminated Koontz and Zuczek on January 5. An arbitration panel reversed that action in an award that issued after the June 4 discharge. Less than 3 months earlier, on October 20, 1997, the Respondent had suspended Koontz and Zuczek for 5 days, an action that was also reversed in an arbitration award rendered after the June 4 terminations. The General Counsel has deferred to both arbitration awards under the Board's *Spielberg/Olin*, supra, deferral policy. On November 3, after the discharge at issue here, the Respondent attempted a third time to discharge Koontz. That attempt proved successful, with the arbitrator upholding the discharge in an award to which the General Counsel has also deferred. The facts related to the June 4 terminations at issue before me are relatively simple and straightforward, and the applicable legal standard, i.e.,

<sup>1</sup> All dates are in 1998 unless otherwise indicated.

<sup>2</sup> The corrected complaint also alleged that a November 3, 1998 discharge of Koontz was unlawful. By letter dated March 2, 2000, the Regional Director dismissed this allegation, deferring to an arbitration award upholding the discharge. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

<sup>3</sup> The Respondent also asserted a general 10(b) defense. The Respondent did not pursue this defense at the hearing or in its posthearing brief.

the Board's *Wright Line*<sup>4</sup> motivation test, is well established. However, my decision is complicated by the parties' insistence that I consider all of the preceding events in determining whether the Respondent's action on June 4 was motivated by protected activity, or would have occurred even in the absence of this activity. The General Counsel and the Charging Party argue that the June 4 termination was merely one in a series of discriminatory and pretextual actions which the Respondent took against Koontz and Zuczek with the intent of ridding itself of these active and outspoken union grievance representatives. On the other hand, the Respondent argues that the conduct for which Koontz and Zuczek were terminated on June 4 is just another example of a pattern of defiant behavior and disregard of management authority by Koontz and Zuczek that is unrelated to their protected activity. The Respondent and the General Counsel each offered a great deal of evidence to convince me of their respective positions. Much of this evidence has already been considered by three arbitration panels whose findings have been effectively adopted by the Board's General Counsel. Other evidence, not previously considered, will be discussed in the findings of fact. Although I may not address all of the evidence and the many conversations and events that I heard testimony about in this proceeding, all of the evidence has been considered in reaching my decision. Statements or events that are remote in time or of little relevance to resolving the unfair labor practice issue have been omitted from this decision.

Before turning to the facts, there are two preliminary motions that must be addressed.

#### Motion to Correct the Record

The parties filed their respective briefs on October 20, 2000. Counsel for the General Counsel filed with her brief a motion to correct the transcript. The Respondent filed a response in which he stipulated to most of the General Counsel's corrections, either as proposed or as modified by the Respondent, and proposed several additional corrections that were accurate and consistent with the corrections proposed by the General Counsel. As to these corrections, I shall grant the General Counsel's motion as supplemented by the Respondent's response and correct the transcript accordingly. Counsel for the Respondent opposed three of the General Counsel's proposed corrections. Because there is a significant dispute between the parties as to these three alleged errors in the transcript, they require additional discussion.

The General Counsel proposed correcting the transcript at page 615, line 10 from "does he" to "do you." The Respondent contends that the current transcript version accurately reflects the question that counsel for the General Counsel asked the witness at the hearing. The Respondent argues that the General Counsel is attempting to change her question to remove an alleged inconsistency in the testimony of the witness (Phillip Bourke). Having reviewed the disputed portion of the transcript in the context of General Counsel's overall examination of the witness and his earlier responses, I find that the correction pro-

posed by the General Counsel is accurate and that the text in the transcript is erroneous. Accordingly, I shall grant the General Counsel's motion in this respect.

The General Counsel proposed correcting the transcript at page 783, line 15 from "it's part" to "it's not part." This portion of the transcript relates to the Respondent's proffer of a document (R. Exh. 29) that contained handwriting on the back. The dispute is over what Respondent's counsel said at the hearing when asked about this handwriting. Although my own recollection is that counsel said it was not part of the document, I find it unnecessary to correct this portion of the transcript. Counsel for the Respondent stated at the hearing, and reiterated in his posthearing response to the General Counsel's motion, that the Respondent was not relying on this handwritten part of the document. Moreover, in ruling on the proffer at the hearing, I explicitly excluded the handwriting from the document received in evidence. Whether the handwriting was part of the document or not is of no consequence because the handwriting is not in evidence and cannot be considered in making a decision in this matter.

The General Counsel proposed correcting the transcript at page 858, line 21 from "contest"<sup>5</sup> to "conduct." The Respondent argues that the word in the transcript is a correct transcription of the witness' testimony. Having reviewed the transcript in the context of the overall testimony of this witness (Deborah Jensen, the attorney for the Union who represented the discriminatees during an arbitration proceeding), I agree with the Respondent that the witness used the word contest, not conduct. Moreover, the transcript as currently typed makes more sense in context than the correction proposed by the General Counsel. Accordingly, I shall deny the General Counsel's motion to correct the transcript in this regard.

A complete list of the corrections made to the transcript pursuant to my order is attached to this decision as appendix A [omitted from publication].

#### The Respondent's Motion to Sever and Dismiss Case 4-CA-27695-2 (Koontz' case)

At the outset of the hearing, the Respondent filed a written motion to sever and dismiss the charge filed by the Union on Koontz' behalf. The Respondent argued that the Union negotiated a prearbitration settlement of its grievance over Koontz' June 4 discharge, the subject of this proceeding, and that the Board should defer to that settlement. The Respondent argued further that the settlement and the subsequent termination of Koontz on November 3, upheld in an arbitration decision to which the General Counsel has already deferred, renders further litigation of the unfair labor practice allegation moot. Counsel for the General Counsel objected. The General Counsel contended that there was no "negotiated" settlement of the grievance over Koontz' June 4 discharge. While conceding that the subsequent termination of Koontz would limit the remedy for any unfair labor practice found here, the General Counsel disputed Respondent's contention that the issue was moot. Because the Respondent's motion raised substantial factual issues

<sup>4</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

<sup>5</sup> As the Respondent correctly notes, the word that actually appears in the transcript at that location is "contest," not "content," as claimed by the General Counsel.

regarding the existence of a settlement and because the motion had been filed with no advance notice to the General Counsel, I deferred ruling on the Respondent's motion until after hearing all the evidence and receiving briefs from the parties.<sup>6</sup>

During the hearing, Deborah Jensen, the Union's attorney, and James Garraux, the Respondent's vice president of employee relations who held the position of general manager of employee relations at the time, testified regarding the alleged "settlement" of Koontz' grievance. Jensen testified that, on October 27, the date the grievances over Koontz' and Zuczek's June 4 terminations were scheduled to be arbitrated, she had a discussion with Garraux before the hearing commenced. Garraux told her that the Respondent intended to arbitrate Zuczek's grievance solely on the basis of timeliness. With respect to Koontz, Garraux said that the Respondent had decided to sustain the grievance, to reinstate Koontz and make him whole. According to Jensen, Garraux did not tell her that the Respondent planned to terminate Koontz again before he could return to work. Based on Garraux's representations, Jensen decided not to pursue Koontz' grievance to arbitration. Jensen denied that the grievance was ever withdrawn. Garraux's testimony differed only slightly. According to Garraux, he told Jensen that, "in order to resolve the case," he would rescind the discharge, make Koontz whole and treat his personnel record as if the incident never occurred. Garraux testified that Jensen accepted this resolution of the grievance by not going forward with the arbitration. Although Garraux denied that he specifically told Jensen that Koontz would be reinstated, he acknowledged being aware that Jensen would believe that reinstatement was implicit in his offer to rescind the discharge.<sup>7</sup> Garraux admitted that he knew at the time of this discussion that the Respondent was going to suspend Koontz for 5 days, subject to discharge, before he could return to work. Garraux also admitted not telling Jensen any of this. Garraux testified that the Respondent's objective in revoking Koontz' June 4 discharge only to discharge him again was to get damaging evidence against Koontz, indicating that he had lied in an unemployment proceeding, before the arbitrator who had ordered him reinstated. On October 30, 3 days after Jensen's conversation with Garraux, the Respondent issued Koontz the 5-day suspension, which it converted to a discharge on November 3.

On October 6, 1999, almost a year after the parties had "settled" the grievance over Koontz' June 4 discharge, the parties appeared again before the arbitrator. This time, the arbitrator

<sup>6</sup> The General Counsel indicated that dismissal of the Koontz' charge would not have resulted in any reduction in the length of the hearing because Koontz was a corroborating witness for Zuczek and the General Counsel was relying on the Respondent's similarity of treatment of the two discriminatees as a factor showing unlawful motivation. The Respondent's counsel conceded that, even if I deferred to the "settlement" of Koontz' grievance, the General Counsel would have the right to offer the same evidence in support of Zuczek's charge.

<sup>7</sup> The parties' collective-bargaining agreement would support such a belief on Jensen's part. Under Sec. 8(C), "[s]hould any initial suspension, or affirmation, modification, or extension thereof, or discharge be revoked by the Company, the Company shall reinstate and compensate the employee affected." Thus, the contract explicitly requires reinstatement when the Respondent revokes a discharge.

was scheduled to hear the Union's complaint that the Respondent had not complied with the arbitrator's August 31 backpay award concerning the January 5 discharge of Zuczek and Koontz.<sup>8</sup> The transcript of that hearing shows that the parties negotiated a settlement of the Union's claims and put the terms of the settlement on the record. Jensen testified that this settlement had nothing to do with the grievance over the June 4 discharge. Garraux testified that the agreement reached by the parties in October 1999 resolved the "make whole" issues regarding both the August 31 arbitration award and the October 1998 "settlement" of the grievance over Koontz' June 4 discharge. In the arbitration transcript, Garraux precedes his description of the terms of the settlement with a statement that he was "going to put on the record a settlement of the claims raised in the compliance hearing." He then describes what the Respondent had agreed to do in order to comply with the arbitrator's backpay order for Zuczek and Koontz. With respect to Koontz, the Respondent agreed to make him whole by paying him salary continuance from January 5, the date of his first discharge, until March 1, and backpay based on a comparable employee's earnings from March 1 until October 30. Garraux stated that this agreement was a compromise and would not be prejudicial to the positions raised by either party. Garraux's statement describing the terms of the settlement is followed in the transcript by Jensen's statement that Garraux's recitation was "completely accurate." The hearing then ended without any further discussion. That same day, the parties arbitrated the grievance over Koontz' November 3 discharge. As of October 6, 1999, Koontz had still not returned to work. Koontz testified before me, without contradiction, that he did not receive any backpay under the August 31 award until a few weeks before the hearing in this case opened.

In support of his motion, the Respondent argues that the Board's policy is to defer to grievance settlements when they meet the standards that the Board has established in *Spielberg*, supra, and *Olin*, supra, for deferral to an arbitration award. Under this test, the Board will defer to a prearbitration grievance settlement where it was reached under the terms of the contractual grievance procedure, the procedure was "fair and regular," all parties have agreed to be bound by the settlement, and the results of the settlement were not "clearly repugnant to the principles and policies of the Act." As the Board has defined the last criteria, a grievance settlement is not "clearly repugnant" unless it is "palpably wrong as a matter of law." *Alpha Beta Co.*, 273 NLRB 1546 (1985), affd. sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). The Board also requires that the parties have "considered the unfair labor practice issue" in settling the grievance, i.e., that the contractual issue and the unfair labor practice issue are factually parallel and the parties were generally aware of the facts relevant to resolving the unfair labor practice issue. *Postal Service*, 300 NLRB 196 (1990).

<sup>8</sup> The Respondent's counsel mistakenly argued that the compliance hearing related to the "settlement" of the grievance over the June 4 pager discharge. It is clear from the caption on the transcript of the hearing that the parties were in fact arbitrating compliance with the August 31 award.

Initially, I find that there was no “settlement” of Koontz’ grievance over the June 4 discharge at issue here. There is no dispute that Garraux did not disclose to the Union, on October 27, 1998, the Respondent’s intention not to reinstate Koontz as part of its offer to rescind his discharge. It is also undisputed that Jensen, the Union’s representative, believed that reinstatement was at least implicit in Garraux’s offer. Such a belief was reasonable in light of the explicit language in the parties’ contract quoted at footnote 8 above. Garraux admitted being aware that Jensen interpreted his offer as including reinstatement. It is clear from this testimony that the parties attached two very different meanings to the language used in the agreement. Under these circumstances, the “meeting of the minds” required for the formation of an agreement was absent. See *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992); *Howard Electrical & Mechanical*, 293 NLRB 472, 489–491 (1989). Cf. *Monterey/Santa Cruz Building Trades Council (National Refractories)*, 299 NLRB 251, 256–257 (1990).

The parties’ resolution of the compliance grievance a year later also did not create an agreement that resolved the issues surrounding Koontz’ June 4 discharge. The question of his reinstatement was still unresolved. By that point in time, it was clear that the Union had not accepted the terms that were actually offered by Garraux a year earlier, i.e., revocation of the discharge without reinstatement. In fact, the Union had grieved Koontz latest discharge almost immediately and pursued it to arbitration with the arbitration hearing taking place the very day the parties “settled” the backpay issues related to the June 4 discharge. Under these circumstances, there was no “settlement” under which all parties had agreed to be bound that resolved either the grievance or the unfair labor practice. See *Spann Maintenance Co.*, 289 NLRB 915 (1988).

Even were I to find that a settlement agreement was reached in October 1998 or October 1999, deferral would not be appropriate because the settlement did not satisfy the Board’s standards cited above. Any “agreement” by the Union to forego arbitration of its grievance over Koontz’ June 4 discharge was fraudulently induced. When Garraux offered to rescind the discharge, he knew that the Respondent had no intention of reinstating Koontz. At the same time, Garraux also knew that the Union would interpret his offer as including reinstatement even if he did not use the word. Nevertheless, he said nothing that would have put the Union on notice that his offer meant something different than the contract and the parties’ practice would indicate. Garraux’s failure to disclose the Respondent’s plans to Jensen was not merely an oversight. It was a calculated strategy to achieve the Respondent’s goal of issuing a termination that would “stick” before an arbitrator. There is no question, based on the evidence in the record before me, that the Union would never have agreed to settle Koontz’ June 4 discharge without reinstatement. On the contrary, a year later the Union was still pursuing reinstatement for Koontz, arguing before the arbitrator that the Respondent’s immediate termination of Koontz upon rescission of the June 4 discharge was evidence of its discriminatory motivation. Where one party induces the other to settle a grievance by failing to disclose a material fact, as was the case here, the proceedings cannot be said to have been “fair and regular.” Moreover, because the Act

encourages good faith and honesty in dealings between the parties to a collective-bargaining relationship, the putative grievance settlement here is “clearly repugnant” to the principles and policies of the Act.

The putative settlement of Koontz’ June 4 discharge also fails to meet the Board’s standards for approval of non-Board resolutions of unfair labor practice charges. See *Independent Stave Co.*, 287 NLRB 740 (1987).<sup>9</sup> The Board evaluates such settlements in light of all factors present in a case to determine whether “it will effectuate the purposes and policies of the Act to give effect to the settlement.” *Id.* at 743. One of the factors the Board considers is whether there has been any “fraud, coercion, or duress by any of the parties in reaching the settlement.” I have already found that Garraux’s behavior fraudulently induced the Union to agree to a settlement that it would not have agreed to were all the facts known. Approval of any non-Board resolution of Koontz’ June 4 discharge allegation would clearly not effectuate the purposes and policies of the Act.

The Respondent also argues for dismissal of the allegations regarding Koontz on the basis that they are moot. Although there may no longer be any issue as to the reinstatement of Koontz based on the subsequent arbitration award upholding his November 3 discharge, and although all backpay issues affecting Koontz have been or could be resolved through the arbitration process, these issues only go toward the remedy that might be available in the event an unfair labor practice were found. The real issue here, which remains alive notwithstanding subsequent events, is whether the Respondent terminated Koontz and Zuczek on June 4 in violation of the Act. This issue goes beyond the individual interests of Koontz and the Respondent and concerns the public interest as expressed in the Act, i.e., protecting the right of employees to engage in those activities enumerated in Section 7. The Respondent’s conduct in rescinding the June 4 discharge and terminating Koontz again hardly amounts to a disavowal or repudiation of any allegedly unlawful conduct. See *Sam’s Club*, 322 NLRB 8 (1996), *enfd.* 141 F.3d 653 (6th Cir. 1998).

Accordingly, for the above reasons, I shall deny the Respondent’s motion to sever and dismiss the allegations relating to Koontz and shall decide his case as well as Zuczek’s on the merits. On the entire record, as corrected above, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, operates a facility in Fairless Hills, Pennsylvania (the Fairless Works), where sheet and tin steel are processed and finished. The Respondent annually purchases and receives goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in

<sup>9</sup> The *Independent Stave* test applies to a much broader category of “settlements,” covering any voluntary resolution of unfair labor practice allegations reached outside the Board’s processes, without regard to whether it occurred in the context of a contractual grievance/arbitration proceeding.

commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Facts

#### 1. Background

The Union has represented a unit of the Respondent's salaried clerical and technical employees at the Fairless Works for many years.<sup>10</sup> The relevant collective-bargaining agreement covering this unit (referred to as the Basic Labor Agreement or BLA) was effective for the period February 1, 1994, to August 1, 1999. At the time of the alleged unfair labor practices, the discriminatees, Koontz and Zuczek, had each been employed by the Respondent at the Fairless Works for about 30 years. They were members of the Union and had held various union offices for 20 years. During the period relevant to these proceedings, both worked in the accounting department with Koontz serving as the Union's grievance committeeman and Zuczek serving as the chairman of the Union's grievance committee. They had held these positions for approximately 10 years. Koontz and Zuczek spent approximately 50 percent of their time on union business. There is no dispute that Koontz and Zuczek had clean disciplinary records until October 1997.

In the spring of 1996, a female unit employee in the accounting department approached Koontz, in his role as grievance person, with a complaint of inappropriate conduct by a department manager. The reported conduct could reasonably be perceived to be a form of sexual harassment. Koontz relayed the employee's concerns to Zuczek, in his role as chairman of the grievance committee. Koontz and Zuczek then met with Robert Kennedy, the Respondent's manager of employee relations at the Fairless Works, on or about May 14, 1996. The employee who reported the conduct was also present. In addition to Kennedy, the Respondent was represented at this meeting by William McBunch, senior personnel analyst whose responsibilities included cochairing the parties' joint civil rights committee, and Louis Schack, who supervised the manager whose conduct was at issue. After hearing the employee's complaint, Kennedy instructed McBunch to speak to the manager and report back to Kennedy. Kennedy advised Koontz, Zuczek and the employee that he would advise them of the results of McBunch's investigation.<sup>11</sup>

<sup>10</sup> Another local of the International Union, Local 4889, has represented the much larger unit of production and maintenance workers at this facility for as many years.

<sup>11</sup> At the hearing, I granted the General Counsel's request, under *Bannon Mills*, 146 NLRB 611 (1964), to preclude McBunch from testifying about his investigation because of the Respondent's failure to furnish the General Counsel, pursuant to subpoena, with documents showing the results of McBunch's investigation of the Union's sexual harassment complaints. The Respondent, in its brief, asks that I reconsider my ruling because any failure to furnish McBunch's notes was inadvertent. I see no reason to reverse my ruling. In any event, McBunch's testimony regarding his investigation is immaterial to the allegations at issue in this proceeding. The issue I must resolve is whether Koontz and Zuczek were engaging in statutorily protected

The parties met again within a few weeks, after McBunch had spoken to the manager about the employee's complaint. In the meantime, another female employee in the unit raised similar complaints about the same manager to Koontz and Zuczek. At this second meeting, McBunch reported to the Union and the complaining employees that the manager had denied engaging in any inappropriate conduct. McBunch informed Koontz, Zuczek and the employees that he had instructed the manager to cease locking his office door when meeting with employees and had reminded the manager of the Respondent's zero tolerance policy toward sexual harassment. In response to this report, Koontz and Zuczek expressed the feeling that the manager should receive some form of discipline for his conduct. McBunch replied that the Respondent did not believe that any discipline was warranted. Either Kennedy or McBunch told Koontz and Zuczek that, due to a previously planned reorganization of the department, the manager would shortly be moving out of the office where the complaining employees worked and into another building. He would no longer have any supervisory authority over these employees. Koontz, Zuczek, and the employees were told that this should prevent such problems from arising again. According to Koontz, the Union did not pursue the matter at that time because the employees who had complained did not wish to pursue it after this meeting.<sup>12</sup>

Zuczek testified that, in May or June 1996, shortly after these meetings, the manager who had been the subject of the complaints came to Zuczek's office and told him that he would fire Zuczek and Koontz for the trouble they had caused him. At the time, this manager supervised Zuczek's immediate supervisor. Zuczek reported this threat to Koontz but did not otherwise pursue the matter. As pointed out by the Respondent, this reticence was out of character for Koontz and Zuczek who often filed grievances and unfair labor practice charges over perceived harassment and discrimination based on their union activities. Nor did Zuczek or Koontz make any notes documenting this alleged threat, conduct which also contrasts with their behavior on other occasions when they were threatened by the Respondent's supervisors. The manager, who testified as a witness for the Respondent, denied making such a threat. Counsel for the General Counsel stated that the threat was not alleged as an independent violation of the Act because it occurred more than 6 months before the charge was filed.

Having considered the testimony and the above factors, I cannot credit Zuczek's testimony regarding this threat. Although I found Zuczek generally a believable witness, this particular portion of his testimony, which is totally uncorroborated and extremely self-serving, defies belief. Based on all the other evidence before me, I simply cannot believe that Zuczek would

activity when they raised the complaints with the Respondent and whether that activity motivated the Respondent's actions against them. Resolution of this issue does not depend on the merits of the employee's sexual harassment complaint or the adequacy of the Respondent's investigation of those complaints.

<sup>12</sup> This recitation is based on a compilation of the testimony of Koontz, Zuczek, Kennedy, and McBunch. The other participants at the meetings did not testify. Any discrepancies in the testimony among the various witnesses do not affect credibility and are reasonable in light of the passage of time between the meeting and the hearing.

essentially have kept such a bald threat to himself all these years, sharing it only with Koontz. In any event, there is no evidence that this particular manager was involved in the decision to terminate Zuczek on June 4. Any threat he may have made to Zuczek 2 years earlier would seem immaterial, if not irrelevant, to the issues here.

The undisputed evidence in the record indicates that the accused manager was relocated out of the area by June 1996 and replaced by a new manager, Robert Walck. Walck also took over supervision of Zuczek's immediate supervisor, William Winslade. The former manager, who had been the subject of the employees' complaints, trained Walck. The record contains a substantial amount of evidence regarding a training program on which Walck placed Zuczek beginning in August 1996. Zuczek had been in his current position, accounts payable control clerk, since the beginning of the year. Before the sexual harassment issue came up, he had filed grievances and unfair labor practice charges complaining that he was being denied training in this new job because of his position as chairman of the grievance committee. There is no dispute that the particular training program imposed on Zuczek was unprecedented in nature. At the conclusion of the 3-month training program, in November 1996, Walck removed Zuczek from his position, claiming that he had failed to adequately learn the job. Zuczek filed a grievance over this action, asserting that his removal was motivated by his efforts on behalf of the employees who had complained of sexual harassment. Walck testified that he had no knowledge of any such complaints before seeing the grievance at the first-step meeting on November 20, 1996. However, Walck acknowledged consulting with, and receiving advice regarding the design of the training program and Zuczek's performance under it, from other management officials, including Schack, who were aware of the sexual harassment complaints. The complaint does not allege that Zuczek's removal from his position was an unfair labor practice and the grievance he filed was apparently settled in 1997 in a package deal. The General Counsel relies on this incident as background evidence of animus toward Zuczek's protected activities. I find it unnecessary to resolve all the factual and credibility issues surrounding Zuczek's removal from the accounts payable position. There is ample other evidence of animus closer in time to the termination at issue here.

In the fall of 1996, the two employees who had complained in the spring about inappropriate conduct by their manager again approached Koontz with concerns about the same manager. Although he was no longer assigned to their department, he was still spending time there and communicating with them by telephone during the month-end closings. They complained that this continued contact made them uncomfortable. After attempts to resolve the issue informally within the department were unsuccessful, Koontz, on December 23, 1996, filed the first formal grievance on behalf of one of the employees. The grievance referred to the earlier complaints and their "resolution" and alleged that the Respondent was not complying with the agreement reached in the spring to remove the manager from the office. After the grievance was filed and denied at step one, Koontz and the grievant were asked to attend a meeting with Preston Henderson, the Respondent's department man-

ager-labor relations and personnel, and Carl Csensich, another accounting department manager. This meeting occurred on January 3, 1997. According to Koontz, Henderson and Csensich questioned the employee about her motives in making the complaints and the specific conduct she believed was inappropriate. Koontz testified that this questioning upset the employee, causing her to cry. Koontz ended the meeting and reported what occurred to Zuczek. When Koontz and Zuczek complained to Kennedy, Kennedy replied that Henderson had a different reading of the meeting and felt that the grievant was satisfied. Koontz then drafted a letter, which was sent to Kennedy under Zuczek's signature on January 10, 1997, describing the meeting and expressing the employee's concern that her complaints were not being taken seriously. The letter ended by stating the Union's desire to resolve the matter "in house" and requested a meeting with Kennedy to discuss the grievant's concerns.<sup>13</sup> Koontz and Zuczek met with Kennedy on January 15, 1997. McBunch was also present. Koontz and Zuczek reiterated their belief that the Respondent had reneged on an agreement to keep the manager away from the employees who had complained about his conduct. Kennedy denied making any such commitment. Kennedy then accused Koontz of inciting the two female employees to make these complaints because of a personal vendetta he had against the manager in question. Koontz denied this and filed his own grievance protesting this accusation.<sup>14</sup>

On January 16 or 17, 1997, the two female employees asked Koontz and Zuczek to accompany them to Philadelphia to file EEOC charges against the Respondent. After Koontz and Zuczek informed their supervisors that they and the two female employees would be taking the next day off for union business, Kennedy asked to meet with them. Koontz and Zuczek started the meeting with Kennedy in Kennedy's office. Zuczek told Kennedy that the two women were prepared to file EEOC charges regarding the manager's conduct, as well as a claim that the Respondent had created a hostile work environment. Zuczek also told Kennedy that a third female employee had come forward with similar complaints about the same supervisor. Zuczek told Kennedy that the women felt they had no choice but to file EEOC charges because nothing had been

<sup>13</sup> Neither Henderson nor Csensich testified about the January 3 meeting. Surprisingly, Henderson denied having any involvement in dealing with the sexual harassment complaints in 1996-1997. The January 10 letter sent to Kennedy under Zuczek's signature clearly refers to Henderson's involvement in the January 3 meeting.

<sup>14</sup> The Respondent made the same accusation in the response it filed to a Finding of Probable Cause by the Pennsylvania Human Relations Commission (PHRC) on charges filed by the two female employees. In that forum, the Respondent took the position that the case before the PHRC was

a thinly disguised attempt by several employees to degrade a supervisor. . . . [The supervisor], prior to the incidents complained of here, had to make a number of personnel cutbacks in the Accounting Department, related to a major permanent shutdown of an entire operating portion of the Works. This was distasteful to a number of employees and particularly upsetting to union representatives in the local union which represented the salaried steelworkers. This case and the companion case . . . are retaliation for those cutbacks previously made by [the supervisor].

done despite the previous meetings and grievances they had filed. Kennedy suggested they adjourn the meeting to a local tavern, the Bridge Café, to see if they could come to some resolution that would prevent the filing of EEOC charges. At the tavern, Kennedy proposed having an independent person come to the plant from Pittsburgh to conduct an investigation into the complaints. The Union agreed and arranged for a meeting the next day between Kennedy and the grievants. The next day, Kennedy met with Koontz, Zuczek and the two women. He asked the women if they had retained legal counsel and they told him they had. Kennedy then made his proposal for an independent investigation of their complaints. The two women agreed to this proposal and did not go to Philadelphia that day.

Thomas Lauritzen, the Respondent's manager—equal employment opportunity, whose office is at the Respondent's Pittsburgh headquarters, came to the plant on January 21, 1997, to conduct the investigation. His investigation lasted 3 days. During the investigation, he interviewed the two women who initially complained about the accounting department manager's conduct as well as other women in the department. Koontz, Zuczek, and two other union representatives, Local 5092 President Dan Rooney and Carol Murphy, the Union's co-chair of the joint civil rights committee, participated in the investigation. It was Murphy who selected the women to be interviewed. She also was present at all of Lauritzen's interviews with employees. Rooney, Koontz and Zuczek attended some, but not all, of these interviews. Lauritzen also interviewed the manager who was the subject of the complaints, but he would not permit any union representatives to be present for this interview. Nor did Lauritzen permit the Union to interview the manager on its own. At the conclusion of his investigation, Lauritzen reported to Kennedy, on or about January 28, 1997, that no sexual harassment had occurred. He did not prepare a written report. Lauritzen testified that he instructed Kennedy, before returning to Pittsburgh, to remind the managers at the plant that there must be no retaliation against anyone for bringing these complaints.

Lauritzen's investigation did not put an end to the issue. Koontz and Zuczek continued to file grievances on behalf of the two female employees who had initially raised the issue in the spring. These new grievances, filed on February 6, 7, and 19, 1997, alleged that the continuing presence of the manager in the department where these employees worked and his contacts with them were creating a hostile work environment. In the grievances, Koontz and Zuczek reiterated their position that the Respondent had agreed in the spring 1996 that this manager would be removed from the department and would have no further contact with the employees. Koontz and Zuczek also challenged the adequacy of the Respondent's investigation of the employees' complaints. One of the grievances also complained of a newspaper clipping, which was critical of women who accuse men of sexual harassment, that the employees found posted in the department shortly after Lauritzen conducted his investigation. The Respondent denied each of these grievances, asserting that their had never been any agreement as described by Koontz and Zuczek and that the Respondent had investigated and remedied all of the complaints made by the grievants.

The record does not disclose whether the Union pursued these grievances beyond step two, which is the last step handled by either Koontz or Zuczek. The two female employees did eventually file a discrimination complaint with the EEOC and the PHRC. By coincidence, in February 1997, the employee who was the lead grievant was demoted from her position in the accounting department to an entry-level clerk's position in the production mill. She was returned to her position in April 1997 as part of a settlement of a number of grievances negotiated between Zuczek and Kennedy. It is undisputed that, as part of this settlement, Zuczek withdrew his grievance and unfair labor practice charge over his removal from the accounts payable position in November 1996. There is a conflict in the testimony whether Kennedy asked Zuczek to withdraw his grievance and charge as a condition to the settlement or whether Zuczek offered to do so to induce Kennedy to settle the other grievances. I find it unnecessary to resolve this conflict. The accounting manager who was the subject of the employees' complaints ultimately left the Fairless Works when he was offered the position of controller at the Respondent's Wilmington, Delaware facility. He testified that, while he did not officially assume his new position until May 1, 1997, he spent most of his time out of the Fairless facility beginning in February or March 1997.

Lauritzen's investigation and Koontz' and Zuczek's grievance activity over the alleged sexual harassment coincided with the arrival at the Fairless Works of a new manager in the accounting department, John Pentin. Pentin had been working at the Respondent's Pittsburgh headquarters as an auditing supervisor. At the Fairless Works, he was responsible for all of the accounting operations, including the departments in which Koontz and Zuczek worked. Koontz and Zuczek were two levels below Pentin in the Respondent's hierarchy.<sup>15</sup> Pentin acknowledged being aware of the sexual harassment issues in his department soon after arriving because Lauritzen was conducting his investigation at that time. Pentin also acknowledged speaking to the accused manager, who was under his supervision, about the accusations and being aware of Koontz' and Zuczek's role in filing and pursuing the grievances over this issue.

Sometime in February or March 1997, Pentin and McBunch met with Koontz and Zuczek at Pentin's request. According to Pentin, the purpose of this meeting was to introduce himself to the union representatives for his area, tell them what his charge was in coming to the department and get some feedback from them as to what they thought should be done. Pentin told Koontz and Zuczek that his charge was to be a "change agent," to improve the performance of the facility and its standing in the eyes of headquarters. Pentin testified that, in response, Koontz and Zuczek, rather than addressing any issues in the department, "jumped on the membership," calling them derogatory names, which will not be repeated here, that are generally

---

<sup>15</sup> Koontz' and Zuczek's immediate supervisor until the summer 1997, William Winslade, did not testify. Winslade resigned his employment with the Respondent in the summer of 1997. Walck testified that no one replaced Winslade. Walck himself was replaced by Mark Clair in January 1998.

associated with women. According to Pentin, after the second time they used such language, Pentin told them that he would appreciate it if they would not refer to their members in such manner. McBunch corroborated Pentin for the most part. McBunch recalled that Koontz and Zuczek derogatory references to female employees came after they had expressed their frustration over a number of grievances from the department, including personal grievances filed by Koontz, that had been pending for awhile. According to McBunch, the derogatory names were used to refer to administrative employees in the department, including nonunit nonexempt employees. Koontz and Zuczek adamantly denied ever using such language to refer to any female employee, unit or nonunit. I tend to believe them because, based on their demeanor on the witness stand and their zealous pursuit of the harassment complaints on the part of women in the department, the language attributed to them by the Respondent's witnesses is out of character. Moreover, I was not particularly impressed by the demeanor of Pentin or McBunch. As will be shown, Pentin was not averse to using profanities to refer to unit employees himself. Thus, his apparent offense at Koontz' and Zuczek's use of profanity is hard to believe. In any event, it is clear that Pentin would be on notice from this meeting, if he didn't already know based on their pursuit of the sexual harassment grievances, that Koontz and Zuczek were not likely to shirk their responsibilities as union representatives in the face of changes in the department and would be aggressive in enforcing contractual rights.

Pentin's next encounter with Koontz and Zuczek was in May 1997, just before the start of a physical inventory that the facility is required to perform on an annual basis. This was the first such inventory that Pentin had presided over at the Fairless Works. Koontz and Zuczek testified that a few unit employees approached them after the Respondent had posted a schedule for the inventory. These employees complained that the schedule showed that the Respondent had assigned nonunit employees and managers to perform the inventory without first asking unit employees if they wanted it. The employees also complained that these nonunit employees were assigned to the preferred shifts. According to Koontz and Zuczek, the practice had been that inventory work was offered first to unit employees in the accounting department, then to the rest of the unit and, only if not enough unit employees volunteered, to nonunit employees and managers. Koontz and Zuczek raised these complaints with their immediate supervisor, Winslade and his supervisor Walck on May 30, 1997. At a meeting in Winslade's office at about 1:30 that afternoon, it was agreed that Zuczek and Koontz would be added to the inventory schedule and would work one of the preferred assignments instead of Joan Nemeth, a nonunit nonexempt employee and Ray Karl, a supervisor. Nemeth had been the subject of several complaints before this incident that she was doing unit work. It is undisputed that Koontz and Zuczek had pursued a number of grievances, following a reorganization in the accounting department in 1996 that resulted in the layoff of unit employees, over the issue of the Respondent reassigning unit work to nonunit employees.<sup>16</sup>

<sup>16</sup> One of these grievances involved a claim by Koontz and Zuczek that Nemeth was doing the work of the employee who had initiated the

Sometime during the afternoon on May 30, Zuczek was called by Winslade and told that Pentin wanted to meet with him and Koontz about the inventory. Koontz, Zuczek, Winslade, Walck, and Pentin attended this meeting. All but Winslade testified. The witnesses had varying degrees of recall and, as to be expected, their recollection was colored by their individual points of reference. It is not necessary to resolve all the minutiae of who said what and why because the witnesses agree in general terms about what transpired at the meeting. Koontz explained the Union's objections to the inventory schedule that had been posted. Pentin said that he had assigned non-unit employees to do the inventory because he wanted it done right. Koontz asked if Pentin was calling the unit employees "stupid." Pentin denied this and complained that Koontz and Zuczek tried to throw a "monkey wrench" every time he tried to do something at the plant. Pentin also accused Zuczek of always "picking on" Nemeth, intimidating and harassing her, and stated his belief that this is what motivated the Union's complaint about the inventory assignments. At one point in the meeting, according to Koontz and Zuczek, Pentin told Zuczek, "[T]wo can play this game, you're not immune to losing your job." According to Pentin, he said, "[N]o employees are immune from the rules, from complaints from other employees, and the potential consequences." There is no dispute that the conversation became heated, with both sides raising their voices and profanity being heard. Pentin conceded that he raised his voice and used profanities himself during the meeting. At one point during this heated exchange, Koontz got up from his seat next to Pentin and moved toward the door. There is no dispute that Pentin touched Koontz in some fashion and called him a "m— f—." It is not clear from the testimony of the witnesses what precisely precipitated this reaction by Pentin. Neither Pentin nor Walck, who testified for the Respondent, described any kind of threatening or abusive conduct on Koontz' part that would have justified Pentin's reaction. What is clear from Pentin's own testimony, as well as Walck's, is that Pentin was angry at Koontz at least in part because of what Pentin believed was an attempt to interfere with the conduct of the inventory.<sup>17</sup> After this meeting, Zuczek and Koontz complained to Kennedy about Pentin's conduct. At a meeting that same afternoon, they asked Kennedy to look into the matter and take action against Pentin. When Koontz said that he would be fired if he did the same thing to one of Kennedy's managers, Kennedy replied, "[Y]es you would."

Zuczek testified that, on May 31, 1997, the day after these meetings, Pentin called him outside of the building to speak to him. No one else was present. According to Zuczek, Pentin told

---

sexual harassment complaints and had been demoted in February 1997. As previously noted, that grievance was settled in April with the employee being returned to her job.

<sup>17</sup> Pentin and Walck testified that they were angry about the discriminatees' complaints because they were told by Winslade that Koontz and Zuczek had been offered and declined the opportunity to work the inventory before the schedule was posted. This hearsay testimony was not received for the truth. As previously noted, Winslade did not testify. Koontz and Zuczek credibly denied that they had been offered an opportunity to work the inventory before raising their complaints.

him if they (Koontz and Zuczek) pursued the incident any further and put a black mark on his record, he would fire both of them. Pentin denied making any such threat. Zuczek did not file a grievance over this alleged threat, but he did document it in notes he prepared in June 1997, shortly after the incident. Although this alleged threat is similar to the one Zuczek attributed to the former manager accused of sexual harassment, testimony which I discredited above, I find his testimony as to Pentin's threat credible.<sup>18</sup> Although Zuczek did not file a grievance, he did request that Carol Murphy, the Union's cochair on the Civil Rights Committee, write to the Respondent's cochair and request an impartial investigation into Pentin's accusations that Zuczek had harassed and intimidated Nemeth. Murphy wrote such a letter on June 2, protesting the accusations against Zuczek and requesting an investigation. Zuczek's conduct in initiating this letter is consistent with Zuczek being concerned about his job tenure in the face of threats made by Pentin at the meeting on May 30 and in the conversation on May 31. Moreover, I generally found Zuczek's demeanor more credible than that of Pentin. In light of the degree of anger Pentin admittedly had toward Koontz and Zuczek after they threw a "monkey wrench" into his carefully laid out plans for the inventory, I find it quite believable that he would have threatened Zuczek upon learning that Zuczek and Koontz had asked Kennedy to do something about Pentin's behavior at the meeting.

In October 1997, Koontz and Zuczek received their first discipline, a 5-day suspension for being "absent from work without permission." The Respondent issued the disciplinary notices on October 20, 1997, after Koontz and Zuczek failed to attend a mandatory meeting that Pentin had scheduled for October 16, 1997. Instead of attending the meeting, Koontz and Zuczek had called out on union business. Under the parties' collective-bargaining agreement, appendix D-2, an employee who receives a suspension like that imposed on Koontz and Zuczek can remain at work pending resolution of any complaint or grievance filed over the suspension. Here, Koontz and Zuczek requested a hearing under section 8-B of the contract.<sup>19</sup> The 8-B hearings for Koontz and Zuczek were held consecutively. They began on October 31 and were continued on November 11, 1997. After the November 11 hearing, the Respondent affirmed the suspensions and the Union filed grievances and unfair labor practice charges on behalf of the alleged discriminatees. An arbitrator heard the grievances on May 5 and issued his decision on July 7, sustaining the grievances.<sup>20</sup> In reaching

<sup>18</sup> It is axiomatic that a witness may be believed as to some but not all of his testimony. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

<sup>19</sup> Under sec. 8-B of the contract, an employee who receives notice of a suspension of 5 days or more, or a suspension pending discharge, may request a hearing at which the Respondent presents the facts concerning the discipline and the employee may present his case against being disciplined. In most cases, the discipline is not effectuated until such a hearing is held. At the conclusion of the 8-B hearing, the Respondent may affirm, modify or rescind the suspension, or convert it to a discharge.

<sup>20</sup> Under the parties' collective-bargaining agreement, grievances are resolved by a permanent board of arbitration presided over by a chairman who is responsible for issuing arbitration decisions. At all relevant times, Shyam Das was the chairman of that arbitration board. The

this conclusion, the arbitrator found that Koontz and Zuczek appeared to have "misuse[d] their positions as union officials in a manipulative manner to miss the October 16 meeting." He nevertheless sustained the grievance on the basis that the grievants' actions involved "an isolated act of misconduct" which did not warrant the Respondent's disregard for progressive discipline, given their clean disciplinary records and lengths of service. He thus concluded that the 5-day suspensions imposed on Koontz and Zuczek lacked proper cause under the terms of the contract.

As previously noted, the Board's Regional Director deferred the unfair labor practice charges filed over the suspensions to this arbitration award. Despite this deferral, both parties presented a considerable amount of evidence regarding the merits of the suspensions. Much of the evidence presented at the instant hearing was also presented to the arbitrator. The only witness who testified before the arbitrator that did not appear before me was the Union's International representative, Lewis Dopson. The arbitrator made detailed factual findings, including credibility resolutions, and reached a result that appears to be reasonably based on the evidence before him. Based on the evidence in the record before me, including my observation of the demeanor of the witnesses I observed who had also testified before the arbitrator, I see no reason to disturb his findings and shall accept them for purposes of determining the merits of the unfair labor practice allegation before me. See *Atlantic Steel Co.*, 245 NLRB 814 (1979).

As found by the arbitrator, Koontz and Zuczek were notified in writing and by oral communication of the mandatory nature of the October 16 meeting. This notification explicitly advised them that they had to obtain permission from Pentin to be excused from the meeting. Neither did so. Instead, on the day of the meeting, both notified their immediate supervisor, via voice mail, that they would be out on union business. It was admitted before the arbitrator, and not disputed here, that this was an acceptable procedure to follow when union officers needed to take time for union business.<sup>21</sup> It was also conceded that the Respondent had never before required any union representative to justify or explain the need to conduct union business at a particular time. Upon learning that Koontz and Zuczek had called out, Henderson and Pentin telephoned them at the union office and told them that they were expected to attend the meeting. Henderson testified before the arbitrator that Zuczek said during this conversation that the Respondent's meeting interfered with union business. Henderson also testified that Zuczek specifically asked what would happen if he and Koontz did not attend the meeting and that he said only that discipline "was possible."<sup>22</sup> The evidence considered by the arbitrator also

grievances over Koontz' and Zuczek's suspensions were heard by Arbitrator Keith Neyland whose findings and recommended award were approved by Das.

<sup>21</sup> Koontz and Zuczek were not compensated by the Respondent for their time out on union business.

<sup>22</sup> Henderson testified in the hearing before me that he did not answer when Zuczek asked him directly what would happen if they did not come to the meeting. According to Henderson, he did not want to commit himself to any action in light of Koontz' and Zuczek's positions as union officers.

showed that Koontz and Zuczek had been absent on union business with some degree of frequency, a fact noted by the Respondent's witnesses. Nevertheless, they had never before been disciplined for being absent without permission and the Respondent acknowledged that they did not have an attendance problem. The arbitrator also noted Kennedy's testimony that the Respondent's managers expected Koontz and Zuczek to try to find an excuse to avoid attending the meeting. The arbitrator concluded that Koontz and Zuczek, relying on the accepted practice of reporting off on union business without question, "sought to take a stand with management by purposefully reporting off for union business solely to miss the October 16 meeting." He found that, by doing so, they were indeed guilty of being absent without permission. However, he also found that this misconduct was isolated in view of their clean record and length of service and did not amount to "incorrigible behavior" that would warrant the Respondent's disregard of progressive discipline.<sup>23</sup> As will be discussed in more detail in my analysis, the Respondent's disregard of progressive discipline for a first offense of this nature suggest that "something more" than their being absent without permission was motivating the Respondent in taking the action it did.

There is no dispute that, at the 8-B hearing on November 11, 1997, Zuczek and Pentin locked horns in another verbal confrontation. During this meeting, Zuczek called Pentin a "m—f—." The witnesses who were at the meeting do not agree regarding what preceded Zuczek's use of profanity. All the witnesses do agree that Zuczek was aggressively presenting the union's case that he and Koontz were being singled out because of their union activities and that Pentin was interfering with their conduct of union business. Koontz, Zuczek, and Union President Rooney recall Zuczek cursed at Pentin only after Pentin got out of his chair and pointed a finger at Zuczek. The Respondent's witnesses, Walck, Pentin and note taker Randall Cook, who held the position of department manager of productivity improvement, conveniently left out of their testimony what happened immediately before Zuczek's outburst. When specifically questioned about this, they feigned a lack of recall. The notes taken by Cook show that the profanity followed a series of questions by Zuczek on the subject of Pentin interfering with the conduct of union business. Pentin's answers were evasive. Cook's transcription of Zuczek's profanity specifically references Pentin pointing his finger at Zuczek. To the extent there is any conflict in the testimony regarding what happened at this meeting, I credit the version provided by the General Counsel's witnesses. On November 14, 1997, Zuczek received another 5-day suspension for using "profane abusive language toward a supervisor" at the November 11 hearing. The Respondent's treatment of Zuczek contrasts with the lack of response to the Union's complaints about Pentin's conduct at the May 1997 meeting described above. The Union grieved this suspension, but did not pursue it to arbitration. Although the complaint does not allege that the November 14 suspension was

<sup>23</sup> There is evidence in the record before me, which shows that Koontz and Zuczek were not the only employees to miss the "mandatory" meeting and that not all had received advance permission to be absent. They were the only employees to receive discipline.

unlawful, the General Counsel relies upon it as further evidence of antiunion animus.<sup>24</sup>

Koontz and Zuczek remained at work through November 11, 1997, the last day of Zuczek's 8-B hearing. On November 12, 1997, Koontz and Zuczek called out of work, claiming stress. There is no dispute that the meeting that occurred the previous day, described above, was a very hostile and contentious one. By the end of that meeting, it was clear that the Respondent was going forward with its decision to suspend these two long-term employees who had no prior discipline. On November 14, 1997, Koontz and Zuczek submitted notes from the same doctor, Dr. Victor Nemerof, indicating that they were under his care and would not be able to return to work until further notice. Koontz and Zuczek were then placed on salary continuance under the Respondent's disability policy. On November 25, 1997, McBunch sent letters to each of them seeking additional medical information from their doctors. On December 2 and 6, 1997, respectively, Dr. Robert H. Brick, an associate of Doctor Nemerof responded individually as to Koontz and Zuczek. The letters are similar, but not identical, with some difference in the diagnosis, treatment, and prognosis as between the two. On December 18, 1997, the Respondent notified Koontz and Zuczek that it was terminating their salary continuance effective December 9, 1997, and directing them to report to work on December 22, 1997. By letter dated December 19, 1997, Dopson, the Union's International representative, requested that the Respondent delay the return to work date for both men until December 26, 1997, to give them time to consult with their doctors. The Respondent denied this request in a letter to Dopson dated December 22, 1997. When Koontz and Zuczek did not report to work on December 22, 1997, the Respondent notified them the same day that it had suspended them for 5 days subject to discharge. On December 29 and 31, 1997, Dr. Brick sent letters to the Respondent stating that neither man could return to work at that time or attend an 8-B hearing over their suspensions because of their psychological condition. By letters dated January 5, the Respondent notified Koontz and Zuczek that "after reviewing all the facts in this case," it had decided to convert their suspensions to a discharge.<sup>25</sup>

The Union grieved these January 5 discharges. The grievances were heard by an arbitrator on June 17. On August 31, the arbitrator issued his award sustaining the grievances. The arbitrator found that the grievants "presented evidence of disability which on its face cannot be rejected as unreasonable and that the company has not established a convincing basis on which to justify its rejection of that evidence so as to provide proper cause for discharge in this case." The arbitrator went on to explain that the determination that the Respondent lacked proper cause to discharge Koontz and Zuczek was based on "a finding that at the time they were ordered to report to work they satisfied the eligibility requirements for sick leave and salary continuance set forth" in the contract. As a remedy, he ordered

<sup>24</sup> The charges in this case were filed and served more than 6 months after Zuczek received this suspension. Any allegation that the suspension violated the Act would now be barred by Sec. 10(b) of the Act.

<sup>25</sup> The parties stipulated that these letters were erroneously dated January 5, 1997. The actual date they were sent was in 1998.

the Respondent to reinstate Koontz and Zuczek without loss of seniority and to remove the discipline from their records. More specifically, the arbitrator ordered immediate reinstatement if the grievants no longer claimed to be disabled. In the event that they presented medical certification of continued disability, the arbitrator permitted the Respondent to require an independent medical examination to assess such certification. Although he ordered a make-whole remedy, he left it to the parties to determine how this should be done. The Board's Regional Director deferred to this award as well.

As with the October 1997 suspension, the parties presented a considerable amount of testimony regarding the merits of the January discharge. Again, I shall defer to the findings of the arbitrator who had the benefit of hearing the testimony of Dr. Brick, as well as that of the Respondent's plant doctor, Dr. Pearcy. No new evidence was presented before me that would cause me to second-guess the factual findings of the arbitrator and his conclusions as to the contractual issues raised by the Respondent's discharge of Koontz and Zuczek. Any unfair labor practice issue regarding the discharge is not before me because the General Counsel has deferred to the arbitrator on that issue. The following excerpt from the arbitrator's award sums up those findings that are most relevant to the issue I must decide here:

There seems little doubt that from the beginning of Grievants' absence Management did not believe that either of them was disabled. It concluded that they were engaged in a charade and power play. That did not give Management the right, however, to simply disregard the certification of sickness and disability provided by Dr. Brick and to order the grievants to report to work on penalty of discharge, particularly since, if they were disabled, such a return to work would not have been medically advisable. The Company first needed to establish an objective basis on which to reject Dr. Brick's medical certification of disability.

Management asserts that it acted on the basis of the objective medical findings made by Dr. Pearcy, the plant physician. Dr. Pearcy was a credible witness. He acknowledged, however, that he did not and could not make a medical determination that Grievants were or were not disabled. There were a number of questions that he believed needed to be answered before he could make such a determination. Some of these questions related to Dr. Brick's diagnosis of adjustment disorder. In particular, Dr. Pearcy was concerned that possibly what was involved was anger and an attempt on Grievants' part to retaliate against Management for the discipline that had been issued to them. He also had questions concerning Dr. Brick's "guarded prognosis", based on his knowledge that generally the prognosis for adjustment disorder is good. Dr. Pearcy's efforts to pursue these questions directly with Dr. Brick were not successful, because Grievants refused to give their consent to having Dr. Brick discuss the details of their psychiatric and psychological problems and treatment with Dr. Pearcy. It was for that reason that Dr. Pearcy recommended to management that an independent

medical examination be conducted by a mental health provider. Management chose not to follow that recommendation.

In many circumstances, a refusal by employees to permit their treating physician to discuss their case with the plant physician, where the latter has legitimate questions regarding the employee's claim of disability, might be a valid basis on which to reject that claim. The situation here is different, however. Dr. Pearcy wanted to inquire about a diagnosis of work-related adjustment disorder, where the stressors involved interaction between Grievants and supervision. Dr. Pearcy wanted to find out what the Grievants had told Dr. Brick about that interaction and, as he put it, wanted to give Dr. Brick "the other side of the story", that is Management's side. Under these circumstances, it hardly is surprising that Grievants would not consent to that sort of dialogue between their mental health provider and the Company's physician, particularly since they reasonably could be concerned that Dr. Pearcy, who they did not know, might share that information with supervision. More generally, employees may be reluctant to share the specifics of their mental health treatment with a Company doctor either directly or through discussion with their mental health provider. Dr. Pearcy said he understood this, and, as he testified,

I accept that, which is the reason why once I made an attempt and was refused to get the consent I made the recommendation that an independent medical evaluation be done.

....

On the present record, the Board is not persuaded by the Company's argument that "common sense" dictates a finding that, notwithstanding Dr. Brick's certifications, Grievants were not disabled, but were engaged in a charade. It is clear from the record that Grievants and the Manager of Accounting were involved in an escalating work-place conflict. One of the Grievants had even gone so far as to file a criminal complaint against that supervisor in May 1997 based on what occurred at a meeting at the plant. Both Grievants received a five-day suspension in October for defiantly refusing to attend a mandatory Accounting Department meeting. One of them then received a second five-day suspension for using profane and abusive language toward the Manager of Accounting at the 8-B hearing on his first five-day suspension. These were 29-year service employees who had held Local Union positions for many years and had no prior discipline records. Clearly, something unusual was happening, and it certainly does not defy common sense to credit the possibility that each of them was suffering from considerable stress and even had reached a point where he believed he was about to get fired or was at risk of committing some further act in the workplace that would lead to his being fired. In these circumstances, even assuming that anger was a factor, it is plausible that he would seek professional assistance as his emotional and psychophysiological condition deteriorated. It also is not incredible, in view of their

joint history at the plant, that the two Grievants would reach a mutual decision to seek professional help on November 12, triggered by what occurred at Grievant B [Zuczek]'s 8-B hearing on November 11, which Grievant A [Koontz] also attended.

It is apparent from the arbitrator's findings and conclusions, as well as my own consideration of the other evidence in the record before me and my observation of the Respondent's witnesses, that the Respondent rushed to judgment when it terminated Koontz and Zuczek for their failure to report to work on December 22, 1997. Rather than take the reasonable step recommended by their own doctor, the Respondent's managers disregarded medical evidence offered by Koontz and Zuczek and concluded that they were fit to work. This behavior by the Respondent's management suggests that something more was involved in the decision than a question whether these two employees were truly disabled.<sup>26</sup>

## 2. The June 4 terminations

The Respondent issues pagers to some of its managers and employees, including union officials. The purpose in doing so is to enable the Respondent to contact these individuals, even when they are out of the plant or away from a telephone, if they are needed to attend a meeting or resolve some workplace issue. Both Koontz and Zuczek, in their role as grievance representatives, had been issued pagers for some time before their termination in January. The Respondent leases these pagers, at a cost of \$3.25 per month, from a company called Pagenet and receives a monthly bill. Pagenet charges the Respondent \$99.95 for lost pagers. Kitty States, a bargaining unit employee, is responsible for issuing pagers, documenting lost, damaged or stolen pagers, replacing them, and reconciling the monthly bills from Pagenet. She has been performing these duties since at least 1991. She uses a stenographic notebook to maintain a log in which she records, by hand, all activity related to the pagers. She has been supervised in this assignment by Pentin since he became the accounting department manager. She has no independent authority to take action against any employee over issues relating to use of the pagers.

Zuczek testified that, sometime after he went out on medical leave in November 1997, he told Local Union President Rooney that he had lost his pager and he asked Rooney to get him another one. Rooney confirmed this testimony and testified further that, in accordance with the customary practice at the facility, he reported Zuczek's lost pager to States and asked her to get Zuczek another one. States testified, and the pager log documents, that Rooney reported Zuczek's pager lost on November 20, 1997. There is no dispute that States told Rooney, when he returned the next day to get Zuczek's new pager, that Zuczek would have to see Pentin if he wanted a new pager. Although the evidence in the record shows that it is not uncommon for employees to report lost pagers and get replace-

ments, there is no evidence in the record that any other employee who lost a pager had to go through Pentin to have it replaced. On the contrary, the log corroborates Rooney's testimony that he had lost a pager and had it replaced by States, without having to contact Pentin, about a month before reporting Zuczek's lost pager.

In an attempt to establish that the treatment of Zuczek's lost pager was consistent with a policy or practice that was uniformly applied, Pentin and States both testified about a new "policy" adopted by Pentin sometime in 1997 and disseminated to managers and others by e-mail. Under this policy, an employee who lost a pager would have to pay for it. According to States, it was this e-mail which formed the basis of her telling Rooney that Zuczek would have to see Pentin to get another pager. Curiously, no e-mail, memo or other written document setting forth such a policy was ever produced at the hearing. In addition, States and Pentin had differing recollections regarding what was stated in the e-mail. Although I doubt such an e-mail ever existed, it is not necessary for me to resolve this issue because the evidence establishes that the "new" policy was essentially never enforced against any employee other than Zuczek. States testified that she was aware of one individual, a guard who worked for a contractor of the Respondent, who paid for a lost pager. Although her log shows that the individual had a pager replaced in July 1997, it does not indicate whether he paid for the lost pager. States conceded that her "knowledge" of this was based on what the individual told her. She admitted that she did not ask the guard to pay for the lost pager and that she did not know who did ask him. States also admitted that she did not collect the payment from him and did not know who did. Such uncorroborated hearsay evidence is insufficient to establish that the Respondent had any practice or policy of seeking reimbursement from employees who lost pagers. Moreover, because the Respondent would be the party in possession of any documentary evidence that would show whether any employee had been required to reimburse it for a lost pager and the Respondent did not produce any such documentation, I must infer that there was indeed no such policy.

States also testified that Rooney asked her on November 20, 1997, to hold Zuczek's pager number, i.e., the telephone number one would dial to page Zuczek, because Zuczek was still looking for his pager and might find it. The notation, "Holding #," appears in the log underneath the entry documenting Rooney's report of the lost pager. Rooney, on rebuttal, denied telling States to hold Zuczek's pager number. Because a pager number is transferable from one pager to another, it is possible that States decided on her own to "hold" Zuczek's number to assign to the replacement he would receive after speaking to Pentin. In any event, States acknowledged calling Pagenet and asking them to cancel Zuczek's pager number to ensure that the Respondent would not be charged for it. The monthly invoices from Pagenet show that States had Zuczek's pager deactivated soon after she received the report from Rooney. The next entry in States' log related to Zuczek's pager is dated December 22, 1997, a notation indicating that Zuczek's pager was "reactivated found." States testified that she was told on that date, either by Rooney or Zuczek, that Zuczek had found his pager. Upon further questioning, States admitted that she could not

<sup>26</sup> In this regard, I also note the evidence in the record before me that the Respondent took steps to hire a private investigator to surveil Koontz and Zuczek almost immediately upon their calling out for medical reasons, before it had received any medical evidence that might have caused it to question the veracity of their claimed illness.

really recall whether Rooney, Zuczek, or someone else told her that the missing pager had been found. According to States, she called Pagenet to reactivate Zuczek's pager after being told it had been found. The January bill from Pagenet reflects a credit for the lease charge on Zuczek's pager for the period November 25–December 31, 1997, and a pro rated charge for the period from December 22 through 31, 1997. On this bill, the Respondent is also charged for Zuczek's pager for the month of January.<sup>27</sup> Both Zuczek and Rooney denied telling States that the pager was found. According to Zuczek, he never found the pager.

On or about January 6, according to States, Supervisor Walck told her to deactivate both Koontz' and Zuczek's pagers because they would not be returning to work. States then wrote in the log, "turned off per Pentin and Walck." States called Pagenet and canceled both pagers around the same time. The February bill from Pagenet shows a charge of \$99.95 on January 15 for each pager, characterized on the bill as "lost." The bill also shows a credit for the portion of the monthly lease fee for Koontz' pager after it was deactivated. A similar credit does not appear for Zuczek's pager. Although Pagenet no longer billed the Respondent the monthly charge for Koontz' pager after February, it continued to bill \$3.25 a month for Zuczek's pager through April 1998. Pagenet finally cancelled Zuczek's pager on the May bill, with a credit only for the April monthly charge. Although States testified that she had been seeking an adjustment for the charges for Zuczek's pager since it was deactivated, she did not explain why the Respondent did not receive a credit for the period from January 6 through March 31.

The monthly bills from Pagenet would seem to corroborate States' testimony that someone told her on December 22 that Zuczek's pager had been found. There is no other reasonable explanation for States having reactivated a canceled pager at that time. At the same time, however, I do not believe that Rooney and Zuczek were lying when they denied telling States that Zuczek had found his pager. As pointed out by the General Counsel, December 22, 1997, was the date the Respondent had demanded that Zuczek return to work from medical leave or face discharge. He and the Union were in the process of trying to buy more time for Koontz and Zuczek to submit additional evidence from their doctors to forestall their termination. It is highly unlikely that Zuczek or Rooney would have been concerned about reporting the whereabouts of Zuczek's lost pager to States on that date. After Zuczek was terminated in early January and informed that his pager was deactivated, there would have been even less reason for either of them to have reported the pager found, even assuming it had been. I also note that States was clearly a reluctant witness who appeared to be nervous throughout her testimony. She had been placed in the difficult position of having to testify as an agent of her employer against fellow bargaining unit employees and the Union that represents her. Moreover, she admitted highlighting entries, changing some entries, and making new ones in the log after Zuczek was terminated in order to assist the Respondent in its response to the charges and its preparation for trial. The

<sup>27</sup> Pagenet bills the Respondent for the monthly lease of the pagers in advance on the first of each month.

location of this particular entry within the log also raises doubts about its veracity because some of the dates in the preceding and succeeding entries appear to have been altered. Finally, States recollection regarding whose report triggered the December 22 entry in the log was poor. I, thus, credit Rooney and Zuczek and find that neither one of them told her that Zuczek had found his pager on December 22, 1997.

On January 13, Mark Clair, department manager-general accounting, sent identical letters, by certified mail, to Koontz and Zuczek.<sup>28</sup> By these letters, Clair informed Koontz and Zuczek that the pagers assigned to them had been deactivated and instructed them to return the pagers immediately to the plant security office at the main gate. The letter warned them that failure to return the pager within 30 days of the letter would result in their being personally billed for the cost of the pager. It is undisputed that Zuczek received this letter. He did not respond to the letter because he no longer had the pager and had already reported it lost. Koontz testified that he did not pick up the certified letter at the post office because of a family tragedy. However, he admitted being aware of the letter from Zuczek. Koontz testified that he mailed the pager back to the Respondent by regular mail, to the attention of States. The Respondent apparently never received it. Koontz had very poor recollection as to when he returned the pager, testifying at various times in this and other proceedings that he mailed it back either in December, or in January, or after it was deactivated. The General Counsel argues that his lack of recall is understandable considering the other issues facing Koontz in late 1997 and early 1998. While I have some sympathy for Koontz and the troubles he was facing, these same issues make it hard to believe that he would have taken the time to package and mail the pager to the Respondent before he was even asked to do so. In addition, there is other evidence in the record, to be discussed infra, that Koontz was still wearing a pager after he says he returned the one issued to him by the Respondent. Thus, on this issue, I cannot credit Koontz' testimony. Although he may sincerely believe that he returned the pager, I doubt that he did. Certainly, there is no evidence in the record that the Respondent received it from Koontz before it embarked on its subsequent actions.

Although neither Koontz nor Zuczek returned their pagers or otherwise responded to Clair's letter within 30 days, as directed by Clair, they were not personally billed for the cost of the pagers. Nor was any other action taken against them for failing to return the pagers until May 5, the date of the arbitration hearing over their October 1997 suspensions. After the arbitration hearing ended, Pentin attempted to hand-deliver envelopes to each of them which Koontz and Zuczek refused to accept. Pentin testified that he left the envelopes on the Union's table in front of Rooney and International Representative Dopson. According to Pentin, each envelope contained a letter addressed to Koontz and Zuczek, respectively, which is signed by Pentin and dated May 6. In the letters, Pentin refers to Clair's January 13 letter and notes that the time prescribed in that letter for return-

<sup>28</sup> Pentin testified that Clair started at the facility in December 1997, replacing Walck who was transferred to a similar position in analytical and statistical accounting. Clair did not testify in this proceeding.

ing the pagers had long since passed. Pentin then characterizes his May 6 letter as Koontz' and Zuczek's "second and final notice to return the pager to the Company." The letter concludes with the warning that if either of them failed to return his pager by May 20, the Respondent would "(1) invoice you for the replacement value. (2) file a civil complaint to recover the pager replacement value and expenses and/or (3) issue discipline up to and including discharge." Although Dopson apparently picked up the envelopes and the Respondent left a copy of each letter in the Union's mailbox at the plant, it did not mail the letters to Koontz or Zuczek, by regular or certified mail. Koontz and Zuczek deny seeing these letters until after they received disciplinary notices from the Respondent.

On May 29, the Respondent sent Koontz and Zuczek, by certified mail, notices of another 5-day suspension subject to discharge. The reason stated on each was "failure to return company property as instructed." When neither Koontz nor Zuczek requested an 8-B hearing, the Respondent converted the suspensions to terminations by certified letters dated June 4. The Respondent never invoiced Koontz and Zuczek for the cost of the pagers, nor instituted any civil action to recover the costs. It is undisputed that no other employee has ever been disciplined in any fashion for failing to return a pager.

As noted above, both Koontz and Zuczek claim that they no longer had the pagers that were issued to them by the Respondent at the time Pentin wrote his May 6 letter. Zuczek testified that he had lost and never found his pager and Koontz that he had returned his pager by the time he learned from Zuczek about Clair's January 13 letter. In order to rebut this testimony, the Respondent produced videotapes taken of Koontz and Zuczek that purport to show them wearing or carrying pagers similar to those issued by the Respondent. These videotapes were taken during the surveillance of Koontz and Zuczek that the Respondent initiated after they claimed to be disabled. The videotapes and still photographs from the tapes show Zuczek with what appears to be a pager on December 16 and 31, 1997, and February 3, after he had reported his pager lost. Koontz is shown with what appears to be a pager on December 16 and 31, 1997, and February 6. Although Koontz was vague as to precisely when he returned his pager, none of the dates he recalled was after February 6. There are no videotapes in evidence for the period after February 6, although the Respondent continued to maintain surveillance of the two discriminatees through March.

Zuczek responded to this evidence by testifying that, after he lost his pager, he borrowed one that the Respondent had issued to Phil Bourke, the Union's safety representative, so that he could keep in contact with other union officials and employees at the plant. According to Zuczek, he got the pager from Bourke in November 1997 and returned it after 3-4 months. Bourke attempted to corroborate this testimony on direct examination by the General Counsel. However, he appeared to be nervous and uncomfortable while testifying. Several times, his voice trailed off to barely a whisper and he had to be asked to speak up. On cross-examination, Bourke acknowledged some common financial interests with Zuczek outside of work. Bourke also acknowledged that he never told States that he had loaned his pager to Zuczek. He testified that the Union's presi-

dent, Rooney, knew he had loaned his pager to Zuczek because he loaned it to him after he was told by Rooney that the Union had been having trouble getting in contact with Zuczek. Bourke also testified that he had his pager replaced during the time that Zuczek was borrowing it. According to Bourke, he got the pager back from Zuczek and gave it to States to get a new one and then returned the pager for Zuczek to use. States' pager log in fact shows that she replaced Bourke's pager on February 19. Neither Bourke nor the log provided any explanation for the replacement. According to Bourke, he is still using the second pager that he received from States in February and that Zuczek returned to him in about March. Koontz responded to the videotape evidence by suggesting that he may have been using his daughter's pager, rather than the one issued by the Respondent, when the videotape was taken. It is also possible that, because of his poor recall, he did not "return" the pager until after February 6, the last date for which videotaped evidence showing Koontz with a pager, is in the record.

Although not entirely free from doubt, I find that Koontz, at least, was still in possession of his company-issued pager at the time the Respondent sent him the letters on January 13 and May 6 asking him to return it. As previously noted, I do not believe Koontz' vague and shifting testimony that he mailed the pager in a box, by regular mail, to the attention of Kitty States at some unknown time in late 1997 early 1998. I also do not believe that the pager that Koontz is seen wearing on the videotape belonged to his daughter. Because his pager number was cancelled on January 6 and the Respondent was billed for his pager as a lost pager effective January 15, he could no longer be paged via that pager. Thus, it would have been useless to him. Because of all that he and Zuczek had recently been through at the hands of the Respondent, it is more likely than not that he simply ignored the request to return what was at that point a nonfunctioning piece of equipment.

Zuczek's situation is more difficult to decipher. As previously noted, none of the witnesses who testified concerning the whereabouts of his pager were particularly impressive. Although there is no dispute that his pager was reported lost and deactivated in late November, it was reactivated in late December. States testified that she reactivated this pager because someone reported it found. Because of credibility concerns regarding States and her entries in the log, I previously credited Rooney's and Zuczek's denials that they reported it found. Nevertheless, someone must have told States that the pager had been found on December 22 because it is highly unlikely she would have reactivated a missing pager. States also testified that she notified Pagenet to deactivate Zuczek's pager again on January 6, the same date that Koontz' pager was also deactivated per the instructions of Walck and Pentin. However, Zuczek's number was not canceled and it remained active through the end of March. At the same time, the cost of the pager to which his number had been assigned was billed to the Respondent as a lost pager effective January 15. It is not clear from the evidence before me whether Zuczek could still be paged with that pager between January 15 and March 31, a period when his number was still active but his pager was written off as "lost." In addition, the videotapes clearly show Zuczek in possession of a pager in December and in early February. In all probabil-

ity, the pager he is seen carrying in the December videos is the one he borrowed from Bourke. However, it is just as likely that the one he is seen wearing in February is the pager he was issued by the Respondent. This is because I found Bourke's testimony regarding when Zuczek returned the pager he had borrowed unreliable. As previously noted, he appeared extremely uncomfortable testifying and appeared to have very little confidence in his answers. He frequently professed to having a poor memory and could not be specific as to the date Zuczek returned his pager or even how long he had it. His testimony regarding replacing the pager while Zuczek was still borrowing it just didn't make sense. I thus find that, while Zuczek may have borrowed Bourke's pager when he first lost his, he had returned it and was again using his own company-issued pager by the time he received the correspondence from the Respondent seeking its return. Again, as with Koontz, I find it more likely than not that he would have ignored the request from Clair because, after everything else he had been subjected to by the Respondent, the threat that he would be billed for a lost pager must have seemed inconsequential. The return of their company-issued pagers, when considered in the context of preceding and contemporaneous events, had to have been a low priority for Koontz and Zuczek during the period from January 13 through May 29.

I credit Koontz' and Zuczek's testimony that they did not see Pentin's May 6 letter threatening them with, among other things, discharge, until after they received their May 29 suspension notices. The fact that they refused hand-delivery of the letters from Pentin makes it probable that they would also have rejected an attempt to deliver these letters through Rooney or Dopson. The fact that Rooney and Dopson may have seen Pentin's letter before May 29 is of little moment. It is the discriminatees whom the Respondent should have put on notice by these letters. The Respondent certainly knew where they lived and could have mailed these letters, as it did others, by certified mail. Yet, for some unexplained reason, it chose not to follow this method of ensuring that Koontz and Zuczek were on notice that failure to return the pagers could result in yet another termination. As will be explained in further detail in the analysis to follow, I find that Pentin's hand-delivery of these letters was a calculated strategy by him and the Respondent to ensure that Koontz and Zuczek did not know their jobs were again in jeopardy.

It is undisputed that no employee has ever been disciplined, let alone terminated, for conduct related to their use or misuse of company-issued pagers. Moreover, although the record also establishes, as noted above, that employees have lost pagers and have left the Respondent's employ without returning assigned pagers, there is no reliable or credible evidence that the Respondent took any action against these individuals to either recover the cost of the pager or seek its return.

In preparation for the hearing in this case, counsel for the General Counsel subpoenaed from the Respondent, *inter alia*, its records showing all employees in the same bargaining unit as Koontz and Zuczek who were suspended and/or discharged during the period from January 1, 1995, through November 8, 1998. After conducting a diligent search of the records, the Respondent produced no records showing that any unit em-

ployee other than Koontz and Zuczek had been terminated during that period. Although records furnished in response to the subpoena showed that a number of employees had received suspension notices, for infractions such as sleeping, insubordination, abusive or threatening language, and/or conduct, many of the disciplinary notices had been removed from the employees' personnel record. The Respondent's counsel offered no explanation for this other than to speculate that they may have been removed as the result of grievances filed by the employee or the Union, or under a policy requiring their removal after a certain period of time. In many cases, the employee receiving the suspension never in fact served the suspension because the discipline was removed in the course of the 8-B or grievance process. The most severe instance of discipline involving unit employees that is in evidence occurred in October 1998, after the terminations of Koontz and Zuczek at issue here. In that case, three employees who worked in purchasing positions were initially suspended for 5 days pending discharge for violating the Respondent's rules regarding the acceptance of vendor gifts. The three employees had accepted a weekend trip to Pittsburgh to see a football game, with all expenses paid by the vendor. One of the employees also received a 5-day suspension for being absent without cause when he missed work to go on the trip. At the conclusion of their 8-B hearings, the Respondent reached an agreement with the employees and the Union to suspend them for 40 days, rather than terminate them. This resolution of the discipline was reached within a week of the initial suspension notices being issued. The records furnished by the Respondent pursuant to subpoena also show that one other employee with a less than stellar disciplinary history received four separate disciplinary notices on the same day, July 14, 1998—a warning and 1-day suspension for unsatisfactory work, a warning for leaving work without permission and a 5-day suspension for using profanity toward a supervisor. Within 2 months, the same employee received another suspension, for 3 days, for unsatisfactory work. This employee was never terminated.

The Respondent countered this evidence with testimony from Garraux, its corporate manager of employee relations, that the failure to return the pager was "tantamount to theft" and that the Respondent deals with such cases severely, regardless of the value of the item stolen. No documentary evidence to support this testimony was offered. There is no evidence in the record before me that the Respondent has discharged any employee at the Fairless Works for theft. The Respondent's witnesses acknowledged that discharge of employees in the salaried unit at the Fairless Works are rare, attributing this to the small size of the unit and the long tenure of most employees in the unit.

### 3. Postmortem evidence

As previously noted, the Respondent terminated Koontz a third time, on November 3, shortly after having revoked his June 4 termination for failing to return the pager. Koontz filed a grievance over this last termination, which the Union pursued to arbitration on October 6, 1999. The chairman of the arbitration panel, Shyam Das, issued his award on December 3, 1999. Arbitrator Das denied the grievance based on his finding that

Koontz had acted dishonestly and that the Respondent had just cause to discharge him. He concluded further that the Respondent's decision to terminate Koontz on November 3 was not due to his union activities. The arbitrator's finding of dishonesty was based on conflicting statements from Koontz and his doctors regarding his ability to return to work in February 1998. As reported in the arbitrator's decision, Koontz had testified at an unemployment hearing on September 2, 1998, that his doctors had determined that he was able to return to work in February 1998. The arbitrator reported further that, on September 16, 1998, the Union, in demanding that the Respondent comply with Das' August 31, 1998 arbitration award reversing the January termination, submitted a letter from one of Koontz' doctors stating that he was able to return to work by March 2, 1998. These two statements apparently conflicted with a letter from the other doctor treating Koontz, which had been submitted as evidence in the arbitration over the January termination, indicating that Koontz was still unable to work as late as February 20, 1998. In the absence of any testimony at the arbitration hearing from Koontz or his doctors, explaining the apparent conflict, the arbitrator concluded that Koontz had "induced his doctors to misrepresent either his disability or his ability to return to work on March 2, or participated in that misrepresentation, for his own monetary gain."

The General Counsel had initially alleged that Koontz' November 3 discharge violated Section 8(a)(1) and (3) of the Act but withdrew that allegation after issuance of Arbitrator Das' December 3, 1999 decision. The General Counsel took this action under the Board's *Spielberg/Olin* deferral policy. No party has contended before me that it was improper to defer to that arbitration award. Nor did any party offer any independent evidence regarding the November 3 termination. Thus, as with the other arbitration awards to which the General Counsel has deferred, I must accept the arbitrator's findings to the extent they are relevant to resolution of any of the issues before me, including those relating to credibility of the witnesses.

#### B. Analysis and Conclusion

The Board, in *Wright Line*, supra, established the analytical framework for determining whether an employer has violated Section 8(a)(1) or (3) of the Act by terminating an employee. The General Counsel must first show, by a preponderance of the evidence, that animus against protected conduct was a motivating factor in the employer's decision to terminate the employee. Once such a showing has been made, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. To sustain his initial burden, the General Counsel must show that the employee was engaged in activity that is protected by Section 7 of the Act; that the employer was aware of the activity; and that the protected activity was a substantial or motivating reason for the action it took. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278 (1996). The Board has long recognized that direct evidence of unlawful motivation will rarely be available. Thus, the General Counsel may rely upon circumstantial evidence from which it may be inferred that union or protected activity was a motivating factor in the employer's action. *Naomi Knitting Plant*, supra.

The evidence described above clearly establishes that Koontz and Zuczek were long-term, active union representatives with a history of grievance filing and other activities intended to enforce the rights negotiated in the collective-bargaining agreement. It is undisputed that, in 1996 and early 1997, Koontz and Zuczek were also involved in representing at least two female employees in pursuing complaints of sexual harassment. These employees ultimately pursued their claims outside the Respondent by going to State and Federal antidiscrimination agencies. The Respondent clearly took the complaints seriously enough to conduct two internal investigations. Although the Respondent's managers concluded that no sexual harassment took place, it did coincidentally remove the offending manager from the work area to minimize his contact with the complaining employees. In any event, the protected nature of the employees' complaints does not turn on their merits. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984). The record evidence also clearly demonstrates that the Respondent's managers at the Fairless Works blamed Koontz and Zuczek for these complaints, accusing them of instigating the women in order to retaliate against the manager in a dispute over a reorganization that adversely affected unit employees. The record before me contains no evidence which would remotely suggest that the employees' complaints were not made in good faith in the reasonable belief that the supervisor had engaged in offensive behavior.

The Respondent's own witnesses acknowledged dealing with Koontz and Zuczek on a regular basis over grievances. Kennedy, in particular, testified that Koontz and Zuczek had been pursuing grievances for some time over the issue of assigning unit work to nonunit employees. In fact, this was the issue that precipitated the May 1997 meeting at which Pentin had his first significant confrontation with the two grievance representatives. Based on the credited testimony of Koontz and Zuczek, I have already found that Pentin touched Koontz and directed an obscene epithet toward him and threatened both that they were not "immune from losing their jobs." I have also found that he repeated the threat of discharge to Zuczek the next day, after Koontz and Zuczek had complained about his conduct at the meeting to Kennedy.

Based on the above, the General Counsel has established at least the first two elements of her case, that the employees were engaged in protected concerted and union activity and that the Respondent was aware of it. I also find that Pentin's threat and abusive conduct toward Koontz at the May 1997 meeting and the position advanced by the Respondent in response to the anti-discrimination claims of the two female employees are evidence of the Respondent's animus toward Koontz and Zuczek for pursuing grievances and the sexual harassment complaints. The Respondent's subsequent actions against Koontz and Zuczek must be considered against this background of hostility toward them in their roles as grievance representatives.

As found by the arbitrator, Koontz and Zuczek "abused their official union position" by calling out on union business in order to avoid attending a mandatory meeting scheduled by Pentin on October 16, 1997. Pentin, obviously irked by this challenge to his authority, suspended them for 5 days, despite the fact that neither employee had any other discipline on their

record and did not have attendance problems. In addition, the evidence in this case establishes that several other employees who were absent from work due to illness or vacation did not attend this meeting. The arbitrator concluded and I agree that this punishment was excessive and out of proportion to the offense. In this regard, I note that the evidence here shows that the Respondent had never before questioned a union official's use of union time and that Koontz and Zuczek followed the established practice for taking time off for union business. I note also that the Respondent's managers went out of their way to "clear" Koontz' and Zuczek's union schedules, even asking the Union's International representative to reschedule a meeting with Koontz, also unprecedented in the Respondent's history with the Union. Under these circumstances, it would have been reasonable for Koontz and Zuczek to believe that the Respondent, and Pentin in particular, was trying to interfere with their conduct of union business and modifying the established practice for taking union time. Thus, as noted by the arbitrator, their failure to attend the meeting was a test of wills. I believe that the Respondent's decision to suspend Koontz and Zuczek for this first offense was motivated not by the fact that they failed to attend a mandatory meeting, as did other employees who were out on other forms of leave, but because they were out on union leave. It is apparent to me that Pentin saw this as another example of Koontz and Zuczek using their union positions to "throw a monkey wrench" into anything he tried to do.

Koontz' and Zuczek's belief that the Respondent's actions were an attempt to undermine their position as union representatives is further evidenced by what occurred at their 8-B hearings on October 31 and November 11, 1997. It is undisputed that Zuczek and Koontz pressed this belief in their questioning of Pentin. Frustrated by his lack of response to their concerns, Zuczek admittedly used profanity toward Pentin. Based on the credited testimony of Koontz and Zuczek, I find that this was precipitated by Pentin pointing his finger at Zuczek. Although Zuczek's conduct on November 11 was not much different than Pentin's on May 30, the Respondent suspended Zuczek for another 5 days. Although there is evidence in the record that the Respondent has suspended other employees for profanity toward a supervisor, there is no evidence of any other incident where the profanity occurred in the context of a heated grievance meeting after the employee was provoked. Moreover, witnesses for both sides acknowledged that the language used by Zuczek was common in the plant, referred to by several witnesses as shop talk. Although I need not resolve the issue because it is not alleged as a separate violation, I will note that the Board has in the past extended the Act's protection to union stewards who use similar profanity in the course of a grievance meeting. See *Severance Tool Industries*, 301 NLRB 1166 (1991), *enfd.* 953 F.2d 1384 (6th Cir. 1992).

On November 12, the day after the verbal confrontation between Zuczek and Pentin, both employees called out claiming to be suffering from stress. As was patently obvious to the arbitrator and is clear from the testimony of the Respondent's witnesses here, the Respondent concluded before receiving any medical documentation, that Koontz and Zuczek were not ill. This rush to judgment was typical of the Respondent's treatment of Koontz and Zuczek. Even when its own plant doctor

advised the Respondent that he could not form a medical opinion on the question of disability and recommended an independent medical evaluation, the Respondent proceeded to terminate their salary continuance benefits and demanded that Koontz and Zuczek return to work. The Respondent then rejected a reasonable request from the Union that they be allowed an additional 4 days, including the Christmas holiday, to consult with their doctor before returning to work. The arbitrator found and I agree that the Respondent did not have just cause to terminate Koontz and Zuczek for failing to return to work on December 22, 1997.<sup>29</sup> The Respondent's hasty and ill-advised decisionmaking which led to its first attempt to terminate Koontz and Zuczek on January 4 demonstrates that the Respondent was motivated by more than just a concern for whether Koontz and Zuczek were fraudulently receiving disability benefits.

On May 5, while Koontz and Zuczek were still out of work awaiting the arbitration of their discharge grievance, the Respondent set in motion another attempt to terminate them. As found above, Pentin attempted to hand-deliver a May 6 letter containing a "final warning" that Koontz' and Zuczek's failure to return company-issued pagers within 2 weeks would subject them to discipline "up to and including discharge." There is no dispute that Koontz and Zuczek refused to accept hand-delivery of the letters. Although the envelopes were left with union representatives, the Respondent made no other effort to serve Koontz and Zuczek with this warning. When the Respondent previously requested return of the pager, with only the threat of being billed for its cost, it sent the letter by certified mail. The Respondent's unexplained decision not to use the same method of ensuring that Koontz and Zuczek received this final warning is suspect. I have found above that Koontz and Zuczek did not see these letters until after the Respondent suspended them subject to termination. I find, based on the pattern of Respondent's treatment of Koontz and Zuczek, that the Respondent was not concerned with whether Koontz and Zuczek actually received this warning because it had already made up its mind to terminate them. Had either Koontz and Zuczek actually received the warning and returned the pager or reported it missing before the deadline, the Respondent could not have proceeded with its plans.

The Respondent's "rush to judgment" in this latest attempt to terminate Koontz and Zuczek is further demonstrated by the Respondent's failure to conduct any investigation before sending the May 29 notice suspending them subject to discharge for failing to return the pager. The memo prepared by Clair which was submitted to the Board's Regional office during the investigation is dated after the termination. The typed portion at the

---

<sup>29</sup> The December 1999 finding by Arbitrator Das that Koontz was dishonest with respect to the status of his disability in February and March 1998 does not affect the result here. There is no evidence in the record before me that would cast doubt upon the veracity of Koontz' and Zuczek's claim that they were suffering from work-related stress when the Respondent began its attempt to discharge them in December 1997. The findings of the same arbitrator, when considering the evidence before him which existed at the time Respondent terminated Koontz and Zuczek the first time, quoted above, is as accurate now as it was then.

top purports to establish that Clair checked to determine the status of the missing pagers before the Respondent issued the discipline. Although Clair indicates in his memo that he consulted with States, the Respondent's custodian of the pager log who is responsible for keeping track of company-issued pagers, she denied being questioned about Koontz or Zuczek's pagers before they were terminated. Clair's handwritten footnote at the bottom of his memo confirms this, indicating that only after the terminations had been effectuated did Clair bother to check with States, learning for the first time that Zuczek had previously reported his pager lost. As noted above, Clair did not testify in this proceeding.

The above facts and the circumstances surrounding the Respondent's June 4 termination of Koontz and Zuczek are sufficient to persuade me that their union and protected concerted activity was a substantial and motivating factor in the Respondent's decision to terminate them over the pagers. In addition to the above, I also note that the Respondent had apparently never before undertaken any similar effort to retrieve a pager from an employee who was no longer employed by the Respondent even though there is evidence that employees have in the past left without returning their pagers. I thus conclude that the General Counsel has met his burden of proving that protected activity was a motivating factor in the Respondent's conduct. The Respondent has argued that the General Counsel failed to meet his burden because of lack of timing and insufficient evidence of animus on the part of its decisionmaker. I reject both these arguments. While it is true that some time had passed between Koontz' and Zuczek's pursuit of the sexual harassment complaints of fellow employees and the June 4 terminations, their protected activity was not limited to this issue. Their activities as union grievance representatives were ongoing. Each time they filed a grievance, or made an issue over a work assignment, they were engaged in activity protected by Section 7 of the Act. It could also be argued that their action in taking union time to avoid attending the October 16 meeting scheduled by Pentin was an effort to protest a perceived interference by management in the Union's affairs. This is the position they took at their 8-B hearings. The Respondent's reaction to this test of management authority commenced with that meeting and escalated until the June 4 terminations at issue here. Thus, contrary to the Respondent's argument, the element of timing supports a finding of unlawful motivation in this case.

The Respondent's attempt to distance itself from the clear evidence of animus on the part of Pentin and the other local managers is frivolous. Although Garraux may have been the individual who made the final decision as to Koontz' and Zuczek's termination, he relied upon reports and recommendations he received from the people at the Fairless Works, including Pentin. He did not conduct any "independent investigation" in the sense of contacting the Union or Koontz and Zuczek to obtain their side of the story. Rather, he accepted whatever Pentin and the other managers communicated to him as the basis for his decision. Under these circumstances, whatever animus these managers harbored toward the discriminatees was attributable to the Respondent. Moreover, Garraux himself exhibited significant animus toward Koontz and Zuczek. I observed at the hearing that he bristled with hostility when testify-

ing about the two discriminatees. The preponderance of the evidence here convinces me that animus toward Koontz' and Zuczek's union and protected activity infected every step of the decisionmaking process at issue here.

The burden thus shifts to the Respondent to prove that it would have terminated Koontz and Zuczek on June 4 even in the absence of such activity. An employer can meet its *Wright Line* burden if it establishes that it had a reasonable belief that an employee engaged in misconduct and that it would have terminated any employee for engaging in such misconduct. *Rockwell Automation/Dodge*, 330 NLRB 82, 85 (2000), and cases cited therein. However, an employer must do more than simply show that it had a legitimate reason for taking disciplinary action. It must persuade by a preponderance of the evidence that the same action would have been taken in the absence of protected activity. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Where the General Counsel makes out a strong prima facie case, as has been done here, the burden on the respondent to overcome a finding of discrimination is substantial. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991).

There is no dispute that neither Koontz nor Zuczek responded to Clair's January 13 letter directing them to return their pagers or risk being billed for their cost. I have found above that, in all likelihood, Koontz and Zuczek still had their pagers when they received this directive. Thus, when Pentin prepared the May 6 final notice, warning them that they faced discipline up to and including discharge if they did not return the pagers by May 20, the Respondent would reasonably have believed that Koontz and Zuczek still had their company-issued pagers. When the pagers had still not been returned by May 29, the Respondent initiated the process that led to the June 4 termination. The real issue here is whether the failure to return the pagers would have resulted in a second termination if not for Koontz' and Zuczek's history of union and protected concerted activity.

The Respondent argues that it made the decision to terminate Koontz and Zuczek because it considered their failure to return the pagers as a continuation of a pattern of defiant disregard of reasonable management directives. The Respondent also argues that the failure to return the pagers was tantamount to theft of company property, conduct which routinely results in termination, regardless of the value of the item stolen. There are several problems with this defense. The Respondent's efforts to suspend and discharge the discriminatees for earlier instances of "defiant disregard of management authority" have already been struck down by arbitrators who heard all the evidence and concluded that the Respondent did not have just cause for this discipline. After hearing the evidence in the instant case, I have agreed with these arbitration decisions. Because the Respondent was ordered by the arbitration panel to remove the prior suspension and termination, it would be improper to rely upon this prior discipline as proof that the Respondent had just cause to discharge Koontz and Zuczek over the missing pagers. Moreover, I do not agree with the Respondent that Koontz' and Zuczek's behavior that resulted in the prior discipline exhibits the type of conduct that would routinely result in discharge at the Respondent's facility. There is no evidence in the record

before me that the Respondent has ever terminated an employee for disregarding a management directive. On the contrary, the limited evidence of discipline that is in the record suggests that the Respondent has tolerated disregard of significant policies over acceptance of gifts from vendors, insubordination, and leaving work without permission by choosing lesser forms of discipline than termination for the employees involved.

Garraux's testimony that he considered the discriminatees' failure to return the pagers as "tantamount to theft of company property" was contradicted by Pentin, the supervisor who initiated the disciplinary action. Pentin testified that the issue was not Koontz' and Zuczek's failure to return the pagers, but their intentional disregard of a management directive to return them, conduct which Pentin described as defiance. I have already noted above that Pentin bore substantial animus toward what he perceived to be defiance by Koontz and Zuczek that occurred in the context of their grievance and union representational activities. This animus obviously colored the significance he attached to their failure to return the pagers. I note, for example, the absence of any evidence that the Respondent attempted to retrieve pagers from former employees before Clair's January 13 letter, despite the testimony of States that it was not unusual for an employee to leave the Respondent's employ without returning a company-issued pager. The record also establishes that the Respondent exhibited very little concern about lost or missing pagers it had issued its managers and employees before the issue arose with Koontz and Zuczek.

Based on the above, I conclude that the Respondent has not met its burden of showing that it would have terminated Koontz and Zuczek on June 4 for failure to return their pagers were it not for their statutorily protected activities as union grievance representatives. In reaching this conclusion, I have considered the final arbitration decision upholding Koontz' third termination and his finding that Koontz had been dishonest and engaged in fraudulent conduct to increase a potential backpay award. I have already found that Zuczek was not entirely credible. In addition, Koontz' and Zuczek's efforts at challenging management over workplace issues, while clearly protected, approached the line between permissible advocacy and insubordination. Nevertheless, their defiant behavior and any "dishonesty" in pursuing their claims of work-related stress were provoked by the Respondent's campaign to rid itself of these strong and effective union representatives. It is undisputed that, before the arrival of Pentin, Koontz, and Zuczek had worked many years for the Respondent and performed their union duties without any discipline. By October 1997, it was clear that Pentin was on a path to set them up for termination in retaliation for their challenge to his authority that began with the inventory in May. Their simultaneous claim to be suffering from workplace stress, which may have seemed incredible to Pentin and the Respondent's management, was a reasonable response to the suspension and what occurred at the 8-B hearings. The Respondent's abrupt cancellation of their disability benefits and decision to terminate them, in disregard of existing medical reports and the opinion of its own plant doctor, would only tend to exacerbate any feelings of defiance on the part of Koontz and Zuczek and would explain their disregard of Clair's letter. I have already concluded, from the manner in which it

was delivered, that Pentin's May 6 final notice was not an attempt to warn the employees that they faced discipline for perceived misconduct, but simply another attempt to set them up for termination. Under these circumstances, the Respondent cannot escape liability for its actions by pointing the finger at Koontz and Zuczek.

Accordingly, I find that the preponderance of the evidence in the record establishes that the Respondent terminated Koontz and Zuczek on June 4 because of their protected union and concerted activities. The Respondent has thus violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

#### CONCLUSION OF LAW

By terminating Brian Koontz and Stanley Zuczek on June 4, 1998, because of their union and other protected concerted activities the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Stanley Zuczek, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Although I have found that the Respondent also violated the Act by discharging Brian Koontz, the General Counsel does not seek reinstatement as a remedy in light of the December 1999 arbitration award upholding his November 3, 1998 termination. To the extent it has not already done so, however, the Respondent must make Koontz whole for any loss of earnings and other benefits for the period from June 4 through November 3, 1998, in the manner set forth above. I shall also recommend the customary expunction and notice posting remedies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

#### ORDER

The Respondent, U.S. Steel, a Division of USX Corporation, Fairless Hills, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting United Steelworkers of America, Local Union No. 5092, AFL-CIO, or any other union, or for engaging in any other concerted activities that are protected by the Act.

<sup>30</sup> 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.

(b) 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) Within 14 days from the date of this Order, offer Stanley Zuczek 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.

(b) Make Brian Koontz and Stanley Zuczek whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the Koontz and Zuczek in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Fairless Hills, Pennsylvania, copies of the attached notice marked "Appendix B."<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 1998.

<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 25, 2001

#### 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 discharge or otherwise discriminate against any of you for supporting United Steelworkers of America, Local Union No. 5092, AFL-CIO, or any other union, or for engaging in any other concerted activities that are protected by the Act.

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, within 14 days from the date of the Board's Order, offer Stanley Zuczek 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.

WE WILL make Brian Koontz and Stanley Zuczek whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Koontz and Zuczek, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

U.S. STEEL, A DIVISION OF USX CORPORATION