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**Precoat Metals and Chester Florian and Jim White and Jack Focht**

**United Steelworkers of America, AFL-CIO-CLC, Local 3911-09 and Chester Florian and Kenneth Rolfe and Jim White.** Cases 13-CA-37256, 13-CA-37310, 13-CA-37343, 13-CB-15838, 13-CB-15860 and 13-CB-15868

May 28, 2004

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 31, 2001, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel and Charging Parties Florian, Rolfe, and Focht filed exceptions and supporting briefs. The Respondent Employer filed exceptions, a supporting brief, and answering briefs. The Charging Parties also filed a Motion to Reopen the Record, and the Respondent Employer filed a brief in opposition to the motion.<sup>1</sup>

<sup>1</sup> In their Motion to Reopen the Record, Charging Parties Florian, Rolfe, and Focht request that the record be reopened to introduce the minutes of a July 12, 1998 union meeting. The Charging Parties aver that they did not receive the minutes until February 23, 2000, in connection with a different proceeding between the parties in federal court. They further maintain that the evidence bears on the judge's credibility determinations concerning key witnesses who testified on behalf of Respondent Union.

We deny the Charging Parties' motion. First, we find that the motion was not "promptly" filed as required by Sec. 102.48(d)(2) of the Board's Rules and Regulations. The Charging Parties received the minutes on February 23, 2000, about 11 months before the judge's decision was issued in this case. The Charging Parties have not adequately explained why they did not bring this evidence to the judge's attention prior to the issuance of his decision. They state only that they "were not certain whether such a motion would be necessary." The judge's decision was issued on January 31, 2001, and the motion to reopen the record was not filed until April 4, 2001. The Charging Parties were certainly aware after the issuance of the judge's decision that "such a motion would be necessary." Yet, they have not explained why they waited more than 2 months after the issuance of the judge's decision to file their motion to reopen the record. Because the motion to reopen the record was not filed "promptly" on the discovery of the evidence, we deny the motion as untimely.

Second, the Board has long held that it will not reopen a record so that a party may attack a judge's credibility resolutions. *Labor Ready, Inc.*, 330 NLRB 1024, 1025 (2000); *Vulcan Waterproofing Co.*, 327 NLRB 1100 (1999), enf. denied on other grounds 219 F.3d 677 (7th Cir. 2000); *P & T Metals, Inc.*, 316 NLRB 1189 fn. 2 (1995). Here, the Charging Parties seek to introduce the additional evidence in order to call into question the accuracy of the judge's credibility findings. Accordingly, we deny the Charging Parties' motion.

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>2</sup> and conclusions as further discussed below, and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

I. INTRODUCTION

In his decision, the judge found that the Respondent Employer did not violate Section 8(a)(3) and (1) of the Act by suspending and discharging employees Chester Florian and Jim White. The judge also found that the Respondent Union did not violate Section 8(b)(1)(A) and 8(b)(2) of the Act. Thus, the judge concluded that the Respondent Union did not cause the Respondent Employer to suspend and discharge Florian; did not fail to process Florian's and White's grievances in a fair manner; and did not fail to fairly represent employee Kenneth Rolfe. For the reasons set forth in the judge's decision, we affirm his dismissal of those allegations.

We also affirm, for the reasons set forth by the judge, his finding that the Respondent Employer violated Section 8(a)(4) and (1) of the Act by placing employee Jack

\* We correct the following inadvertent errors in the judge's decision:

(i) In part I, D, par. 47 [p. 51], "Roger L. Kramer In – Jack Focht Out," the case citation for *Partington v. Broyhill Furniture Industries, Inc.*, 000 F.2d 269, 271 (7th Cir. 1993), should be deleted and replaced with the case citation, 999 F.2d 269, 271 (7th Cir. 1993);

(ii) In part I, G, par. 7 [p. 78] "Suspension of Florian on August 4," the case citation for *Yesterday's Children Inc. v. NLRB*, 115 F.2d 36, 48-49 (1st Cir. 1997), should be replaced with the case citation, 115 F.3d 36, 48-49 (1st Cir. 1997);

(iii) In part I, H, par. 67 [p. 105], "Discharge of Florian on August 10," the case citation for *Cleveland v. United States*, \_\_ U.S. \_\_, 121 S.Ct. 365, 373-374 (2000), should be deleted and replaced with 531 U.S. 12, 23-24 (2000); and in par. 80 [p. 108], the case citation for *Reeves Sanderson Plumbing Prods., Inc.*, \_\_ U.S. \_\_, 120 S.Ct. 2098, 2109 (2000), should be deleted and replaced with 530 U.S. 133, 148 (2000); and

(iv) In Part II, par. 36 [p. 186], "Discussion," the case citation for *Consolidated Freightways v. NLRB*, \_\_ F.2d \_\_, 133 LRRM 2320 (D.C. Cir. 1989), should be deleted and replaced with 892 F.2d 1052 (D.C. Cir. 1989).

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

In addition, some of the Charging Parties' exceptions imply that the judge's findings and conclusions were the result of bias. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Parties' contentions are without merit.

<sup>3</sup> We shall modify the judge's recommended Order in accordance with our decision in *Excel Container*, 325 NLRB 17 (1997), and shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

Focht on paid leave of absence, offering Focht a last chance agreement, and discharging him for talking to and giving an affidavit to a Board agent. However, the judge recommended that the Respondent Employer not be ordered to offer Focht reinstatement to his former position with backpay. For the reasons set forth below, we agree with the judge's recommendation.

## II. BACKGROUND

In brief, the facts concerning the Focht violations are as follows. The Respondent Employer is engaged in the business of coating metal coils for other companies. Focht is a 35-year employee of the Respondent Employer. In 1991, he began working at the Respondent Employer's Chicago plant as a manager/supervisor. On May 20, 1998,<sup>4</sup> the Respondent Employer removed Focht from his production manager position because he allegedly engaged in discriminatory hiring practices as found in the preliminary report of the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP). Focht remained employed by the Respondent Employer and retained his production manager title between May and August, but did not possess managerial or supervisory authority during that time.

On August 7, the OFCCP issued its final decision that reaffirmed its preliminary holding that Focht had engaged in discriminatory hiring practices. Notwithstanding the OFCCP ruling, Regional Manager Ray Drufke appointed Focht to a newly created business manager position in mid-August. The judge found that despite Focht's title, the evidence failed to show that Focht's new position was supervisory or managerial within the meaning of the Act. While the Respondent Employer contends in its exceptions that Focht possessed supervisory authority when he was the business manager, we agree with the judge that the evidence establishes that Focht's status after May 20 was that of a statutory employee.

On August 31, Focht accompanied employees Florian and Rolfe to the Board's Chicago Regional Office and gave an affidavit in support of Florian's unfair labor practice charge against the Respondent Employer. On September 11, during a meeting with Drufke and Plant Manager Jim Boyle Jr., Focht disclosed that he was working with Florian's attorney and "went to the NLRB." Thereafter, Drufke discussed the results of the meeting with his supervisor, vice president of manufacturing, Roger Kramer, and they agreed to meet with Focht on September 14. At the September 14 meeting, Kramer, Drufke and Focht discussed the Respondent Employer's treatment of Florian and the fact that Focht

was working with "someone's attorney in conjunction with the NLRB." At the end of that meeting, the Respondent Employer placed Focht on a paid leave of absence to do some "soul searching" and determine how he could best serve the company in the future.

Focht remained on paid leave until October 28th when he met with Kramer and Human Relations Director John Christopher. At that meeting, Kramer offered Focht a last chance agreement and a transfer to the Respondent Employer's Jackson, Mississippi facility. On November 2, Focht declined the last chance agreement and transfer. On November 3, the Respondent Employer terminated Focht.

The judge concluded that "a preponderance of the credible evidence does establish that Focht had been placed on paid leave on September 14, offered the last chance agreement on October 28, and discharged on November 3 because Kramer discovered that Focht—a statutory employee—had become involved with the Board, in the course of working with 'someone's attorney,' and had decided to retaliate against Focht for having engaged in this statutorily-protected conduct, in violation of Section 8(a)(4) and (1) of the Act." We agree with the judge.

The judge recognized that reinstatement and backpay are the traditional Board remedies for a discriminatory discharge. Indeed, the judge stated that "reinstatement is a particularly important remedy to order in situations where, as here, an employer's discriminatory motivation is one proscribed by Section 8(a)(4) of the Act." Again, we agree with the judge.

In Focht's case, however, the judge determined that the customary reinstatement and backpay remedies should be withheld because Focht engaged in "deliberate and malicious" conduct that undermined the Board's ability to effectively administer the objectives of the Act.<sup>5</sup> In support of his determination, the judge relied essentially on two factors: (1) Focht's false testimony at the hearing and in his prehearing affidavit; and (2) Focht's misconduct during the course of his employment with the Respondent Employer. Once more, we agree with the judge. As discussed below, we find that it would not effectuate the policies of the Act to award Focht the remedies of reinstatement or backpay in the circumstances of this case.

## III. ANALYSIS

The Board is authorized under Section 10(c) of the Act to remedy unfair labor practices with "such affirmative

<sup>4</sup> All dates are in 1998, unless stated otherwise.

<sup>5</sup> The judge cited *Service Garage, Inc.*, 256 NLRB 931 (1981), enf. denied on other grounds 668 F.2d 247 (6th Cir. 1982); and *Owens Illinois*, 290 NLRB 1193 (1988), enf. 872 F.2d 413 (3d Cir. 1989).

action including reinstatement of employees with or without back pay, as will effectuate the policies” of the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964). Congress has delegated “to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act.” *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323–324 (1994). See 29 U.S.C. Sec. 160(c). Although reinstatement and backpay are the usual remedies when an employee has been unlawfully discharged,<sup>6</sup> the Board has, at times, decided not to grant those remedies where doing so would not effectuate the policies of the Act. For example, the Board has denied employees remedial relief when they have engaged in conduct that abused and undermined the integrity of the Board’s processes. See, e.g., *D.V. Copying and Printing, Inc.*, 240 NLRB 1276 fn. 2 (1979) (“subornation of perjury alone constitutes deliberate and malicious conduct so calculated to abuse and undermine Board processes” that the discriminatee’s right to reinstatement and backpay was tolled “as of the time of such conduct”).<sup>7</sup>

Recently, in *Toll Mfg. Co.*, 341 NLRB No. 115, slip op. at 3–5 (2004), the Board exercised its remedial discretion and decided not to award full backpay to a discriminatee who lied under oath in a Board proceeding.<sup>8</sup> The Board stated that in exercising its broad remedial discretion in cases where a discriminatee has made false statements or has otherwise engaged in misconduct during Board proceedings, “the Board conducts a ‘balancing’ analysis and assesses the impact of the discriminatee’s transgression on the integrity of the Board’s processes.” *Toll Mfg.*, supra, slip op. at 4. The Board’s remedy must “accord[ ] with the magnitude of the transgression” and must strike a balance “between the equally important policies of discouraging unfair labor practices by remedying them and protecting Board processes from manipulation” by denying employees any benefit that

might flow from their interference with Board processes. *Id.*, slip op. at 4–5. In striking that balance, the Board examines the seriousness and significance of the offense to the outcome of the case, the overall veracity of the discriminatee, and the impact of the offense on the integrity of Board processes.

Applying that balancing test here, we conclude that, as a result of his false testimony in his pretrial affidavit and at the hearing, Focht has forfeited his entitlement to reinstatement and backpay.

We agree with the judge that Focht’s lies undermined the Board’s ability to administer the Act. The judge found that Focht was a “generally untrustworthy witness” who “gave testimony totally lacking in effort to be candid,” both during the hearing and in his prehearing affidavit. In his affidavit, Focht lied to a Board agent about the core issue involved in the unfair labor practice charge filed by employee Chester Florian. The judge found that Focht wholly invented conversations in which representatives from both the Union and management demonstrated their animus in terminating Florian. These falsehoods, in all likelihood, largely contributed to the General Counsel’s decision to pursue the complaint and caused the Board to expend considerable resources pursuing an ultimately groundless complaint. As the judge stated, “supplying false statements during the investigative phase of the Board’s proceedings [led] the General Counsel to make allegations not based in whole or in part on credible evidence.” As the judge concluded, this conduct “is hardly a course which promotes effective administration of the Act.”

Not only did Focht’s prehearing conduct cause the Board to spend resources pursuing a groundless complaint, but Focht continued to lie at the Board’s hearing in this case. As in *Toll Mfg.*, supra, in which full backpay was denied, Focht’s false trial testimony concerning a central issue in the case prolonged the proceeding and compounded the waste of the Board’s resources. Focht’s lack of veracity was pervasive, and had a serious impact on Board processes.<sup>9</sup> For these reasons, we conclude, in

<sup>6</sup> *Sheller-Globe Corp.*, 296 NLRB 116 (1989).

<sup>7</sup> Similarly, the circuit courts have declined to enforce Board orders that awarded reinstatement and backpay to employees who lied to their employers and in testimony under oath. *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964), denying enf. of 142 NLRB 1030 (1963); *Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176, 184–185 (8th Cir. 1964), denying enf. in relevant part of 144 NLRB 615 (1963).

<sup>8</sup> Because the employer had already reinstated the employee, the appropriateness of a reinstatement remedy was not at issue in *Toll*.

Member Schaumber dissented in *Toll Mfg.*, supra. Because he found that the respondent employer did not violate Sec. 8(a)(3) and (1) of the Act by discharging the employee at issue in that case, Member Schaumber did not reach the issue of whether backpay should be denied. However, as explained at n. 5 of his dissent in *Toll*, if Member Schaumber had found the violation, he would have joined his colleagues in finding that backpay should be cut off as of Dec. 12, 2000, the date that the employee at issue first lied under oath at a Board hearing.

<sup>9</sup> The cases relied on by our dissenting colleague, in which the Board granted traditional remedies to employees who gave false testimony, involve lies that were less substantial than those Focht perpetrated. See, e.g., *Service Garage, Inc.*, supra, 256 NLRB 931 (remedy not forfeited where lie “did not go to the heart or even to the periphery of the Board’s processes”); *Owens Illinois*, supra, 290 NLRB 1193 (where the major portion of a discriminatee’s testimony at an unfair labor practice hearing was credited and relied on, the discriminatee was given a full remedy even though she gave some false testimony at the hearing); *Lincoln Hills Nursing Home, Inc.*, 288 NLRB 510, 512 (1988) (the public interest in vindicating the Act outweighed “the evil to be contemplated” from a discriminatee’s “insignificant trespass on the truth” where a discriminatee’s false testimony constituted a “very small

agreement with the judge, that Focht's false statements in his affidavit and at the hearing constituted "malicious abuse of the Board's processes,"<sup>10</sup> and that in order to protect the integrity of the Board's processes it would not effectuate the policies of the Act to allow Focht to benefit from the Board processes that he abused.

Inasmuch as Focht's remedies are being denied because of the insult to the Board's processes resulting from Focht's lies, we find it unnecessary for the *Respondent Employer* to show, in order to justify a denial of remedy based on Focht's false testimony, that it would have lawfully discharged Focht, or any employee, for that false testimony. Cf. *Berkshire Farm Center*, 333 NLRB 367 (2001), in which the Board stated that reinstatement and backpay are appropriate *unless the employer* can show that the employee "engaged in misconduct for which the employer would have discharged any employee." In cases such as this one involving perjury or other interference with Board processes, where the Board's motivation for the denial of remedy is the protection of the integrity of its own processes, an employer need not meet the burden set forth in *Berkshire Farm*, supra. In cases not involving interference with Board processes, however, we shall continue to apply the standard set forth in *Berkshire Farm*, supra. See, e.g., *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994) (full remedy denied because employer met its burden of showing that employee who engaged in on-the-job sexual misconduct would have been discharged for that conduct had the employer known about it); *John Cuneo, Inc.*, 298 NLRB 856 (1990) (full remedy denied because employer showed that it "probably would not have retained" the employee after it learned that he had misrepresented his employment history on his application).

Our dissenting colleague says that we have exaggerated the impact of Focht's falsehoods on the administration of the Act. On the contrary, it is he who has minimized their impact. As the Supreme Court stated in *ABF Freight*, "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." 510 U.S. at 323.<sup>11</sup> By finding that

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part of his otherwise credible testimony and played no part in the outcome of the case.").

<sup>10</sup> *Service Garage*, supra, 256 NLRB 931.

<sup>11</sup> We recognize that, in *ABF*, the Court upheld the Board's authority to grant full relief to an employee-victim of an unfair labor practice, even if that employee has lied in some respects. However, the fundamental principle of *ABF* is that the Board has the discretion to grant, or not grant, such relief. Further, the Court's strong language condemning the act of lying in Board proceedings clearly indicates that the Court would affirm a Board denial of relief in a case like the instant one.

Focht has not forfeited his reinstatement and backpay remedies, our dissenting colleague is condoning false testimony and thus compromising the effective administration of the Act. We are not, as our dissenting colleague suggests, discouraging employees from testifying before the Board; we are, however, discouraging employees from making false representations under oath to the Board. Accordingly, we deny Focht reinstatement and backpay to which he would have otherwise been entitled.

Our dissenting colleague says that we are denying reinstatement and backpay simply because Focht was discredited. That is not the case. There is a difference between the discrediting of a witness and a finding that a witness has deliberately lied. In the instant case, Focht wholly invented conversations, and was "totally lacking in effort to be candid."

Our colleague also notes that some of the Respondent's witnesses were discredited. However, as noted above, there is a distinction between the discrediting of a witness and a finding that a witness has deliberately lied.

Our colleague argues that Focht's lies concerned a fellow employee, rather than Focht himself. We think that this is classic distinction without a difference. The essential point is that a person has deliberately lied to the Board. It matters not that the lie concerned another person.

Our dissenting colleague finds it particularly troublesome to deny relief in a Section 8(a)(4) case. We disagree. Section 8(a)(4) is designed to insure the integrity of Board processes. To award full relief to an employee who has deliberately abused those processes would be contrary to the very principles of Section 8(a)(4).

Having found that Focht has forfeited full backpay as a result of his false testimony, we must determine whether he is entitled to any backpay at all. In cases involving forfeiture of remedy for abuse of Board processes, backpay is tolled as of the time the abuse occurred. See *Toll Mfg.*, supra (backpay tolled at the time of discriminatee's first material lie under oath); *Lear-Siegler Management Service*, 306 NLRB 393, 394 (1992) (backpay tolled as of date employee threatened witness to induce him to testify); *D.V. Copying*, supra (backpay tolled as of date of subornation of perjury).<sup>12</sup> Consistent with Board

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<sup>12</sup> Because the conduct requiring forfeiture of the discriminatee's remedy in this case is the abuse of Board processes rather than other "misconduct for which the employer would have discharged any employee," *Berkshire Farm*, supra, we believe that it is appropriate to toll backpay as of the date the Board's processes were compromised, rather than the date the employer acquired knowledge that the discriminatee had engaged in that misconduct. Just as whether the employer would or would not have discharged the employee for abusing Board processes is irrelevant to our inquiry as to whether the employee's remedy

precedent, we find that Focht is not entitled to any backpay after August 31, the date of Focht's affidavit and his first material lie under oath. Because Focht had not yet been discharged as of the date of his affidavit, we conclude that Focht is not entitled to any backpay in this case.

While Focht's abuse of Board processes is the sole and independent reason for the denial of reinstatement and backpay, we agree with the judge that, in addition to his false testimony, Focht also engaged in misconduct in the workplace that demonstrated a lack of trustworthiness. Thus, Focht's false testimony, which is the sole basis for the denial of the remedy, was not inconsistent with a pattern of earlier misconduct. Thus, the judge opined, and we agree, that Focht sowed the seeds of distrust and conflict among the employees, the Respondent Employer, and the Respondent Union, and that that behavior was so disruptive to harmonious labor relations as to warrant a denial of the usual reinstatement remedy.

The judge set forth numerous examples of Focht's misconduct. We agree with the judge's assessment of Focht's conduct, both when he was a supervisor and when he was an employee. We are convinced, for the reasons set forth by the judge, that reinstating Focht would not effectuate the purposes of the Act. For example, Focht granted employee Florian's request for a day off, even though Focht lacked the necessary authority to do so. After management rescinded Focht's action, Focht did not reveal the true facts to Florian and instead allowed Florian to believe that the Respondent Union improperly caused his request to be denied. Focht allowed the "conflict" between Florian and the Respondent Union to remain uncorrected.

Focht also falsely told Florian, after Florian had been suspended for violating a work rule, that "he [Florian] got set up" by both the Respondent Employer and the Respondent Union. This caused Florian to distrust the Respondent Union.

Additionally, after Florian was warned by management about his violation of a work rule, Florian spoke to Focht, and Focht told Florian to disregard the warning. Florian was discharged because he followed Focht's advice.<sup>13</sup>

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should be forfeited, the date the employer first acquired knowledge of the employee's abuse of Board processes is irrelevant to our decision as to when backpay should be tolled. Compare cases not involving abuse of Board processes such as *John Cuneo*, supra (backpay tolled when employer first acquired knowledge of application falsification); *Marshall Durbin*, supra (backpay tolled when employer first attained knowledge of sexual misconduct).

<sup>13</sup> Although our dissenting colleague opines that these findings are based on inferences, we find that the inferences are amply supported by the record.

As a result of these and other incidents discussed by the judge, the judge concluded that, if reinstated, Focht "would locate other 'conflicts' that he could create for unit employees, Respondent Union, and Respondent Employer." In light of this, as well as his lack of trustworthiness and false testimony before the Board, we find that Focht is unfit for reemployment with the Respondent Employer and that it would not effectuate the policies of the Act to order his reinstatement.

Our dissenting colleague asserts that, in relying on these incidents, we have failed to apply the precedent discussed in *Berkshire Farm Center*, supra, 333 NLRB 367 (holding that reinstatement is appropriate unless the employer can show that the employee engaged in misconduct for which the employee would have been discharged). However, as we noted above, the *Berkshire Farm* standard does not apply in cases involving abuse of the Board's processes. In the instant case, the abuse of Board procedures was not inconsistent with a pattern of earlier misconduct. Our dissenting colleague therefore suggests that the *Berkshire Farm* standard applies. We disagree. The standard applied in cases involving abuse of Board processes is the one set forth above. We fail to see why this standard should be abandoned simply because the abuse of Board processes is not inconsistent with a pattern of earlier misconduct.

Finally, contrary to the assertion of our dissenting colleague, we are not leaving the unfair labor practice "essentially unremedied" and allowing the Respondent Employer to "escape the consequences of its violation" of Section 8(a)(4). As pointed out by the judge, the Respondent Employer remains subject to a cease-and-desist Order, which will "remain as background should the Respondent Employer again engage in conduct which violates Section 8(a)(4) of the Act." We agree with the judge that this is "not an inconsiderable consequence." See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 fn. 13 (1984) ("Were [the Respondent] to engage in similar illegal conduct, [it] would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act.").

#### ORDER

The National Labor Relations Board orders that the Respondent, Precoat Metals, Chicago, Illinois, its officers, agents, successors, and assigns shall

##### 1. Cease and desist from

(a) Placing on paid leave of absence, offering a last chance agreement to, discharging, or otherwise discriminating against employees, for having filed charges or given testimony, including in the form of an affidavit, under the National Labor Relations Act.

(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 National Labor Relations 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, remove from its files any reference to Focht's placement on a paid leave of absence, offer of a last chance agreement, and discharge, and within 3 days thereafter, notify him in writing that this has been done and that the leave of absence, last chance agreement, and discharge will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 September 14, 1998.

(c) 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. May 28, 2004

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues and the judge that the Respondent violated Section 8(a)(4) and (1) by placing em-

<sup>14</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."

ployee Jack Focht on a leave of absence, offering him a last chance agreement, and discharging him, all for giving testimony in the form of an affidavit under the Act.<sup>1</sup> However, as set forth below, I do not agree with their refusal to grant Focht the traditional remedies of reinstatement and backpay.

Section 10(c) of the Act grants the Board broad discretionary authority to devise remedies that effectuate the policies of the Act. "The underlying policy of Section 10(c) of the Act . . . is 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Trustees of Boston University*, 224 NLRB 1385 (1976), enf. 548 F.2d 391 (1st Cir. 1977), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). "Where a respondent has been found to have . . . unlawfully discharg[ed] employees, we have long held that the best way to ensure that discriminatees are restored 'as nearly as possible' to the position they would have been in absent the unlawful discrimination is to require the respondent to reinstate those employees and to make them whole by awarding them backpay in the amount they would have earned but for the respondent's unlawful discrimination." *Sheller-Globe Corp.*, 296 NLRB 116 (1989). Traditional reinstatement and backpay remedies should only be withheld "where the circumstances require forfeiture of remedy to effectuate the purposes of the Act." *Iowa Beef Packers, Inc.*, 144 NLRB 615, 622 (1963), enf. denied in pertinent part 331 F.2d 176 (8th Cir. 1964). This is not such a case.

In denying Focht reinstatement and backpay, my colleagues rely on two grounds: (1) Focht's false testimony under oath in his pretrial affidavit and at the hearing; and (2) Focht's conduct during his employment that caused conflict in the workplace. Neither of these is sufficient under Board precedent to justify the denial of the Board's traditional remedies to Focht.

#### A. False Testimony

Although false testimony by a discriminatee may warrant a denial of remedies if it reaches the level of "malicious abuse of the Board's processes,"<sup>2</sup> the Board is not precluded from granting reinstatement and backpay to an employee who has testified falsely if it would effectuate the policies of the Act to grant those remedies.<sup>3</sup> In *ABF*

<sup>1</sup> I also agree with my colleagues that the judge properly dismissed the other allegations in the complaint.

<sup>2</sup> *Service Garage, Inc.*, 256 NLRB 931 (1981), enf. denied on other grounds 668 F.2d 247 (6th Cir. 1982); *Owens Illinois*, 290 NLRB 1193 (1988), enf. 872 F.2d 413 (3d Cir. 1989).

<sup>3</sup> "The Board has often ordered the reinstatement of discriminatees despite findings that they had perjured themselves at the hearing." *D.V. Copying & Printing, Inc.*, 240 NLRB 1276, 1288 (1979), citing

*Freight System v. NLRB*, 510 U.S. 317 (1994), the Supreme Court upheld the Board's decision to grant reinstatement and backpay to a discriminatee who committed perjury while testifying before an administrative law judge.<sup>4</sup> Although the Court expressed its concern about the seriousness of the discriminatee's misconduct,<sup>5</sup> the Court also recognized that there were countervailing considerations. "Most important is Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice."<sup>6</sup> Thus, the Supreme Court held that it was within the Board's discretion to award a full remedy to a discriminatee who falsely testified at an administrative hearing.

Recently, in *Toll Mfg. Co.*, 341 NLRB No. 115 (2004), the Board reviewed the law concerning the appropriateness of granting traditional Board remedies to an employee who lied under oath in a Board proceeding.<sup>7</sup> In *Toll*, the Board stated that in deciding whether traditional remedies should be forfeited for abuse of Board processes, the Board must strike a balance "between the equally important policies of discouraging unfair labor practices by remedying them and protecting Board processes from manipulation" by denying employees any benefit that might flow from their interference with Board processes. *Toll Mfg.*, supra, slip op. at 5. In conducting this "'balancing' analysis," the Board assesses "the overall veracity of the discriminatee," as well as the "magnitude of the transgression" and its "impact on the Board's processes." *Id.*, slip op. at 4.

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*Trustees of Boston University*, 224 NLRB 1385, 1401-1402, 1410 (1976), enf. 548 F.2d 391 (1st Cir. 1977); *Coca-Cola Bottling Co. of Memphis*, 232 NLRB 794, 809, 812 (1977), enf. as modified 616 F.2d 949 (6th Cir. 1980), cert. denied 449 U.S. 998 (1980). See also, *Service Garage*, supra, 256 NLRB at 931 (discriminatee's false testimony, although "deliberate and willful," did not warrant a forfeiture of the usual Board remedies); *Owens Illinois*, supra, 290 NLRB at 1193 (Board granted reinstatement and backpay to a discriminatee despite five "examples of untruthfulness" in her testimony); *Lincoln Hills Nursing Home, Inc.*, 288 NLRB 510, 512 (1988); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 622 (1963), enf. denied in pertinent part 331 F.2d 176 (8th Cir. 1964).

<sup>4</sup> 304 NLRB 585, 591 (1991), enf. sub nom. *Miera v. NLRB*, 982 F.2d 441 (10th Cir. 1992), affd. sub nom. *ABF Freight System v. NLRB*, 510 U.S. 317 (1994).

<sup>5</sup> The Court stated that "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." 510 U.S. at 323.

<sup>6</sup> 510 U.S. at 323-324. The Court noted that Section 10(c) of the Act expressly authorizes the Board to determine whether reinstatement and backpay "will effectuate the policies of [the Act]."

<sup>7</sup> In *Toll*, the Board concluded that the employee was not entitled to a full backpay remedy. Reinstatement was not at issue.

Applying the principles in *Toll* to the facts of this case, my colleagues erroneously conclude that Focht has forfeited his entitlement to the Board's traditional remedies. The proper application of the principles in *Toll*, however, leads to the conclusion that Focht is entitled to reinstatement and backpay.

As the Board recognized in *Toll*, not every lie requires forfeiture of the Board's remedies. In *Toll*, however, the employee's repeated lies went to the central issue in the case, and the employee in *Toll* "abused the Board's processes for his own benefit." 341 NLRB No. 115, slip op. at 5. Further, the employee's lies in *Toll* caused the Board to unnecessarily reopen the record and hold a second unfair labor practice hearing. In contrast, here, Focht did not manipulate the Board's processes to obtain a remedy for himself, and his false testimony was unrelated to the legality of his discharge. Although the judge found that Focht was a generally untrustworthy witness, the judge did credit the portion of Focht's testimony relating to the 8(a)(4) violation found by the judge. Unlike in *Toll*, Focht's false testimony did not impact in any way on the unfair labor practice to be remedied and did not result in any benefit to Focht. Under these circumstances, the fact that Focht's testimony on other matters in the case was discredited should not preclude any remedy for Focht, a victim of an unfair labor practice under Section 8(a)(4) of the Act. See, e.g., *Lincoln Hills Nursing Home*, supra, 288 NLRB at 512 (discriminatee's deliberate false testimony did not preclude a remedy where "it cannot be said that [the discriminatee] abused the Board's unfair labor practice proceedings for his own benefit," because none of the violations about which he falsely testified entitled him to receive any remedial benefits.) A forfeiture of remedy should be reserved for cases in which an employee seeks to profit from his abuse and manipulation of Board processes.

My colleagues and the judge have exaggerated the magnitude and impact of Focht's false testimony on the administration of Board processes. The judge stated that "it is fair to conclude that this proceeding would not have been so prolonged, had those false statements not been made during the investigation." This "conclu[sion]" is mere speculation on the part of the judge and is no basis for refusing to grant Focht reinstatement and backpay. Here, Focht's version of the events in this case was discredited, but his testimony did not rise to the level of "malicious abuse" of Board processes requiring "forfeiture of remedy to effectuate the purposes of the Act." *Toll Mfg.*, supra, slip op. at 4.

My colleagues have also failed to give any significant weight to the adverse impact their decision will have on the administration of the Act. Because Focht has been

denied his traditional remedies merely because he was discredited, employees will be discouraged from testifying in Board proceedings for fear that they, too, will lose any potential remedies in the event they are discredited. Witnesses' versions of events are routinely discredited in whole or in part in most Board cases, but remedies have been denied only "where the circumstances require forfeiture of remedy to effectuate the purposes of the Act." *Iowa Beef Packers, Inc.*, supra, 144 NLRB at 622.<sup>8</sup> My colleagues have not shown that a forfeiture of Focht's remedies here, where the discredited testimony was unrelated to the unfair labor practice to be remedied and Focht received no benefit from his discredited testimony, is necessary to effectuate the policies of the Act.

In denying reinstatement and backpay to Focht, my colleagues have also failed to take into account some of the countervailing considerations supporting a remedy for Focht discussed in *ABF Freight*, supra. In that case, the Court noted that the administrative law judge had refused to credit a number of the employer's witnesses, and that the "unfairness of sanctioning [the discriminatee] while indirectly rewarding those witnesses' lack of candor is obvious."<sup>9</sup> This inequity was a factor leading to the Court's conclusion that the Board did not abuse its discretion in awarding a full remedy to the discriminatee.<sup>10</sup>

As in *ABF Freight*, Focht was not the only witness who testified falsely in this case. Although the judge found Focht to be "a generally untrustworthy witness," the judge also found that vice president Kramer's testimony "regarding his motivation for [taking adverse action against Focht] was no more reliable than that of Focht." In addition, the judge was critical of the testimony of plant manager Boyle and human relations director Christopher. Indeed, in the introductory section of his decision, the judge stated that there was "little basis for relying upon the testimonies of many of the principal witnesses."

Thus, here, as in *ABF Freight*, "[t]he unfairness of sanctioning [Focht] while indirectly rewarding [the Respondent Employer's] witnesses' lack of candor is obvious." 510 U.S. at 325. Furthermore, in assessing the equities of the situation, it is important to consider the fact that the Respondent Employer is the wrongdoer that

has been shown to have acted with a motive proscribed by the Act, and withholding reinstatement and backpay would leave the Respondent Employer's unfair labor practices substantially unremedied. As the Board stated in *Owens Illinois*, supra, 310 NLRB at 1193, the "denial of the normal remedy leaves the effects of the Respondent's unlawful conduct unremedied and thus fails to effectuate the policies of the Act." Leaving the effects of an 8(a)(4) violation essentially unremedied is particularly troublesome, because that provision was enacted to protect the integrity of the Board's processes.<sup>11</sup> While my colleagues claim to be motivated by the protection of the Board's processes, they are actually undermining, rather than protecting, the effective administration of the Act by failing to adequately remedy the 8(a)(4) violation in this case, and by discouraging employee testimony under the Act. Although false testimony is not to be rewarded or condoned, it will not effectuate the policies of the Act to withhold the traditional remedies of reinstatement and backpay from Focht under the circumstances of this case.

#### B. Misconduct During Employment

Although finding Focht's false testimony to be the "sole basis for the denial of the remedy," my colleagues do not stop there. Instead, they go on in dicta to cite various incidents occurring during the course of Focht's employment that they believe render Focht unfit for re-employment. In relying on this "pattern of earlier misconduct" to support their withholding of Focht's reinstatement remedy, my colleagues have seriously misapplied Board precedent.

"When an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent conduct, or discovery of conduct, that would have resulted in a lawful discharge." *Berkshire Farm Center*, 333 NLRB 367 (2001). Under established Board precedent, "if an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct." *Berkshire Farm*, supra, citing *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993),

<sup>8</sup> See also *D.V. Copying*, supra, 240 NLRB at 1288.

<sup>9</sup> 510 U.S. at 325.

<sup>10</sup> As stated in *D.V. Copying*, supra, 240 NLRB at 1288, "some leeway must be extended to an employee who has been the object of unlawful discrimination, particularly since the falsity has no predictable effect on future employment. . . . [T]here is, perhaps, a certain weighing of equities in such cases, since the employers' representatives will necessarily also have been found to have perjured themselves by declaring that their motive for discharge was pure."

<sup>11</sup> As conceded by the judge, "reinstatement is a particularly important remedy to order in situations where, as here, an employer's discriminatory motivation is one proscribed by Sec. 8(a)(4) of the Act. To allow conduct motivated by that proscription to be left unremedied by reinstatement would naturally compromise a statutory prohibition aimed at effective administration of the Act. See, e.g., *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966)."

enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 NLRB 856 (1990).<sup>12</sup>

Here, the judge set forth a litany of transgressions committed by Focht during his employment that the judge believed precluded Focht's reinstatement. The judge found that Focht sowed the seeds of distrust and conflict among the employees, the Respondent Employer, and the Respondent Union, and concluded that Focht's behavior was so disruptive to harmonious labor relations as to warrant a denial of remedial relief.

My colleagues affirm the judge.<sup>13</sup> In doing so, the majority has totally misapplied the burdens of proof set forth in *Berkshire Farm*. Under that precedent, it is the employer's burden initially to show "subsequent conduct, or discovery of conduct." 333 NLRB at 367. In order to meet this burden, the employer must show either that the conduct occurred after the discharge, or, if the conduct occurred during the course of the employee's employment, that the employer did not discover it until after the discharge. Here, there is no contention that misconduct occurred after the discharge. Rather, the misconduct relied on by my colleagues to support the denial of Focht's reinstatement occurred during the course of Focht's employment. Of critical importance is the fact that the Respondent Employer, the party with the burden of proof under *Berkshire Farm*, has not shown that it first became aware of this conduct *after* Focht's discharge. For this reason alone, the majority errs in relying on the "pattern of earlier misconduct" to support withholding the reinstatement remedy.

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<sup>12</sup> My colleagues state that this precedent is not applicable where a forfeiture of remedy results from alleged abuses of Board processes. In such cases, my colleagues apply the principles set forth in *Toll Mfg.*, supra. My colleagues agree, however, that this precedent is applicable where it is alleged that other types of misconduct justify the denial of traditional remedies. Because the judge and my colleagues rely on misconduct not involving the abuse of Board processes to justify their denial of traditional remedies, this precedent is applicable to that misconduct.

<sup>13</sup> One "incident" relied on by the majority was constructed by the judge's piling of inference on inference. After Florian was warned by management about his violation of a work rule, the judge inferred (1) that Florian spoke to Focht and (2) that Focht told Florian to disregard the warning. Building on those inferences, the judge "infer[red] that Florian was discharged as a result of following Focht's advice." It is well established, however, that "inferences must be founded on substantial evidence upon the record as a whole" and that "an inference based upon an inference" is not permissible. *Steel-Tex Mfg. Corp.*, 206 NLRB 461, 463 (1973). The judge's series of inferences lack evidentiary support in the record, and must be rejected on that basis. Similarly, the judge inferred that, if reinstated, Focht "would locate other 'conflicts' that he could create for unit employees, Respondent Union, and Respondent Employer." This aspect of the judge's rationale rests on nothing more than conjecture, surmise, and speculation, a wholly inadequate basis for withholding the customary remedies for unlawful conduct.

In addition, the Respondent Employer has not satisfied the second prong of the *Berkshire Farm* test. Under that prong, it is the employer's burden to show that the employee's misconduct was of a type that "would have resulted in a lawful discharge." *Berkshire Farm*, 333 NLRB at 367. The Respondent Employer obviously has not carried that burden because the conduct the majority relies on was tolerated by the Respondent Employer during the course of Focht's employment. Inasmuch as the Respondent Employer did not discipline Focht for that misconduct at the time it occurred, the Respondent Employer cannot show now that it is the kind of misconduct for which it would have discharged any employee.<sup>14</sup>

Not only have my colleagues totally misapplied both prongs of the *Berkshire Farm* test, but their opinion is also completely inconsistent with their own conclusion that Focht was unlawfully discharged in violation of Section 8(a)(4) and (1). Implicit in that conclusion is a determination that the Respondent Employer did not meet its 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 Focht would have been discharged for lawful reasons in the absence of his protected activity. Yet, what the Respondent Employer failed to show at the merits stage it successfully established at the remedial stage, for the majority inconsistently holds that Focht engaged in misconduct during his employment for which the Respondent Employer would have discharged any employee. In essence, under the guise of addressing a remedial issue, the majority is permitting relitigation of a *Wright Line* issue. There is absolutely no precedent whatsoever supporting this bizarre approach.

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<sup>14</sup> My colleagues refuse to apply *Berkshire Farm* to the misconduct during Focht's employment, stating that Focht's false testimony is the "sole basis" for the denial of the remedy. Despite that purported disclaimer, however, my colleagues nonetheless cite the "pattern of earlier misconduct" as support for their finding that Focht is unfit for reemployment with the Respondent Employer. My colleagues cannot evade the application of *Berkshire Farm* merely because the misconduct during Focht's employment is only a supporting reason for their decision not to reinstate him. If Focht's conduct during the course of his employment is being used to support a denial of reinstatement, *Berkshire Farm* applies to that misconduct and, as set forth above, the Respondent has not met the burden set forth in that case. Contrary to my colleagues' suggestion, by applying *Berkshire Farm* to the conduct during Focht's employment, I am not "abandon[ing]" the *Toll* standard applicable to cases involving abuse of Board processes. Rather, as set forth above, I have appropriately applied the *Toll* standard to Focht's false testimony. In addition, I have appropriately applied the *Berkshire Farm* standard to Focht's misconduct during his employment. Having applied the applicable standard to each type of misconduct committed by Focht, I conclude, for the reasons set forth above, that neither Focht's false testimony nor his misconduct during his employment is sufficient to warrant a denial of Focht's traditional remedies.

In ruling from on high that Focht's misconduct was so "disruptive to harmonious labor relations" as to require the forfeiture of the Board's traditional remedies, the majority has taken the classic misstep, long condemned by the courts, of impermissibly substituting its own judgment for that of the Respondent Employer. See *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956) ("[M]anagement is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision."). Where, as here, an employer has decided not to discipline an employee for conduct occurring during the course of his employment, the NLRB should not assume the role of a super-personnel board and reevaluate that decision.

### C. Conclusion

In sum, the factors relied on by my colleagues and the judge do not support a denial of Focht's remedies in this case. Focht's behavior during the course of his employment did not amount to conduct for which the Respondent Employer "would have discharged any employee,"<sup>15</sup> and Focht's lies in his affidavit and at the hearing did not reach the level of "malicious abuse of the Board's processes" requiring "forfeiture of remedy to effectuate the purposes of the Act."<sup>16</sup> By denying Focht the traditional remedies of reinstatement and backpay under these circumstances, my colleagues are allowing the Respondent Employer to effectively escape the consequences of its violation of Section 8(a)(4) of the Act, and are undermining, rather than effectuating, the policies of the Act.

Dated, Washington, D.C. May 28, 2004

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Dennis P. Walsh, 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 a union  
Choose representatives to bargain with us on your behalf

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<sup>15</sup> *Berkshire Farm*, supra.

<sup>16</sup> *Toll Mfg.*, supra, slip op. at 4.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT place on paid leave of absence, offer a last chance agreement to, discharge, or otherwise discriminate against employees for having filed charges or given testimony, including in the form of an affidavit, under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Jack Focht's unlawful placement on paid leave of absence, offer of a last chance agreement, and discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the leave of absence, last chance agreement, and discharge will not be used against him in any way.

### PRECOAT METALS

*Diane E. Emich and Homero Tristan*, for the General Counsel.  
*James N. Foster Jr., Geoffrey M. Gilbert Jr.*, and with them on brief, *Michelle M. Cain (McMahon, Berger, Hanna, Linihan, Cody & McCarthy)*, of St. Louis, Missouri, and *Robert Christopher*, of Hackensack, New Jersey, for the Respondent-Employer.

*David L. Gore and David L. Gore Jr.*, of Chicago, Illinois, for the Respondent-Union.

*Timothy J. Coffey*, of Chicago, Illinois, for Charging Parties Florian, Rolfe, and Focht.

### DECISION

#### STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Chicago, Illinois, on May 17 through 19, and on August 10 through 13 and 16 through 18, 1999, and on January 18 through 21 and 24 through 27, 2000. On December 14, 1998,<sup>1</sup> the Regional Director for Region 13 of the National Labor Relations Board (the Board) issued an Order consolidating cases, consolidated complaint, and notice of hearing, based on unfair labor practice charges filed between August 4 and September 23,<sup>2</sup> alleging violations of Sections 8(a)(1), (3), and

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<sup>1</sup> Unless stated otherwise, all dates occurred during 1998.

<sup>2</sup> The charges in Cases 13-CA-37256 and 13-CB-15838 were filed by Chester Florian on August 14, and Florian filed amended charges in Case 13-CB-15838 on August 31 and, again, on November 6. The charge in Case 13-CB-15860 was filed by Kenneth Rolfe on August 31, with an amended charge filed by Rolfe on November 6. The charges in Cases 13-CA-37310 and 13-CB-15868 were filed by James White on September 4, and White filed an amended charge in Case 13-CB-15868 on November 4. The charge in Case 13-CA-37343 was filed by Jack Focht on September 23.

(4) and 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). The Regional Director issued an amendment to consolidated complaint and notice of hearing on April 26, 1999, and a second amendment to consolidated complaint and notice of hearing on April 29, 1999.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make for following.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### I. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Introduction

Respondent-Employer, Precoat Metals, is a corporation which is a division of Sequa Corporation. Sequa has contracts with the Federal Government, but Respondent-Employer does not. Rather, at all material times it has engaged in the business of coating metal coils for other companies. Those companies supply Respondent-Employer with coils of metal which Respondent-Employer paints to customer specification, after which the painted coils are returned to the customers for installation in steel buildings and mobile homes, as well as in appliances such as washers, dryers, and refrigerators.

Obviously, line speed is important for Respondent-Employer's operation: the faster coils can be coated—the “through-put”—the greater the earnings derived by Respondent-Employer. Yet, through-put is not the lone consideration in its process. The appropriate amount of coating must be applied. Failure to do so results in low film: a lack of appropriate paint thickness which can lead to discoloration and, even, coating lift-off from substrate caused when it is exposed to the sun's ultraviolet rays.

Over time Respondent-Employer has added to its number of facilities. By the time of the hearing it had facilities in St. Louis, Missouri; Houston, Texas; Chicago and Granite City, Illinois; Portage,<sup>3</sup> Indiana; McKeesport, Pennsylvania; and, its newest facility, Jackson, Mississippi. In addition, it and another company operate a joint venture at a second Granite City facility. Aside from ability to handle a greater volume of coil coating, another reason for adding a new facility was to effect improvements in then-existing facilities. For example, the nonjoint venture Granite City facility was built in 1981 with an eye toward improving less than satisfactory personnel performance, quality and productivity at the St. Louis facility. In consequence, it is unrefuted, operations at that Granite City facility are conducted in a highly structured and disciplined manner, with the result that that facility is the leader among not only Respondent-Employer's facilities, but also in the overall coating industry.

For administrative and supervisory purposes, Respondent-Employer groups its facilities, apparently in pairs. Thus, the sometimes mention in the record of Lithostrip refers to an internal grouping, under a regional manager, of the Houston and Chicago facilities. At the time, or sometime after, operations

began around 1995 in Portage, the facility there and the Chicago facility were paired for administrative and supervisory purposes under Regional Manager Raymond Drukke.

The unfair labor practice allegations all pertain to events occurring at the Chicago facility. It is admitted that the 12-month period preceding issuance of the consolidated complaint is a representative period for jurisdictional purposes and, in addition, that during that period Respondent-Employer sold goods and materials valued in excess of \$50,000 which were shipped directly from the Chicago facility to points outside of the State of Illinois. Therefore, it is further admitted that at all times material Respondent-Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

To properly understand events during 1998, which have given rise to the complaint's allegations, there is no escaping a need to understand in some detail certain aspects of Chicago operations. That facility is located at 4800 South Kilbourn Street. It occupies an entire city block on the westside of South Kilbourn.<sup>4</sup> South Kilbourn is a north-south public thoroughfare, with a public park located across the street from Respondent-Employer, on the eastside of South Kilbourn. On the northside, the facility is bounded by 48th Street and on the southside by 49th Street.

Three buildings are located on Respondent-Employer's Chicago lot. A paint vault is situated on the southwest corner. More importantly, two adjoining buildings are located on the east or front side of the lot, collectively extending the entire length along South Kilbourn from 48th Street to 49th Street. Both are approximately the same length, extending from each respective corner to about midway on South Kilbourn. But, the building at 48th Street extends roughly twice as far back on the lot. It is referred to as the main building. On the front of it, facing onto South Kilbourn, are two docks or bays, referred to in the record as C-Bay and D-Bay.

The second building—referred to as the annex—has no opening onto South Kilbourn, so far as the record discloses. Rather, several docks open at the south end onto 49th Street. Until the mid-1990s Respondent-Employer leased only a portion of the annex, affording it access to between two and four of the building's docks. At some point during 1994 or 1995 it leased, or perhaps bought, the entire annex building. One result was an increase in overall parking space at the facility.

Three parking areas exist along South Kilbourn, on the apron between that street and the main and annex buildings. Prior to 1997 employees also could park in the lot's open areas, behind and between the three buildings—referred to as the backyard—inside a fence erected along the open perimeter areas, where there are no buildings facing a street. However, thefts began occurring from the backyard. There are four security cameras, two of which scan the South Kilbourn parking areas, one which scans 49th Street and the fourth which scans the backyard. Nevertheless, the thefts continued until Respondent-Employer decided to close and lock the backyard gate opening onto 49th

<sup>3</sup> Sometimes misspelled “Portidge” in the record.

<sup>4</sup> Occasionally misspelled in the record as “Kilborne” and, at some places in the formal documents, as “Kilbourne.”

Street. Thereafter, the backyard was used for storage of materials and no parking was allowed in it.

Even so, parking is still available in the South Kilbourn parking areas and along the curbs of streets which form the perimeter of the Chicago facility. In addition, once the entire annex was acquired, employees were allowed to drive through its docks and park inside the annex so long, of course, as they did not block dock entrances. Few employees appear to have availed themselves of that opportunity and for a reason.

Most of Respondent-Employer's Chicago employees work in the main building. The offices are located there. In fact, the South Kilbourn parking area nearest 48th Street is designated for office personnel parking. All production lines are also located in the main building. Thus, all production or "line" employees work in that building and, seemingly, park near the South Kilbourn entrances to it. Also working in the main building are operations<sup>5</sup> support employees.

Operations support employees perform a number of nonproduction line duties: shipping and receiving product, operating crane(s) and forklifts, fetching paint and other materials to the paint vault and production lines. Most of them work regularly in the main building, though periodically some must make trips to the annex. Two of them on each of the three shifts—a shipping clerk and a loader—work regularly in the annex. From there they ship completed coil orders to customers. As might be obvious, the loader is the employee who operates a forklift to load the trucks picking up those orders. In the course of performing their own duties other operations support employees may come to the annex and work in it, such as when replacing absent shipping clerks and loaders, picking up paint and other material stored in the annex to take to other locations in the Chicago facility, and moving finished product to the annex for shipment to customers. Conversely, it seems not disputed, annex shipping clerks and loaders will sometimes perform other operations support functions in the main building, as needed.

Shipping clerks and loaders assigned to the annex appear to ordinarily park in the annex or at street locations adjacent to it. So, too, do a few—two or three—other main building production and support employees. All of those employees are required to punch in when commencing work and to punch out at conclusion of their shifts. There is only one timeclock and it is situated in the main building. In consequence, annex employees must enter the main building to punch in each day and then go to the annex, and must leave each day by way of the main building, to punch out on its timeclock. For as long as anyone seems able to remember most, perhaps all, employees working in the annex, as well as those main building employees who park in or near the annex, followed a regular procedure of arriving for work, parking temporarily by the main building's docks or bays, going into the main building and punching in, returning to their vehicles and driving along South Kilbourn and 49th Street to their parking spots. They would reverse that process when their shifts ended: drive along 49th and South Kilbourn Streets to the main building's docks or bays, park temporarily

near them, enter the main building and punch out, then returning to their vehicles and leaving.

At the Chicago—and apparently at some, if not all, of Respondent-Employer's other facilities, such as the one in Houston—there is a rule, denominated work rule 11 at Chicago, which prohibits, "Leaving company premises without permission of supervisor during scheduled work hours." That prohibition was formulated to prevent employees, after punching in and before punching out for the workday, from leaving for lunch and personal business, which ended up extending beyond scheduled break periods. Still, the fact is that, read literally, work rule 11's prohibition extends to driving along South Kilbourn and 49th Streets after having punched in and before having punched out—the procedure outlined above for employees who park in and adjacent to the annex. Nevertheless, prior to the summer of 1998, the rule was never applied to that procedure. Nothing was ever said to any of the employees engaging in it and nothing was ever said to their collective-bargaining representative about driving on those streets after having punched in and before having punched out.

Respondent-Employer has collective-bargaining relations with labor organizations at five of its facilities. The Chicago facility is one of them. During events at issue, it was party to a collective-bargaining contract, having a stated term of December 16, 1995, through December 15, 1999, with United Steelworkers of America, AFL-CIO, CLC, herein referred to as Steelworkers. Steelworkers did not, itself, directly deal with Respondent-Employer on a day-to-day basis with regard to Chicago employees. At the time the contract became effective, its administration was handled by United Steelworkers Local Union 7045. Then, on May 1, 1996, Steelworkers merged 19 local unions, including Local Union 7045, into a single local: United Steelworkers of America, AFL-CIO, CLC, Local 3911. To preserve the separate identity of what had formerly been 19 separate local unions, each representing employees of a different employer, Steelworkers assigned suffix numbers, 3911-00 through 3911-18, to what became 19 separate bargaining units encompassed by a single local union. Thus, Respondent-Employer's production, maintenance and warehouse employees, plant clerical employees, and inspectors at Chicago—all line and support employees—became represented by United Steelworkers of America, AFL-CIO, CLC, Local 39911-09, herein called Respondent-Union, which is a labor organization within the meaning of Section 2(5) of the Act.

At the time of signing the above-mentioned 1995–1999 collective-bargaining contract, there were four officers of Local 7045: a "Local President, Unit Chairman" and three grievance committeemen or grievors, as mentioned in article XII of that contract. Prior to the merger each of the other 18 separate local unions also had a president. Following that merger, the president of each local became a unit chairman, reflecting the 19 separate bargaining units encompassed by the Union. Overall, the Union had a single president and 11 other constitutional officers.<sup>6</sup> Pursuant to Steelworkers' international constitution,

<sup>5</sup> Sometimes spelled in the plural—operations—in the transcript and other times in the singular: operation.

<sup>6</sup> For purposes of completeness, Local 3911 was abolished as a result of amalgamation which occurred during August 1999. Replacing it was United Steelworkers of America, AFL-CIO, CLC, Local 9777.

elections are conducted every 3 years both for unit officers and, separately, for local officers. By the time the hearing commenced, the most recent elections had been conducted during the spring of 1997 and elections were to be conducted during 2000. As will be seen below, those elections become the starting point for the consolidated complaint's allegations.

Before that, however, one aspect of the 1995–1999 collective-bargaining contract should be clarified. Its article XIII sets forth a grievance procedure which, for the most part, is unremarkable: a step 1 meeting between supervisor and employee who may choose to be accompanied by a union representative; a step 2 meeting between “the Committee” and regional manager or his designated representative; a step 3 meeting between the director of labor relations or his designated representative and “the Committee” which “may” also be attended by a representative of Steelworkers. The next step is arbitration. However, the discretion implied by the word “may” at step 3 should not be regarded literally.

Steelworkers employ officials designated as service and staff representatives. Each one is assigned to assist one or more local unions when negotiating contracts and processing grievances. It is unrefuted that, regardless of collective-bargaining contract language, it is the appropriate staff representative who handles grievances once they reach step 3 and who handles arbitration of grievances. Local and unit officials are free to express opinions about how grievances should be processed during those stages of disputes resolution. But it is the staff representative who makes final decisions about whether or not to process grievances into and past step 3 and into arbitration, and who makes final decisions concerning how grievances will be handled in those contractual steps. However, other than bargaining and limited grievance handling, staff representatives exercise no authority over local union or unit officers.

In addition, under article XIII, section 3 of the 1995–1999 contract, it is not possible for Respondent-Employer to simply discharge a represented Chicago employee. Rather, if it feels that discharge is warranted, it must notify Respondent-Union and, at that point, can only suspend the employee. The period of suspension allows Respondent-Union's committeemen to investigate and, if warranted, meet with Respondent-Employer—in a so-called “sit down” meeting—to discuss the propriety of the penalty before discharge is actually effected.

Against the foregoing background, the scenario supporting the consolidated complaint's allegations, as amended, seems relatively straightforward. An operations support employee attempted to run for unit chairman, against the incumbent, during the unit's 1997 election, but was declared ineligible for having failed to attend the required number of union meetings during the 2-year period preceding that election. There was no opposition to reelection of the incumbent unit chairman and, consequently, he was reelected. The ineligible employee, however, declared his intention to run for unit chairman in 2000. Hostile toward that employee for having tried to run in 1997, and for expressing intent to run in 2000, the unit chairman attempted to persuade Respondent-Employer to discharge the

employee, according to the complaint. On August 4, continues the scenario, those ongoing attempts achieved success: the dissident operations support employee was suspended under work rule 11 for having driven on South Kilbourn Street, between the annex and main building, to clock out on August 3 and, then, on August 10 was discharged.

In the interim between August 3 and 10, another employee also drove on South Kilbourn from the annex to the main building to clock out. Discovering that from security camera tape, Respondent-Employer suspended that employee on August 13 and discharged him on September 4. That employee had not been involved in any internal union activity which endangered the incumbency of any of the four unit officers. But, the argument proceeds, to protect the asserted legitimacy of its motivation for the dissident's termination, Respondent-Employer had to suspend and fire that other employee, since his action had been identical to that of an employee already suspended and discharged for such conduct.

Respondent-Union did meet with Respondent-Employer's officials about, and did file grievances concerning, those two suspensions and discharges. Under the scenario sketched to support the complaint's allegations, however, it had been to benefit Respondent-Union's unit chairman that the first employee had been discharged and Respondent-Union could hardly represent that employee in the manner contemplated under the Act. Moreover, inasmuch as the second employee had been fired to protect the asserted legitimacy of the dissident's discharge, Respondent-Union was hardly in a position to properly represent him. So, it is alleged, Respondent-Union violated the Act by its unfair, arbitrary and invidious representation of those two employees. In addition, it is alleged that the unit chairman unlawfully threatened employees with unspecified reprisals for affiliation with the dissident employee and, in addition, inflicted injury upon the second employee, by grabbing and choking him, because that second employee “repeatedly referred to” the discharged dissident.

A third employee enters the scene during August. He had earlier been laid off. During his brief tenure with Respondent-Employer he had not been involved in any internal union activity. Even so, it is alleged that Respondent-Union, since August, has refused to file a grievance concerning recall rights of that third employee because he became affiliated with the first—dissident—employee.

On Monday, August 31 a business manager, formerly Chicago production manager, went to the Board's regional office where he gave an affidavit in support of the dissident employee's by-then filed unfair labor practice charge. According to the consolidated complaint, that business manager was discharged on September 14 because he had done so. Actually, he was not discharged on September 14; he was put on leave of absence on that date. Later, he was offered a transfer to Respondent-Employer's Jackson, Mississippi facility and, when he declined to accept that offer, was terminated on November 3. Still, those events—leave of absence, offer of transfer and November 3 discharge—were litigated and it is argued that every one of them had been motivated by the business manager's contact with the regional office.

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Suffixes were retained, however, with the result that Respondent-Employer's Chicago employees became represented by Local 9777–09.

There is nothing extraordinary about any one of the foregoing allegations. Historically, some labor organizations have singled out dissidents, have made threats against them and other employees associated with them, and have caused or attempted to cause their employers to discriminate against them. Employers have discharged such dissidents in response to union-efforts to have them discharged. Employers have discharged nonactivist employees in an effort to disguise unlawful motivation for discharging activist-employees. Employers have also discharged personnel, employees and supervisors, for giving affidavits during investigation of unfair labor practice charges. Labor organizations have processed grievances in unfair, arbitrary and invidious fashion. What is extraordinary here, however, is the extent of mendacity displayed by the principal witnesses in this case.

To be sure, in most cases there is a certain amount of “confusion as to details,” *NLRB v. ILWU, Local 10*, 283 F.2d 558, 563 (9th Cir. 1960); see also, *Doral Building Services*, 273 NLRB 454 fn. 3 (1984), by witnesses, showing no more than “fallibility of memory,” *NLRB v. American Art Industries*, 415 F.2d 1223, 1227 (5th Cir. 1969), ordinarily encountered in human affairs. Beyond that, it is not unusual for witnesses in these cases to embellish some aspects of their accounts, while diminishing other aspects—to try to put their thumbs on the scale, as it were. And in this case, there were a number of instances where it appeared that witnesses became confused by counsels’ seeming failure to have taken adequate notes concerning earlier testimony, as well as by all too-frequent efforts to tailor questioning in an effort to have witnesses agree to implications that, in fact, those witnesses never asserted and did not agree could be derived from their earlier descriptions.

Even so, it is not possible to review the transcript and escape the conclusion that witnesses were attempting to tailor their accounts, sometimes constructing accounts completely out of the whole cloth, to support the positions of the side(s) which those witnesses favored and, on the other hand, to portray the other side(s) in the most unfavorable light possible. Indeed, those efforts sometimes amounted to a thorough trashing of anyone who disagreed with the positions favored by those witnesses.<sup>7</sup> For example, internal contradictions are revealed by comparison of accounts of particular events given on direct examination with testimony about those same events elicited during cross-examination and, even, during redirect examination, as well as recross examination. Witnesses whose interests seemed aligned<sup>8</sup> failed to corroborate each other, when testify-

ing about the same event, and, indeed, often contradicted each other. Accounts were advanced that either did not conform to objective considerations or were at odds with those considerations. Mere generalized accounts were supplied when specific accounts seemed warranted by situations presented and, in fact, were necessitated by specific matters in issue.

In sum, review of the record, standing alone, leaves little basis for relying upon the testimonies of many of the principal witnesses. Beyond that, such a review serves to confirm my impression, formed as those witnesses were testifying, that rather than attempting to candidly relate which had occurred, those witnesses were tailoring their accounts to advance the cause of the side(s) they favored and to inflict maximum damage on the opposing side(s). In that regard, it cannot be overlooked that, by the time they testified in this proceeding, many principal witnesses had already been involved in grievance and arbitration proceedings and in depositions given during proceedings before the United States District Court for the Northern District of Illinois, Eastern Division, as well as having given affidavits during the investigative phase of this proceeding. By the time that they testified in this proceeding, therefore, they were hardly novices in the process of being questioned about, and giving answers concerning, events brought into issue by the consolidated complaint. Beyond that, participation in those proceedings, and the questioning directed to them, seems to have alerted the principal witnesses to accounts that would and would not be helpful to the side(s) favored by each, to a degree not ordinarily encountered during the quarter century unfair labor practice hearings in which I have been involved.

In light of that situation, certain general principles of credibility should be placed in focus at the outset. First, testimony cannot be relied upon when it conflicts with judicial admissions (the pleadings) or with facts stipulated by the parties. See, e.g., *Boydston Electric, Inc.*, 331 NLRB 1450, 1451 (2000), and cases cited therein. Moreover, testimonial admissions are to be accorded significant weight.

Second, while uncontradicted testimony need not always be blindly accepted, the very absence of contradiction distinguishes such testimony from that which is contradicted. That is, there must be good reason for accepting testimony which is not contradicted. “Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation.” (Citation omitted.) *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). A corollary to that more general principle is that general or “blanket” denials will not suffice to refute specific and detailed testimony advanced by an opposing side’s witnesses. See, e.g., *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Em-*

<sup>7</sup> Indeed, if past is any indication of prologue, I have no doubt that charges of bias will ensue from what is written in this decision, just as was, in effect, anticipated in *Handicabs, Inc.*, 318 NLRB 890, 895 fn. 4 (1995), and as, in fact, came to pass. *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684 (8th Cir.1996), cert. denied, 521 U.S. 1118 (1997). The fact, however, is that witnesses in this case have no one to blame but themselves for testifying in a manner that leads to adverse conclusions about their credibility and which, as shown in succeeding subsections, “were properly and necessarily acquired in the course of the proceedings,” *Liteky v. U.S.*, 510 U.S. 540, 551 (1994), in which those witnesses testified.

<sup>8</sup> There are instances in this case when witnesses who facially seemed aligned with a particular party—such as officers and agents of a

party—in fact had interests which diverged from those of that party. For example, it might be assumed that former Regional Manager Raymond Drukke’s interest would naturally correspond with those of Respondent-Employer. However, he seemed to favor the above-mentioned alleged discriminatee-business manager and, beyond that, to harbor some antipathy toward two of Respondent-Employer’s Chicago facility officials. In short, the reality here did not always conform to stereotypical situations based upon seeming facial organizational alignment.

*erson Elec. Co v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); and *Mastercraft Casket Co. v. NLRB*, 881 F.2d 542 8th Cir. 1989). Another corollary is that professed lack of recollection does not suffice as refutation of positive testimony and, accordingly, falls short of creating an issue of fact. *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). See also, *Shelby Memorial Hospital Assn. v. NLRB*, 1 F.3d 550 (7th Cir. 1993).

Third, with some relation to what has been said in the immediately preceding paragraph, when one witness testifies with specificity about an event, and an opposing witness advances merely a vague or generalized account about that same event, the account of the first tends to be inherently regarded as the more reliable one. For, “general testimony does not address the factual situation in issue.” *Emergency One, Inc.*, 306 NLRB 800 (1992). “Comparative vagueness [can be] central to the credibility determination,” *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 71 (4th Cir. 1996), and an account which is vague tends, at the very least, to demonstrate uncertainty about what actually occurred. See, e.g., *General Telephone Co. of Michigan*, 251 NLRB 737, 740 (1980); and *Ohio New & Rebuilt Parts, Inc.*, 267 NLRB 420, 421 (1983).

Fourth, failure to supply corroborating testimony and other evidence, standing alone, is not fatal. See, e.g., *Laborers Local 190 (ACMAT Corp.)*, 306 NLRB 93 fn. 2 (1992); *C.P. & W. Printing Ink Co.*, 238 NLRB 1483 (1978), and, more generally, *U. S. v. Ginn*, 87 F.3d 367, 369 (9th Cir. 1996). Nevertheless, absence of corroboration is a factor, in some instances a most persuasive one, for determining whether testimony should or should not be credited. See, e.g., *SCA Services of Georgia*, 275 NLRB 830, 832–833 (1985); and *C & S Distributors, Inc.*, 321 NLRB 404 fn. 2 (1996). Beyond that, reliability of testimony is certainly brought into question whenever it is contradicted by the testimony of an ostensibly corroborating witness. See, e.g., *Advance Development Co.*, 275 NLRB 186 (1985).

With these principles in mind, attention turns finally to the events giving rise to the alleged unlawful conduct of Respondent-Employer and Respondent-Union, herein collectively referred to as Respondents.

#### B. April 1997 Internal Union Election

As pointed out in the preceding subsection, the starting point, in the scenario presented to support the consolidated complaint’s allegations, is Respondent-Union’s 1997 unit and local union elections. More specifically, in addition to voting for officers of Local 3911, as a whole, employees of Respondent-Employer voted in April 1997 for unit chairman, three grievance committeemen and a recording secretary. All incumbent officers ran for reelection: Richard Damron,<sup>9</sup> an admitted statutory agent of Respondent-Union at all material times, who had been employed by Respondent-Employer in maintenance and who had been president of Local 7045 until the above-described 1998 merger, after which he had become unit chairman; grievance committeemen John Robinson—who had been employed for 33 years at Respondent-Employer’s Chicago facility as a coater operator in the main building and who had been a grievance committeeman since 1991—Jesse or Jessie

Forias and Glen Thomas. Norman Sandquist or Sundquist was the incumbent recording secretary.

During the nominating meeting conducted during March of 1997, the only employee, other than Damron, to be nominated for unit chairman was Chester Florian. Florian had worked for Respondent-Employer at the Chicago facility since 1991 as a loader-forklift operator, for the most part in the annex. He had never held office in Respondent-Union, nor with Local 7045, prior to 1997. However, he had briefly held the position of president of another Steelworkers’ local union during the 1970s, when he had been employed at another company, Ball Metal.

Several employees, in addition to the three incumbents, were nominated for the grievance committeeman positions: Joseph T. “Tom” Phillips,<sup>10</sup> a production line worker for Respondent-Employer at Chicago since October 2, 1992; Wayne Crylen,<sup>11</sup> who had worked for Respondent-Employer a total of 37 years and in operations support at the Chicago facility since the mid-1980s, though on leave of absence since August 1, 1998; Eduardo Morales, an operations support employee for Respondent-Employer at Chicago since March 8, 1994; and, Manuel Escobedo,<sup>12</sup> an operations support employee at Chicago since September 1993. Either Donna Frank or Frank Mego, depending upon whose account is more accurate, ran against the incumbent Sandquist or Sundquist for recording secretary.

Given its seeming noncontroversial background nature, it would appear that the evidence pertaining to the April 1997 unit election would require relatively brief discussion. Following their nominations, Florian, Phillips, and Crylen were told that they were not eligible to run for unit office, because none of them had attended the minimum number of union meetings during the preceding 2 years. They then took two steps. They went to speak with the staff representative handling grievances and bargaining with Respondent-Employer. They approached then-Production Manager Jack Focht to ascertain how many union meetings could be eliminated from the last 2 years’ count, because one or more of the three employees had been scheduled to work, and had worked, on the Sundays when those meetings were conducted. That effort failed to render any one of them eligible. Phillips circulated a petition to waive the meeting requirement among Respondent-Employer’s employees. In the end, however, an unopposed Damron won reelection and so, too, did Robinson. But, Morales and Escobedo were successful in being elected grievance committeemen. This sequence of events becomes less than straightforward, however, when more than superficial attention is paid to testimony about those events advanced by Florian and Phillips.

The first problem arises upon examination of their accounts concerning how they went about seeking to run against the incumbents. Asked during cross-examination if he had been running on a slate, along with Phillips and Crylen, Florian equivocated. Initially he answered, “I don’t know, I don’t

<sup>10</sup> A few times misspelled in the record as “Philips.”

<sup>11</sup> Misspelled variously as “Krylin,” “Kryland,” “Crowley,” “Cryland,” and “Crylin” in the record.

<sup>12</sup> Misspelled variously in the record as “Escopito,” “Eposito,” and “Escobito.”

<sup>9</sup> Often misspelled in the record as “Damaron.”

know what anybody else's intentions were or who they were going to run against. That's all I know is I was running against Mr. Damron." That was not truly a responsive answer and the question was repeated. Florian again appeared to attempt to avoid a direct answer: "There is no slate for a Union position, ticket or whatever you want to call it." Yet, in a prehearing affidavit, taken during investigative phase of this proceeding, Florian had stated, "Crylin [sic], Phillips and Franks were all planning to run *with me* in April of 1997." (Emphasis added.)

Of course, there is no allegation of unlawful conduct by either of Respondents against Phillips or Crylen. As he testified concerning the subject of a slate or ticket, Florian appeared concerned that the allegations concerning his suspension and termination might be somehow diminished, at least somewhat, if he had been linked too closely in 1997 with other employees who had not become subsequent targets of purported unlawful conduct for having participated in the unit election. As cross-examination progressed, however, his answers began to concede the very fact that he had earlier seemed to be trying to evade acknowledging. That is, he appeared to be conceding that, yes, he had been running in 1997 as part of a team. "Not a ticket. It's, I don't know how to describe it to you but I know they were going to run. People knew that we were running *together*," (emphasis added), he testified and, then, "I guess you'd call it a slate. Then maybe that's how I referred to it."

Even after having been shown the above-quoted portion of his affidavit, however, the record of his testimony discloses continued vacillation by Florian concerning whether he had been running in 1997 as part of a team. "No," he retorted when asked if he, Phillips, Crylen and Franks were running as a slate. "I believe there was more people running for those positions," he then answered. Yet, when next asked if the other three were running with him, Florian replied, "Yes," only to then contradict that acknowledgment by answering, "I, I don't know what their [the other three employees'] intentions were." "Okay," he responded when asked if a "Slate is an appropriate way to describe what the four of you planned to do."

The fact is that, aside from the above-described equivocation and seeming evasive testimony by Florian, there is evidence that he had been attempting to run as part of a team or slate in the April 1997 unit election. When called as a witness by the General Counsel, Grievance Committeeman John Robinson said as much. That is, he referred to Florian as having tried to run in 1997 as part of a "team." To be sure, Robinson was an admitted statutory agent of Respondent-Union at all material times. Even so, as pointed out in the preceding subsection, agency is not necessarily the determining factor in the instant case that it ordinarily can be in other cases. By the time that he completed his testimony for the General Counsel and Charging Parties, it seemed clear that Robinson was not terribly enamored of Unit Chairman Damron and, conversely, tended to be sympathetic toward Florian's situation. In any event, given sequestration, there is no basis for concluding that, when testifying, Robinson would have appreciated that his "team" characterization might conflict with some of Florian's testimony. That is, it seems to have been a truthful, spontaneous characterization.

Beyond that, there is undisputed evidence that Florian had actually been attempting to put together a slate or ticket to run against Respondent-Union's incumbent officers during early 1997. Escobedo testified that, during early March 1997, "Chester had heard that me and Eddie [Morales] were going to be running and that he had been asking around and that the guys wanted to vote for us and he wanted me, Eddie, Tom Philips [sic] to run on his ticket, he was going to run for unit chairperson." Escobedo further testified that he had declined that offer: "I just wanted to win, see if I could win. I didn't want to be on anybody's special ticket or anything like that."

Now, like Robinson, Escobedo was an admitted statutory agent of Respondent-Union at all material times. And unlike Robinson, by the time he testified in this proceeding, it became quite plain that Escobedo was antagonistic toward Florian. Yet, as pointed out in the preceding subsection, a more than usual amount of litigation has been occurring during the approximately year-and-a-half which preceded Escobedo's appearance as a witness in this matter. Those very proceedings appear to have generated hardened attitudes by each party's witnesses toward the other party or parties, as well as toward counsel for other parties. As a consequence, by the time witnesses testified in the instant case their attitudes did not necessarily reflect what those attitudes toward other people had been at earlier stages, such as during 1997. In fact, Escobedo testified that, during March of 1997, "I wanted Chester to run. I wanted him to win, too."

Talk, of course, is cheap. It is easy to express personal opinions that cannot realistically be tested. Indeed, Florian gave testimony which does tend to show that Escobedo and Morales were not truly dissidents trying to unseat grievers—Forias and Turner—whose incumbency might indicate that their reelections would naturally be supported by incumbent Unit Chairman Damron. "To my understanding at the time of the elections . . . Mr. Damron did not want Jesse nor did he want Glen Thomas to get back into office," claimed Florian, "And he encouraged Eddie Morales and Manny Escobedo to run." But, that assertion is not supported by any other evidence. Asked where he had gotten that information, Florian ducked a direct answer, responding only that "Manny had mentioned that he wanted to run and that he was going to run against, he did not like Tom Philips [sic], Wayne Kryland [sic] at the time. And they [presumably Phillips and Crylen] were going to run against them." Of course, of itself, such a statement—showing Escobedo's disdain for Phillips and Crylen—hardly supports Florian's above-quoted assertion that Damron had influenced Morales and Escobedo to run for election, much less shows that Damron had opposed reelection of Forias and Thomas.

More importantly, while he sat at counsel table through most of the hearing and was present during the final day when rebuttal witnesses were called, Florian never denied Escobedo's relatively specific testimony about being asked by Florian "to run on [the latter's] ticket." Obviously, that uncontested testimony shows that Florian had been attempting, at least, to form a slate or ticket to run against Respondent-Union's incumbent officers in 1997, contrary to the above-described equivocations and sometime denials by Florian of that fact.

Not only is there no evidence that Morales and Escobedo had run in the 1997 election as some type of accommodation to Damron, but Escobedo's unrefuted account tends, at least, to demonstrate that Florian had been favorably disposed toward the candidacies of Morales and Escobedo. And as those two employees were attempting to replace incumbents running for grievance committee members' positions, there is no basis for concluding that Morales and Escobedo had been any less dissidents in 1997 than Florian had been. That is not simply an inference. Phillips—a witness quite clearly hostile toward Damron and, conversely, quite sympathetic toward the charging parties—testified that, in 1997, there had been “basically a group of people that wanted to run to get out the old and bring in the new people.” Among that “group of people” Phillips included Morales and Escobedo.

In sum, a review of Florian's testimony regarding his decision to run against Damron, and his efforts to implement that decision, display internal contradictions, lack of support for some of his assertions and refutations of others, and inconsistencies between his accounts and those of witnesses both sympathetic and unsympathetic toward Florian by the time of the hearing in the instant case. Those deficiencies continued to mar Florian's testimony—and that of Phillips, as well—during efforts to describe the declaration of ineligibility to run for union office in 1997.

Florian testified during direct examination merely that after the March 1997 nominating meeting, “I was informed that I did not have enough meetings to qualify for that position” of unit chairperson. Left unanswered were the subjects of who had “informed” him and of how he had been “informed.” It is difficult to conclude other than that those omissions were deliberate. For, Florian testified, “That particular day Mr. Damron took nominations with the recording secretary” at the nominations meeting. Asked whether it was not true that there is a committee which runs local union elections, Florian professed uncertainty: “I'm not sure of that, no, sir.” Asked who had told him that he was ineligible to run, Florian answered, “The only one that had told me was Ray” Pasnack,<sup>13</sup> then the director of Steelworkers Sub-district 1 and the immediate supervisor of then-service and staff representative Craig F. Langele,<sup>14</sup> who then handled bargaining and grievance processing, starting at step 3, for Respondent-Employer's employees.

Asked if he had been informed of his ineligibility by someone other than Pasnack, Florian responded, “I don't remember if anybody else told us that we weren't.” Later during cross-examination, questioning returned to this subject. “I believe so,” testified Florian, when asked if he had been told only by Pasnack that he was ineligible to run for unit chairperson. Asked, again, if anyone else had told him, Florian answered, “Not to my knowledge, no.”

Had the record been left in this posture, it would show no more than that Damron had been one of the two officials accepting nominations and, later, a Steelworkers official had told Florian that he was not eligible to run. The intended implica-

tion of so terse a sequence of events seems to have been that Damron had, at least inferentially, been involved in the declaration of ineligibility, with at least one Steelworkers official playing along. The record was not left in that posture, however.

Cross-examination of Florian was pursued by showing him an excerpt from his deposition of April 9, 1999. That excerpt states, “I wanted to run for local union president [sic] at our union itself. And I was told that I was ineligible because of the amount of meetings at that time. I came in to discuss that with Mr. Pasnack [sic].” A natural reading of that answer seems to show that, contrary to his above-described testimony in this proceeding, Florian had already known about his ineligibility when he approached Pasnack. Asked to explain that seeming discrepancy, Florian simply professed a lack of recollection about what he had said when his deposition had been taken: “No, that I don't remember, sir,” having said that during the deposition. There is another aspect to that portion of Florian's testimony which will be taken up below.

At this point, however, discussion must be directed to testimony by Phillips which contradicts, almost in its entirety, Florian's above-described testimony regarding the nomination process and how Florian, Phillips, and Crylen came to be notified that each was ineligible to run for unit office. Damron testified that he had no role in determining eligibility of nominees for unit office—that satisfaction of requirements for nomination is determined by an independent committee. For the most part, Phillips agreed. In the process, not only does the record show that Phillips provided testimony which contradicts that of Florian, described above, but also that Phillips provided some testimony which was internally contradictory.

As to the contradiction of Florian's testimony, during direct examination Phillips testified that—shortly after the March 1997 nominating meeting—he, Florian and Crylen “all received letters on the same day at the plant that we were not eligible.” It hardly could be argued with the least persuasion that that testimony by Phillips was somehow the product of momentary mistake. “That's correct,” he later responded when asked if an election committee had notified each of those three would-be candidates of his ineligibility to run for unit office. “I know that we did receive a letter from the union saying that we were ineligible to run,” acknowledged Phillips at a still later point. Obviously, Phillips was including Florian as one recipient of the letters. Yet, Florian never even mentioned having received such a letter.

Nor did Florian make mention of any election committee. Nevertheless, Phillips conceded that one had been appointed, although his testimony about it and its activities displayed internal contradiction. “They have like an election committee that goes through and finds out if you're eligible as far as meetings attended,” testified Phillips during direct examination. He added, “They check the records and we all received letters on the same day at the plant that we were not eligible.” Certainly it seems that Florian should have been aware of that committee. Phillips testified, “Well, we got to, yeah” pick at least half of that committee's members: “Yeah, we just, we got to pick someone we trusted to do the job.”

More specifically, Phillips testified that Damron, and presumably the other incumbent officers, had selected Donald

<sup>13</sup> Misspelled in the record variously as “Paznek,” “Pasnek,” “Pasnack,” and “Pasnik.”

<sup>14</sup> Misspelled frequently in the record as “Langley.”

Ashesky, “[a]nd then we volunteered Mark Newscal and nothing was said about that.” Presumably by “we” Phillips was referring to the dissidents who were seeking to unseat the incumbent officers. Certainly, he—or, for that matter, any other witness—never advanced any testimony to the contrary. Moreover, there is no basis for concluding that Ashesky had somehow been under the control of Damron. Phillips effectively vouched for Ashesky’s reliability: “Dan Ashesky was trusted by a lot of the guys in the plant. He was a nice guy. So there’s no, nothing was said about” his selection for the committee.

Internal contradiction does emerge upon examination of certain testimony given by Phillips as cross-examination progressed. Initially, he seemed to be testifying that the same Ashesky-Newscal committee had determined eligibility and, in addition, had counted the ballots cast during the April 1998 unit election. Thus, as quoted above, during direct examination Phillips testified, “They have like an election committee that goes through and finds out if you’re eligible,” and he also testified “like counters for, for counting votes and stuff,” during the initial phase of cross-examination. There is no evidence that two separate committees had existed: one to determine eligibility and another to count ballots. Yet, during a later phase of cross-examination, Phillips seemed to become concerned that charging parties’ position might somehow be diminished by testimony that the same committee both determined eligibility and counted ballots. Accordingly, his testimony took a meandering course regarding the committee.

“That’s correct,” he agreed, the election committee had given notice of ineligibility of Florian, Crylen and himself. Then, however, Phillips claimed, “I don’t even know who was on the election committee.” But, he agreed that he earlier had testified how he had been involved in selecting the people who had counted the votes: “Right. Those were people who counted votes.” Well, then, he must have known “who was on the election committee.” Yet, Phillips next testified, “No, I don’t think they were the same people who go through your, to find out your eligibility to run for Sundays and all that.”

Of course, Phillips had already identified Ashesky and Newscal as the committee-members selected during March, as quoted above. As cross-examination progressed, he was then asked if the “tellers committee” was not what he had been calling an election committee. His answer was not truly responsive: “I, the tellers, I know that they, what, the one thing I do know that they did was they counted the ballots.” Asked next if those had not been the same people who had written the letter telling him he was not eligible to run for office, Phillips again avoided a direct response: “I’m not sure whose job it was to check that out. I know that we did receive a letter from the union saying that we were ineligible to run. I don’t know whose job that falls under and who,” replied Phillips. It appeared by this point that, in response to those questions, Phillips was trying to work out mentally which answers might harm the charging parties’ position and, conversely, which might operate to the greater detriment of Respondent-Union, rather than attempting to answer candidly to questions which he seemed sufficiently perceptive to understand.

Significantly, not included among the plethora of documentation offered in support to the complaint is a copy of the ineli-

gibility letters which Phillips admitted that he, Florian and Crylen had received. There was no contention that none of those three letters was available for production. No explanation was advanced for their nonproduction, though they surely would have resolved the open question of who had sent them. Not apparent from the record, as well, is any legitimate explanation for Florian’s failure to have mentioned those letters when he testified. Apparently, he felt that including only Damron and Pasnick in his recitation of events concerning the 1997 unit election better served his view that everybody in and connected with Respondent-Union had been conspiring against him. Or it may be that he perceived some purpose that might better serve his suit filed in Federal District Court.

As it turns out Florian did, in fact, speak with Pasnick about the eligibility issue. To be sure, I did cut off interrogation of Crylen about the 1997 unit election. By that time, however, Florian and Phillips had already advanced inconsistent descriptions regarding their contact with Steelworkers. Nothing said by Crylen would erase the extent of those inconsistencies.

During cross-examination Florian was asked if he had been told about the eligibility problem by someone other than Pasnick. He answered, “I believe among ourselves [the dissidents], when we were talking, we thought as far as the meetings would be concerned that we knew that there was a certain amount that had to be covered at that time,” although Florian claimed that at Ball Metal, during the 1970s, “eligibility was waived many a time, so I didn’t know what the current by-laws were or if they could waive them or not.” Then, testified Florian, “I had gone down and talked to Mr. Ray” Pasnick who “showed me some by-laws that stated that I was not eligible by the amount of meetings that I could run for.”

No question that Florian was claiming that, on his own initiative, he had gone to see Pasnick after he (Florian) had been nominated, but before being given any notification of ineligibility to run, for unit office. Asked if it was not true that he had gone to see Pasnick about eligibility “because you had been told by your local union that you were ineligible?” Florian answered flatly, “No. I was told—we checked on it ourselves because we were looking for, just in case this would come about, that’s when we came up with our records,” the latter a subject discussed below and in the immediately following subsection. However, the testimony by Phillips portrays a quite different story, though one not free of its own internal contradiction.

Phillips agreed that he, Florian and Crylen had discussed, among themselves, their eligibility in light of the number of union meetings not attended by any one of them. In contrast to Florian’s above-described testimony, however, Phillips testified that that conversation had taken place “[w]hen we got our letters” saying none of them were eligible for run for unit office. For most of cross-examination Phillips testified about two meetings with then-Staff Representative Langele. For example, he testified initially, “when we got our letters, we discussed, we discussed what the requirements were, as far as days that we worked, according to the meetings. That’s when we find out, when we went to Langele, we found out about the Sundays that had, were days we held meetings and if they were counted against us or how they worked.” No question Phillips was

testifying that at that stage that he, Florian and Crylen had gone together to see Langele at Steelworkers' facility at 92nd and Harlem Avenue in Chicago. He was asked specifically about having gone there and he agreed that all three of them had gone to that location where they spoke with Langele.

According to Phillips, Langele's remarks led the three of them to the realization that absences from Sunday union meetings would be excused—and those meetings excluded from calculations of percentages of meetings attended—if one or more of them had been scheduled to work, and did work, when Sunday meetings were held, as quoted above. "He [Langele] said that we'd have to find out about the information on the scheduling, what Sundays we worked and what ones we didn't. Because *the election committee* didn't know which ones we worked. The *election committee* only knew what days the meetings were held and which meetings we attended." Apparently, at that point, Phillips saw no problem in identifying the election committee as the source of the ineligibility determination. Still, contrary to his own above-described testimony, at that point he added, "I didn't even know who was on the election committee."

Acting on the information obtained from Langele, testified Phillips, "that's when we went to do the, to look into the schedules." That was done by going to then-Production Manager Focht, as discussed below in greater detail. After checking the records he provided, Phillips testified that he, Florian and Crylen had returned to speak with Langele: "we talked to him about the Sundays that we found in the scheduling coinciding with the Sundays that we worked, with the Sundays that meetings were held on." No question that Phillips was testifying that this had been a second meeting with Langele: "Yeah, its another meeting that we had with Mr. Langele."

During that "same meeting," Phillips further testified, "We went from Mr. Langele to Mr. Pasnack [sic]." This was the first point—after two meetings with Langele—at which Phillips placed Pasnick as having become involved in the eligibility issue. "But I only saw Ray Pasnack [sic] and Craig Langele one time together with Chester and Wayne Crylen," claimed Phillips. As it turned out, even deducting Sundays when one or more of the three would-be candidates had worked during the preceding 2 years, none of them was able to satisfy the eligibility requirement of having attended one third of union meetings during that period.

Had the testimony in this area by Phillips concluded at that point, the sequence of events portrayed by him would have been relatively straightforward, albeit not consistent with that portrayed by Florian: receipt of ineligibility letter, meeting with Langele at the Steelworkers' Chicago facility, procurement of records from Focht, second meeting with Langele and, then, Pasnick. Yet, as cross-examination progressed further, the record shows that Phillips began modifying, even changing, that seemingly straightforward recitation.

First, Phillips made an addition. "When we found out we were ineligible, I called up Saunders," the president of Local 3911, who "referred me to Langele," testified Phillips. Then, "I called Langele as well and said, listen, we were found ineligible" (emphasis added), testified Phillips at that point. When he told Langele that, "we were found ineligible," Phillips claimed,

"they already knew because they were the ones who sent the letters out." This is the only point in the entire record where authorship of the three ineligibility letters is attributed to Steelworkers' staff officials. In so testifying, Phillips contradicted his own above-quoted testimony. Furthermore, there is no evidence whatsoever that Steelworkers had played any role in determining eligibility to run for unit office and, moreover, there is no evidence whatsoever that could supply an inference that either Langele or Pasnick would have known about ineligibility letters being sent to would-be candidates for unit offices.

Second, as the emphasized word in the preceding paragraph shows, the testimony by Phillips was that he had "called Langele." To be sure, he could have both telephoned Langele and then, accompanied by Florian and Crylen, gone to meet with Langele at Steelworkers' Chicago facility. Yet, any such inference tends to be dispelled by Phillips's account of what had been said during the now-asserted telephone conversation. "I said what about the Sundays that we worked and the Sundays that meetings were held on? You know, how does that work into it?" testified Phillips. According to him, "They [sic] said, well, now you're going to have to find out what Sundays you worked and what Sunday meetings did it [sic] fall on." Now, that is essentially what Phillips earlier testified had been said during his above-described testimony about the purported first meeting with Langele. It seems almost absurd, at least absent some evidence to the contrary, to conclude that Phillips had been told by Langele during a telephone conversation to check Respondent-Employer's Sunday records and, then, had gone to Steelworkers' facility to pose the same questioning to Langele and to have Langele repeat the same answers as, by now, purportedly provided already during a telephone conversation.

The fact is that Langele denied having participated in any such meetings and, implicitly, conversations such as the record reveals that Phillips alternatively described. Langele testified that when he arrived at Steelworkers' Chicago facility one day, he discovered that Florian and "a couple individuals" were meeting there with Pasnick. "I'd come in when they were already there," testified Langele. Of course, a meeting with Pasnick—not with Langele—is what Florian had described, as mentioned above. And Pasnick's testimony corresponded with that of Langele and Florian: "Craig wasn't in the office. I think he just came back from a meeting or something and came in," and, moreover, "[h]e probably walked by the door and I probably motioned for him to come in," because, "[h]e's the servicing staff representative. It would have been, ordinarily, I think these individuals would have probably talked to Craig. They probably didn't talk to Craig [that day] because I was in and he wasn't."

To a degree Pasnick's and Langele's descriptions of that meeting tended to correspond more to that of Florian than to anything described by Phillips. As set forth above, Florian made no mention of the ineligibility letter—admitted by Phillips to have been received by him, Florian and Crylen—but testified that he had met with Pasnick as a result of discussion with Phillips and Crylen about possible eligibility problems. Still, Pasnick's account of his meeting with Florian and Phillips, at least—Pasnick recalled having spoken with Florian and "another guy" he believed "may have been" Phillips; when he

entered the meeting Langele recalled there had been “a couple individuals meeting with Ray”—does not preclude the possibility that the meeting had occurred after Florian, Phillips, and Crylen had already received their ineligibility notifications.

“They had come over to the office to talk about the Local Union elections that were coming up,” testified Pasnick, “in particular, the meeting attendance requirements under the [Steelworkers] Constitution and By-laws.” According to Pasnick, Florian “was concerned that he would be ineligible because the current Constitution and By-laws call for a meeting requirement of attending one-third of the Local Union meetings in the 2-year period prior to the election, and he didn’t have the meeting requirements.” Florian “wanted to know if there was a procedure to waive the meeting requirements,” Pasnick testified, but he told Florian “the meeting requirements are set by international convention in conjunction with approval from the Labor Department. And there was nothing I could do to change the meeting requirements for him.” To allow Florian to verify that position, “[i]f he didn’t feel that I was giving him the straight story,” testified Pasnick, “I referred him to a guy by the name of Paul Aldridge, who was in the Pittsburgh office. And Paul was the coordinator for all the Local Union elections on the national basis, international basis.” Both Pasnick and Langele testified that, once the latter had entered Pasnick’s office, Pasnick explained the situation being discussed. Langele testified, “I think I said we can’t waive the meeting requirement: ‘I said, you can’t do that,’ or, ‘Well, we can’t do that.’”

Florian, Phillips, and Crylen, as mentioned above, also went to then-Production Manager Focht, to ascertain the number of Sundays one or more of them had been scheduled to work, and had worked, when union meetings had been occurring. That may have occurred before the meeting with Steelworkers’ staff officials or afterward. Phillips claimed that it had occurred between the two meetings he asserted having with Langele.

Regardless, Florian acknowledged that Focht had been eager to have someone replace Damron as unit chairman. For, Florian testified that Focht had said he “was happy that somebody else was running” for unit chairman, because “it would be good to have somebody in there that the company and the Union could, I guess, that communicate, deal with, whatever is the word you want to use,” and, further, that Focht had said that “sometime when we had asked for the [attendance] records.” After being shown a portion of a prehearing affidavit, Florian acknowledged that Focht had said also that he (Focht) could not deal with the current unit chairman or could not “deal with the current people that were in there or communicate with them,” agreeing further that Focht had said that he was glad Florian was running for unit chairman.

As mentioned above, the subject of what records Focht gave to the three would-be candidates will be discussed further in the immediately following subsection. At this point, discussion is confined to certain conflicting testimony appearing the record in connection with the request for that information, when attention is paid to the accounts of Focht, Florian and Phillips.

During direct examination, according to Focht, he had been approached by Florian and Phillips during March of 1997. At that stage of examination, Focht testified that Florian had said, “they needed some information. In order for them to be able to

run they had to have so many Union meetings in. If they were scheduled to work on a Sunday they were excused from the Union meetings and they might have enough time to run.” Focht’s testimony at that stage continued, “And then they weren’t sure if they had enough time in and they asked if I could get out, pull some records so they could look at them to see how many Sunday’s [sic] they had worked.” That testimony shows that Focht had been fully informed at the time of the information request of the specific reasons why it was being sought. In fact, Focht repeated as much during the initial phase of cross-examination: “they needed to know how many Sundays they had worked so they would be excused from their Union meetings in order to run for office.”

As cross-examination returned to the subject, however, Focht seemed to become concerned, perhaps based on intervening examination, that saying that he had known too much, at the time of the request, might somehow prejudice Florian’s, or possibly his own, position. Asked then if Florian had said why he needed to see the records, Focht answered, “No, he just told me he was running for office.” “Yes,” he replied when asked if Florian had said only that he needed records, “[b]ecause they were running for office.” “No, he did not,” Focht answered, when asked if Florian had said that he had been nominated for office. As a consequence, Focht contradicted his earlier above-quoted accounts of having been told about potential Sunday work-union meeting conflicts providing an excuse that might allow one or more of the three would-be candidates to run for unit office. The matter did not conclude at that point, however.

Asked if it had not been his previous testimony that Florian had said the records were needed to ascertain if he (Florian) had worked on Sundays so that he could qualify or be eligible to run for union office, Focht switched back by answering, “Yes, it was” his previous testimony. Nonetheless, when then asked if it followed that Florian had said more than simply that he was running for office and needed his records, Focht responded in the negative, but then modified that denial: “No, he told me he was going to run for office and he needed to investigate these records to see if he had enough time to run.” Well, then, he had said more than simply that he was running for office and needed his records. Still, the modification contradicted Focht’s earlier assertion that Florian had explained the significance of overlapping work and union meetings on certain Sundays. That may have been covered by Focht’s final answer during this sequence of questioning. “Yes, he did,” answered Focht, when asked if Florian had explained why he needed the records to qualify for office. If so, it corresponded to some of his above-quoted testimony, while contradicting other answers that Focht had given in this area.

Turning to another aspect of Focht’s testimony regarding the information request, he was confronted with a prehearing affidavit in which he had stated only that he had given “Florian his records.” Focht conceded that there is no mention in the affidavit of Phillips having been present and seeking his own records nor, for that matter, of Crylen. Focht admitted that he had not mentioned Phillips to the Regional Office’s investigator: “No, I didn’t.” As pointed out above, Phillips is not an alleged discriminatee. To some extent, therefore, omitting mention of his involvement in the identical statutorily-protected

activity as Florian—making an effort to run for union office—advanced Florian’s position, at least during the investigative phase, by making it appear that Florian’s activity had been if not unique, at least singular. When Focht was asked as much, he denied that, in effect, he had tried to tailor his affidavit-account in an effort to advance Florian’s position by deliberately omitting mention of Phillips’s involvement in the same information request: “No, my error in concentration was I had no notes and I was trying to remember everything in my head.”

That is a difficult explanation to swallow in the circumstances. Both Florian and Phillips had together asked for attendance records. There is no basis in the record for concluding other than that separate sets of attendance records are maintained by Respondent-Employer for each of its employees. Focht gave both employees their attendance records at the same time. Against that background, it is difficult to believe that, in the course of describing the transaction to the Region’s investigator, Focht would have remembered having given those records to Florian but not remembered having given a like set of records to Phillips and, beyond that, remembered that the one employee had requested those records, but not remembered the other having done so.

In addition, there were discrepancies when the record is reviewed of the testimony given by Phillips in connection with the information request. According to the account which he advanced during direct examination, “We also went to, I believe Mary Abbott, also, because she looked into at first about getting us access to the timecards.” Furthermore, the account by Phillips appears to portray Abbott as having been involved with Focht in procuring the requested records: “*they* found another way”; “*They* had all the schedules.” (Emphasis added.) Abbott is personnel administrator or personnel benefits coordinator in Respondent-Employer’s human resources department. While seemingly employed by Respondent-Employer during the hearing, she was not called as a witness, though there is neither evidence nor representation that she was not available to testify. Thus, the foregoing account by Phillips of her involvement, in the information production, is not disputed by Abbott.

Even so, it is difficult to simply accept the testimony by Phillips that Abbott had been involved in production of the information sought by the would-be candidates for unit office. Neither Florian nor Focht mentioned Abbott as having been involved. Omission of her involvement by Focht is particularly significant. He testified that he “[h]ad someone” copy the records and that the copies were given to Florian, Phillips, and Crylen. Thus, Focht did supply at least a cursory description of how he had gone about providing the requested information. But, he made no mention of Abbott.

As mentioned above, exclusion of Sundays worked by Florian, Phillips, and Crylen still did not qualify any one of them for eligibility. So, Phillips proceeded along a different path. He testified that he wrote out “a brief paragraph” petition or plea “that simply stated that we wanted to ask that anyone who was nominated, at the nominations hearing [sic], be allowed to run in the next election and the determining factor on who the officers were going to be in that plant would be decided by the people, by the union members of the plant.” He

further testified that he had taken “this plea around and I got people to sign it,” obtaining “over half the company, half of our Union or our Union workers in the Precoat facility signed it.” No question that Phillips had circulated such a petition or plea. Escobedo acknowledged having been offered the opportunity by Phillips to sign it. Damron acknowledged having been aware of it. Still, no employee other than Phillips testified to having actually signed it. No signed petition or plea was produced during the hearing, though there is neither evidence nor representation that it could not be obtained by counsel for the General Counsel or by counsel for Charging Parties. So, while there is no question that Phillips had circulated his petition or plea, there is no evidence that as many people as he claimed had signed it. In fact, independent of the testimony by Phillips, there is no evidence that any employee signed it other than him. Even Florian did not claim to have signed such a petition or plea for Phillips.

Phillips testified that he, Florian, and Crylen had taken the petition or plea to Steelworkers’ Chicago facility where they showed it to Local 3911 President Saunders and Staff Representative Langele. According to Phillips, Langele said “it’s impressive,” and promptly took it to Pasnick. During direct examination Phillips testified that Pasnick “just looked at and threw it on the table and said no. He said he’s not going to honor that.” During cross-examination, Phillips acknowledged that Pasnick had mentioned Steelworkers’ international constitution and Local 3911 by-laws, but seemed to be avoiding an answer that might leave an impression that Pasnick disregarded the petition or plea based upon those documents. “Right, he wasn’t going to budge,” testified Phillips when first asked about the constitution and by-laws. Then, Phillips added to his account given during direct examination, by testifying that Pasnick “said there were, there were ways that he could go through paperwork and all this stuff, he said, but he’s not going to do it for this small of—” at which point he was cut off. Resuming that account, however, Phillips testified that Pasnick “said, if you, if they really had to pursue it, if this was some big, you know, union and there was some extenuating circumstances, he could, he’d get into it, but there’s not, he says, this is going to, this is the way it’s going to stand, you’re not going to be eligible.”

Neither Pasnick nor Langele denied with particularity that the above conversations had occurred, nor did either deny with specificity the remarks attributed to Pasnick by Phillips—remarks which surely tend, at least, to show that Pasnick had been refusing to exercise some sort of discretion which he had possessed. On the other hand, as set forth above, Phillips claimed that Florian had been present when the petition first had been shown to Saunders and Langele and, then, when it had been given to Pasnick. Florian never corroborated Phillips; never testified that he (Florian) had been present during a meeting when Phillips gave the petition or plea to Steelworkers staff officials. Florian did describe a conversation with Pasnick, as set forth above. But, Florian did not corroborate any of the remarks which Phillips attributed to Pasnick.

The clear intended, at least, implication of adducing that testimony by Phillips had been to support an argument that Steelworkers had dealt unfairly with Florian—and with Phillips and

Crylen, as well—by depriving him of an opportunity to run for election when, so the argument progresses, Pasnick had discretion to allow all three of those employees to run for unit office. The fact is, however, that the meeting-attendance requirement is not simply some informal unit rule nor, even, a local union requirement. It is undisputed that that requirement is one that was formulated at the international level and is embodied in the international constitution. True, there are exceptions to the meeting-requirement. However, there is no evidence that any one of those exceptions were satisfied by Florian, Phillips, or Crylen during March and April of 1997. Aside from those exceptions, there is no evidence whatsoever that any Steelworkers official, at any level, had the least discretion to make *ad hoc* exceptions to the requirement. It does not take a great deal of imagination to foresee the potential legal consequences should the Department of Labor discover that staff representatives were making exceptions, on the spur of the moment, to promulgated and published election eligibility requirements of Steelworkers and its subordinate locals.

To be sure, Respondent-Union was a statutory labor organization. Even so, it was not truly a local union. It was but one unit in a local union which consisted, as of March 1997, of a number of other like units, each with a separate suffix number. Accordingly, not only were Florian, Phillips, and Crylen seeking an exception to international eligibility requirements, but in reality they were seeking one that would apply only to a single segment—unit—of one local union. In the totality of these overall circumstances, it can hardly be argued with any persuasion that unwillingness to allow three would-be candidates—or, even, a majority of the unit in which they worked—to have such an exception somehow evidences any hostility whatsoever toward those three individuals arising from their effort to run for unit office.

Yet, that seems to have been precisely what Phillips appeared to be contending at one point during direct examination of him. He testified about “the loopholes that they found that we [he and Florian] still felt that it was unjust the way we were turned down for being able to run” during early 1997. Of course, those supposed “loopholes” were part of the above-mentioned international constitution requirements for eligibility to run for union office. Apparently having realized after direct examination that he might have taken characterization a step too far, Phillips professed during cross-examination that he did not recall having earlier used the term “loopholes.” “I don’t recall saying that,” he twice claimed, thought quite obviously he clearly had done so.

In fact, as a general proposition Phillips displayed somewhat of a cavalier attitude toward rules which disadvantaged him, personally. He freely admitted that he disliked Damron. Why? Well, Phillips conceded, while he and Damron had gotten along before sometime during 1996, before his effort to run for unit office during 1997, during 1996 “we had a falling out due to the fact that when we came off of a four-shift operation, they wanted to put me, like they did it like almost immediately, they put me on second shift.” The problem with that was that Phillips then had 5 weeks left to complete night school courses that conflicted with second-shift work. So, he testified, “they said,

you’re going to have to drop your classes and work on the second shift.”

Phillips testified that his hard feelings toward Damron had followed from that incident. “About his wording of” the collective-bargaining contract, asserted Phillips. It is understandable that Phillips would have become upset at having to forego completion of his classes. Nevertheless, he gave no testimony showing that Damron had somehow improperly interpreted that contract’s provisions. To the contrary, Phillips admitted that his assignment to second shift “was based upon seniority and training, too.” Apparently, he felt that Damron should have simply ignored contractual provisions and rammed through some sort of exception to allow Phillips to complete his courses, regardless of any effect that might have on other unit employees.

As pointed out near the beginning of this subsection, the basic events surrounding the 1997 unit election are essentially undisputed: there was an election among unit employees; while nominated, Florian, Phillips, and Crylen were not eligible to run under objective standards embodied in international constitution; it was not possible to waive the eligibility requirement which barred them from standing for election; they were unable to run. Ordinarily, those events would represent no more than background ones. Testimony concerning them would be brief and largely, if not completely, collateral to subjects brought into issue by complaints’ allegations.

As illustrated by the number of references above to direct examination, however, those events were described in greater detail in the instant case, to buttress the complaint’s allegations against Respondents. In the process, they were made essential elements in support of those allegations and, in turn, bred cross-examination about them. Frequently during that cross-examination, and sometimes even during direct examination, the record shows that the testimony given by Florian and Phillips was internally contradictory, inconsistent with each other’s accounts, inconsistent with objective considerations and unsupported in other areas. Having opened these areas to more than prefatory ones, there can be no complaining that events in connection with the 1997 unit election should be regarded as collateral to the issues posed by the complaint.

### C. *The Asserted Animus by Damron Toward Florian*

As will be explored more fully in succeeding subsections, all of the alleged violations of Sections 8(a)(3) and 8(b)(2) of the Act are rooted in Damron’s alleged hostility toward Florian. That is, Florian was suspended and discharged. Another employee had to be suspended, when he engaged in the same misconduct as Florian, to protect the purported unlawful motive for Florian’s suspension and, later, termination. A business manager was eventually separated from employment for having given an affidavit to the Regional Office in support of Florian’s unfair labor practice charge. Yet another employee was favorably disposed toward Florian and, as a consequence, no grievance was filed on that employee’s behalf.

As to Florian, it is argued that Damron displayed animus toward him because Florian had chosen to attempt to run for office against Damron during early 1997, as discussed in the immediately preceding subsection. That is not all. Florian testi-

fied that, after that 1997 election, he had formulated an intention to run against Damron for unit chairperson in 2000. And, testified Florian, he had expressed that intention to others—employees, unit officials, management officials. Again, this area was explored in some detail during direct examination of Florian and Phillips. In turn, that bred cross-examination. Viewed in their totality, as was true of their accounts covered in the preceding subsection, the record of those two employees' testimony in connection with the 2000 election display sometimes internal contradiction, occasional inconsistency between accounts, other times inconsistency with other evidence, and some lack of support from evidence which should have supported their accounts about the 2000 election and Florian's intention to run in it.

What does seem plain is that Florian had made some statements about intending to run for unit chairperson in the 2000 unit election. But, it is doubtful that those statements had been so frequent and ongoing as Florian attempted to picture them. During direct examination he testified that he had spoken about running in 2000 to "a variety of people," including Morales and Escobedo. Asked during cross-examination to estimate how many such conversations occurred, Florian testified, "Could be 50, could be 60. I, you know, every day conversation with somebody in the plant." To an extent his assertions tended to be corroborated by Phillips: "Chester, himself, did tell me that he was going to run again in the next election." Yet, other than Morales and Escobedo, neither Phillips nor Florian identified any other employee with whom Florian had spoken about running in 2000. And no other employee-witness—both those called in support of and in opposition to the complaint's allegations—testified to having heard Florian speak about intending to run in 2000.

To the contrary, John Robinson—as discussed in the immediately preceding subsection, one union official who seemed sympathetic toward Florian and his situation—was asked specifically by counsel for Charging Parties if he (Robinson) had "any idea if Chester Florian intended on running for office in the" 2000 election. "I don't know," answered Robinson. Similarly, when alleged discriminatee White was asked if he had known that Florian was going to run in 2000, White answered, "No, I did not know if he was," although he had heard Florian say that, "He [Florian] was interested in running, yes."

As to Morales and Escobedo, Florian testified that at "a couple of the [union] meetings," they had "said, oh, Chester, apparently you're going to be running for office again. And I told then, yes, I am." Florian never explained the contexts in which either of those exchanges had occurred. On the other hand, neither Morales nor Escobedo denied with any specificity having made those remarks to Florian and having heard his affirmative responses. Conversely, Florian was never called as a rebuttal witness and, thus, did not deny having participated in a November 1997 exchange described by Escobedo.

Frustrated that day by some aspect of his grievance committeeman's duties, as he was working with Florian, Escobedo expressed that frustration. "I don't know why you guys fought so hard to get these—to run for these jobs, it's nothing but a pain in the ass," Escobedo testified that he had said to Florian, "you get all these grievances and you've got to keep coming in

early and changing your schedules around and I said I just don't understand it, you know what the big deal is about." According to Escobedo, Florian had replied, "it's the fringe benefits," and when Escobedo had inquired what that meant, Florian had said, "How do you think Damron got his boat? You turn in bogus receipts and you get the money for it," or, alternatively, "how do you think Rich got that boat? He turns in bogus receipts and gets paid for it."<sup>15</sup>

Based on the above-described testimony, the most that can be said is that, at least on some occasions after April 1997, Florian had expressed an interest, accepting White's testimony, or an intention, accepting that of Florian and Phillips, about running for unit chairperson in 2000. But, there is no support for Florian's assertions that he had done so with such frequency and so ongoingly—" Could be 50, could be 60: times—between April 1997 and August 1998, as he claimed. Two other points are worth reviewing in connection with whatever expressions of interest or intention Florian did express.

First, as described further below, Focht testified that, following the 1997 unit election, there had been an ongoing drumbeat of requests and demands by Damron for Florian's termination. The point of eliciting that testimony, obviously, was to show Damron's hostility toward Florian and desire to have Florian fired, both for having run for unit chairperson in 1997 and for possibly running for that position in 2000. As discussed below, Focht described a specific incident, at a labor-management meeting during December 1997, when Damron had sought to have Florian discharged for demanding money from truckdrivers employed by firms other than Respondent-Employer. Yet, there simply is no evidence that from April through December of 1997 Florian had engaged in any conduct which Damron might have perceived as posing a threat to his position by 2000.

Florian had not been eligible to run for office in 1997 because he had not attended the requisite number of union meetings during the preceding 2 years. So, presumably, he—and Phillips and Crylen, as well—would have tried to repair that deficiency, to be certain of being able to run for unit office in 2000. Indeed, both Florian and Phillips claimed that that is exactly what they had done. "Started to attend my meetings when I could," answered Florian, when asked what he had done to prepare himself to run in 2000. Phillips testified, "Chester and I had been attending our meetings together." Those assertions encountered one problem: Local 3911 has a sign-in sheet for each meeting and those sheets must be signed by employees attending those meetings.

The above-described testimony by Florian and Phillips could have been corroborated by production, pursuant to subpoena, if need be, of the sign-in sheets for all the meetings which each

<sup>15</sup> Lest there be doubt, there is no evidence whatsoever that Damron had been turning in "bogus receipts," nor did Florian provide any basis for, it is uncontested, having made such an accusation against Damron during 1997. In fact, there is not even evidence that Damron owns a boat, though that subject was brought up in connection with an accusation made about a relationship between Damron and one of Respondent-Employer's officials. Seemingly, if nothing else, public registration records could have been produced to show such ownership, had it existed. Before an objection could be ruled on, Damron denied that he owned a boat.

claimed, at least to those points in their testimonies, to have attended. The sign-in sheets were not produced to support their assertions, though no reason was given for the failure to do so. In fact, as cross-examination progressed, it became apparent that neither one had attended very many union meetings after April of 1997.

"I don't think I have this year [1999] yet, no," attended any union meetings, admitted Phillips. Asked how many he had attended during 1998, Phillips responded, "I think four." Asked next if union records would be incorrect in showing that he had attended only three meetings during 1998, Phillips answered, "No, I guess maybe it's right," adding, "because I mean. I said four, three." Hardly the record of someone attempting to cure a meeting-deficiency which had caused him to be ineligible to run for office during April 1997.

More significantly, when Florian was asked if union records were in error in showing that he had not attended any union meetings during 1997, he first answered, "I couldn't tell you, sir. I don't know when I started to go," even though, as set forth above, Florian testified that he had started attending union meetings after being declared ineligible to run for office in 1997. Asked if was not true that he had not attended any union meetings until March of 1998, Florian responded, "Possibly, I couldn't tell you, sir." Asked if union records were in error in showing that he had attended a total of only four union meetings since January 1997, Florian replied, "I couldn't tell you, sir." Now, given the fact that Florian had been barred from running in 1997 because of his failure to have attended enough union meetings, it seems odd that he would not have begun attending union meetings, so that he would be eligible to run in 2000, and even more odd that he would have no knowledge about the number of union meetings which he had attended after March of 1997. Beyond that, seemingly union records—sign-in sheets showing who had attended union meetings—were available to the General Counsel through subpoena. However, as pointed out in the preceding paragraph, not produced were sign-in sheets, showing attendance at a greater number of union meetings by Florian and Phillips, than mentioned during examination.

Had Florian actually started attending union meetings during 1997, after having been declared ineligible, there might have been some objective basis for Damron to seek, as early as a labor-management meeting in December of 1997, the termination of Florian, as discussed below. The apparently uncontradicted contrary fact, that Florian had not attended any union meetings during 1997, removes at least one objective basis for testimony that Damron had been seeking Florian's termination during 1997: regardless of any expressions of interest and intention, the fact is that by the end of 1997 Florian had made no greater effort to render himself eligible for the 2000 elections, than he had to render himself eligible to run in 1997. From Damron's perspective, any expressions of interest or intention to run in 2000 by Florian were, by the end of 1997, as devoid of reality as had been Florian's situation during March and April of 1997.

Not perhaps surprisingly, Florian and Phillips both advanced, seemingly as *ad hoc* responses to unanticipated questioning, explanations for not having attended any union meetings dur-

ing, at least, 1997. Phillips claimed that "a lot of times they posted like at the last minutes, like the last possible time in the day they would post, you know, okay, there's a meeting this Sunday. Or sometimes it wouldn't be posted at all." Florian took that assertion a step further: "At the local part, we did not have any meetings. Mr. Damron did not hold any meetings, for whatever reason." Obviously, that testimony portrayed Damron as the villain in Florian's lack of attendance at union meetings during 1997. "Yes," Florian agreed, Local 3911 did hold a meeting on the first Sunday of each month. Well, then, Phillips should have known that, regardless of whether or not a notice was posted announcing those meetings on the first Sunday of every month. In an apparent effort to cover his own flank, having testified that Damron had not been conducting unit meetings, Florian claimed, "After our local [sic] itself was not holding any meeting, I was informed that I could *start attending the monthly meetings*, once a month on Sunday, and that I could be eligible for this. This would give me my eligibility to run." (Emphasis added.)

Now, at the outset, no one seems to dispute that it had been those very monthly Local 3911 meetings that members were supposed to be attending to be eligible to run for unit office, not unit meetings convened by Damron or by any other unit officials. That is, there seems no dispute that eligibility to run for local or unit office is based on attendance at local union—not bargaining unit—meetings. That only makes sense, given the multiple bargaining units which composed Local 3911, as described in subsection A above, and the fact the elections every 3 years are simultaneously conducted for unit and Local 3911 offices. Obviously, were the meetings-eligibility requirement to be based upon unit meetings, as opposed to Local 3911 monthly meetings, then candidacies for both unit and local offices would be hostage to the whims of unit chairmen—to whether they decided to conduct monthly meetings. Against that background, there is a clear air of unreality to Florian's claim that he had been "informed that I could start attending the monthly meetings" to achieve "eligibility to run" for unit chairperson in 2000. That was not an alternative course to attending unit meetings; it was the prescribed manner to satisfy the meeting requirement.

In sum, even had Florian been expressing ongoing interest in, or intention to, run for unit chairperson in 2000, throughout 1997 he took no action which would, as an objective matter, render him any more ineligible to run for that office in 2000, than he had been in 1997. As discussed above, it is a matter of considerable doubt that Florian had been expressing so many times intention to run in 2000, as he testified had been the fact. Still, it seems undisputed that he had occasionally expressed such an intention or, at least, interest in running for unit chairperson in 2000. Such expressions, however, do not seem to be as significant as the General Counsel would have them construed.

Second, called as a witness for the General Counsel, Dan Mahoney—material manager for Respondent-Employer at Chicago from March 1997 until October 1998; production manager thereafter at that location—was asked during direct examination about having heard that Florian intended to run in 2000. "You know, you hear a lot of stuff. I mean, I'm sure I heard it,

yeah.” Now, Mahoney was one of those officials, mentioned in subsection A above, whose actual sympathies did not seem to align necessarily with the party—Respondent-Employer—whose agent he was. To the contrary, he appeared sympathetic toward Florian because the latter had been suspended and fired, unfairly in Mahoney’s view. So, his above-quoted ambiguous answer should not be viewed as suspicious because he was a management official attempting to avoid an answer that might harm Respondent-Employer. Rather, it appeared that so insignificant had been any expressions of interest or intention by Florian, to run for office in 2000, that Mahoney could not truly recall any of them. And Mahoney was not alone in failing to attribute any significance to any such expressions of interest or intention by Florian.

Mahoney’s “you hear a lot of stuff” answer tended to draw support from testimony given by alleged discriminatee Jim White, the employee supposedly suspended and discharged to cover-up an unlawful motivation for Florian’s termination. Obviously, White’s interest was aligned closely with that of Florian. Yet, when asked during redirect examination about knowing that Florian intended to run in 2000, White answered, “It was two years away. There’s *always discussion* about some one running.” (Emphasis added.) In other words, Mahoney’s answer, in the context presented here, seems more accurate than evasive: at Respondent-Employer’s Chicago facility, “you hear a lot of stuff,” including ongoing “discussion about someone running.” Any such expressions by Florian had not been some sort of unique expressions, which might naturally lead Damron to become fearful of opposition, but instead had been simply examples of ongoing remarks by one or another employee at the Chicago facility.

At this point, three principles should be brought into focus. First, the extent of an employee’s statutorily-protected activity is one factor which must be considered in weighing claims of discrimination and of attempts to cause it. A “minimal amount of union activity . . . detracts from [a] conclusion that this was the reason for” alleged discriminatory action. *NLRB v. Brookshire Grocery Co.*, 837 F.2d 1336, 1340–1341 (5th Cir. 1988). See also, *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000); and *Leather Agent, Inc.*, 330 NLRB 646, 647 (2000). Of course, Florian had attempted to run for unit chairperson during early 1997. Yet, he had been declared ineligible for having failed to attend a minimum number of local union meetings during the 2 years preceding March 1997 nominations. Despite subsequent professions of interest in running or of intention to run in 2000, Florian attended no local union meetings during the remainder of 1997 and only a few thereafter. Viewed from Damron’s perspective during 1997, at least, Florian’s expressions represented nothing unique, given that “[t]here’s always discussion about some one running,” and, accordingly, could be regarded as nothing more than all sizzle but no steak, given that Florian had not started attending union meetings following the April 1997 union elections.

Second, there is no objective evidence showing that Florian had posed, or would pose, any sort of risk to Damron’s incumbency. Nothing shows that Florian enjoyed any significant support among Respondent-Union’s members. Consequently, there is no evidence showing that Florian’s candidacy, either in

1997 nor potentially in 2000, “posed any sort of threat . . . to the continued officer status of” Damron, assuming that Damron truly intended in 1998 to stand for reelection in 2000, “such that it might be said that [Damron] would likely be motivated to [attempt to] eliminate” Florian from Respondent-Employer’s payroll and, concomitantly, from the bargaining unit there. *Douglas Aircraft Co.*, 307 NLRB 536, 545 (1992), affd. 65 F.3d 175 (9th Cir. 1995). No doubt, Florian truly believes that he posed such a threat to Damron’s continuation as unit chairperson. However, “no weight should be placed on the subjective reactions of employees” (Citation omitted.) *Gem Urethane Corp.*, 284 NLRB 1349, 1351 (1987). See generally, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1408 fn. 7 (10th Cir. 1997).

True, as discussed in subsection B above, Phillips testified that “over half” the bargaining unit had signed his petition or plea, to allow all nominated employees to run for office in 1997, regardless of constitutional eligibility requirements. Yet, there is no objective or other evidence which supports that testimony about the petition or plea having been signed by so many employees. Beyond that, there is no evidence that Florian had been involved with the petition or plea circulated by Phillips. At least, Florian never testified to having circulated it or advocated that coworkers sign it. Phillips acknowledged that no employees’ names were on it. So, it cannot be said that Florian’s name was on the petition or plea. If anything, the petition or plea, and its circulation, tend more to show that it was intended for the benefit of Phillips. Thus, signing it did not somehow evidence any sort of support for Florian to oust Damron as unit chairman.

Third, against the background of the preceding two considerations, timing is a factor which must be weighed, for “the proximity between union activity and the employer’s action by itself is substantial circumstantial evidence.” (Citation omitted.) *Matson Terminals, Inc. v. NLRB*, 114 F.3d 300, 303 (D.C. Cir. 1997). Florian was not suspended until August 4, 1998, 19 months after he had attempted to run for unit chairperson in March 1997. And his suspension, and following discharge, occurred approximately 20 months before another unit election would occur. Those “considerable timelag[s],” *Terrillon Corp.*, 280 NLRB 366, 367 (1986), make it “far from obvious” that the suspension and ensuing discharge were likely “a direct response to,” *Lutheran Home*, 264 NLRB 525, 527 (1982), Florian’s 1987 intraunion activity and possible 2000 such activity.

Of course, “passage of time . . . does not preclude” a conclusion of discriminatory conduct, necessarily. *Treanor Moving & Storage Co.*, 311 NLRB 371 (1993). “[T]ime lapse does not overcome . . . other evidence of [discriminatory] motive,” *Flannery Motors*, 321 NLRB 931 (1996), nor, concomitantly, of attempts by union officials to eliminate past and potential rivals for union office. Nevertheless, passage of time since the 1997 election, and until the 2000 election could be conducted, cannot simply be ignored. And examination of the testimony about Damron’s asserted expressions of hostility toward Florian is not even minimally reliable. Accordingly, it fails to supply the “other evidence” referred to by the Board in the above quotation.

As mentioned above, Focht claimed that Damron had voiced frequent and ongoing demands and requests for Florian's discharge. If true, of course, that would supply evidence of "attempt to cause" under Section 8(b)(2) of the Act. Yet, when Focht's more specific testimony about those purported demands and requests is scrutinized, and compared to other testimony, little room is left for placing any reliance upon Focht's claims.

In general, Damron denied ever having told Focht that Florian should be fired and, further, denied having told Focht to fire Florian or having said that Florian should not be working for Respondent-Employer. Of course, that would be expected even if Damron had made such statements. It is hardly likely that he would admit them. Yet, Production Manager, and former material handling foreman, Mahoney gave testimony which tends, at least, to corroborate Damron's denials, rather than tending to corroborate testimony about purported ongoing demands and requests for Florian's termination. With respect to Mahoney, it should not be overlooked that he was called as a witness by the General Counsel.

Mahoney testified that, over the course of 6 years prior to 1998—and, thus, starting well before Florian had attempted to run for unit chairperson during 1997—he and Damron had engaged in "no more than five" conversations about Florian. Mahoney further testified that, during each of those conversations, Damron had said, "just that he didn't care for the guy." According to Mahoney, "it was just a mutual thing. I don't think Chester cared for [Damron] and he didn't care for Chester." Nonetheless, Damron's adverse comments do not appear to have been confined to Florian. "There may have been somebody else," testified Mahoney, when asked if Damron had referred to other employees in the way as he had to Florian. Beyond that, former Regional Manager Druke testified that he had heard Damron make comments about other employees, not just Florian: "that's just as a routine course of business. Rich made his likes and dislikes pretty well known around the plant," for the most part about "people on either the coating line or in the packaging area at the end of the line," Druke testified. But, both Mahoney and Druke denied specifically that, in the course of such remarks, Damron had ever sought to have anyone fired, including specifically Florian.

"No," answered Mahoney, when asked by the General Counsel whether Damron had ever mentioned firing Florian. Pursuing the matter, Mahoney was asked whether Damron had suggested during his most-recent conversation—likely to have occurred after Florian had attempted to run in the 1997 unit election—that Florian be terminated. "Well, if Chester's name came up it was just that he didn't care for Chester. That's all," responded Mahoney. "No," he replied, when asked if Damron had used any other kind of language about Florian, though Mahoney allowed that Damron might have called Florian a "fat ass"—hardly a phrase which could fairly be construed as an effort to cause Florian to be fired. Instead, despite continued examination, Mahoney denied expressly that he had never been told by Damron that the latter could not believe that Respondent-Employer had not yet fired Florian, or had said that he (Damron) could not believe that Florian was still around.

Former regional manager Druke was obviously disposed favorably toward Focht. All else aside, after leaving Respondent-

Employer Druke became employed elsewhere and hired Focht following the latter's termination by Respondent-Employer. Druke did testify that Damron had never been reluctant to criticize coworkers, naming Phillips, Eddie Gammon, Glen Thomas, Troy Calabrese and Florian. However, testified Druke, "Rich never asked me to fire anyone that I recall," nor did Damron ever recommend to Druke that anyone be fired, save for a maintenance manager who was not a member of any union. "No," Druke answered unequivocally, when asked whether Damron had ever requested, recommended, sought or urged Druke to fire or to terminate anyone who was a member of Respondent-Union.

The sum of these three witnesses' testimony—that of Focht, Mahoney and Druke—is that Damron had complained to each about coworkers, including Florian. It seems a fair conclusion that had Damron been disposed to seek anyone's termination when complaining to one of them, in the natural course of affairs he also would have sought that person's termination when speaking with the others. Yet, of the three, only Focht claimed that Damron had been saying that Florian should be terminated, in the course of voicing criticism about Florian's performance. The fact that Damron had criticized Florian, but had not sought his discharge, when speaking with Mahoney and Druke tends inherently to contradict Focht's testimony about such discharge demands and requests by Damron with regard to Florian. For, the record simply suggests no reason that Damron would have voiced such demands and requests to Focht, but not to Mahoney and Druke, even though he seemingly had voiced the same criticisms of Florian to all three of them. That is particularly so in the case of Druke, since Druke was Focht's immediate superior and, if Damron had truly been unable to obtain satisfaction from Focht—by getting Florian discharged—then, Druke would have been the logical next link in the chain of supervision, for having Florian terminated. Obviously, Damron felt comfortable enough talking to Druke about other employees.

In that regard, one point should not escape notice. While Damron was an official of Respondent-Union, he remained a statutory employee. As such, he was not barred from voicing the same types of opinions as any other employees are entitled to voice under the Act. His union official's position did not somehow compel Damron to relinquish a "freedom of action" accorded statutory employees. *Building & Construction Trades Council of Tampa (Tampa Sand & Material Co.)*, 132 NLRB 1564, 1569 (1961). See also, *Hospital Workers' Union, Local 250*, 255 NLRB 502, 506 (1981). Like any other employee of Respondent-Employer, Damron was allowed under the Act to criticize—"bitch" about—his coworkers. He simply was not allowed under the Act to seek that Respondent-Employer take any employment action against those coworkers. The testimony of Mahoney and Druke shows that Damron had not taken such a step, leaving the contrary assertions by Focht hanging somewhat in the wind. And the wind blew more ill for Focht when certain other aspects of his testimony are also compared with other testimony given by Druke and Mahoney.

Druke testified that Focht had reported that Damron complained about coworkers whom Damron did not regard as being good employees. Having gone so far as to make a report of

such complaints, it seems natural that Focht would have reported, as well, any discharge demands or requests made by Damron. But, testified Druke, “I can’t specifically remember Jack coming to me and saying Rich is trying to fire people,” nor “get people fired.” By those answers, Druke did not appear to be testifying that he did not recall whether or not Focht had made such reports—to be testifying that Focht might or might not have said that Damron had requested that certain employees be discharged. For, Druke was quite specific regarding what Focht had reported. “Jack Focht complained on a few occasions that Rich Damron had people he didn’t like and was real vocal and Jack thought that might affect morale in the plant,” explained Druke. In consequence, Focht reported to Druke what Damron had been saying about other employees and, further, reported what Focht felt would be possible adverse consequences of what Damron had been saying. But, Focht never reported to Druke that Damron had ever sought the discharge of any of those employees, specifically Florian.

As to Mahoney, in an apparent effort to establish that Damron had been willing to take that added step of seeking Florian’s termination, Focht claimed that, during “1998, in March, late March, early May,” he had been told by Mahoney “that Rich had come to him [Mahoney] and he [Damron] also told Dan that Chester was a troublemaker, he should be working there, we should fire him,” according to Focht. Of course that account is contradicted by Mahoney’s above-described denials: Mahoney testified that Damron had never told him that Florian should be fired. Mahoney never testified that he had told Focht that Damron had made such a demand—did not corroborate the foregoing testimony by Focht of such a report having been made by Mahoney. Beyond that, Focht’s testimony in this area leads to consideration of three specific areas opened to show, at least, inferential evidence of Damron’s hostility toward Florian for having tried to run for unit chairperson during 1997 and, as well, for expressing interest in, or intention to, run for that position during 2000.

According to Focht, the foregoing comments by Mahoney had been made during a conversation pertaining to Focht’s willingness to grant Florian’s request to be relieved of work on a Saturday for which Florian had been scheduled to work. No question that Focht was claiming that it had been that excuse from work which had led to his above-described account of Mahoney having said that Damron said that Florian was a troublemaker who should be fired. “This all stemmed from the day Chester wanted the day off and,” Focht testified, “He [Mahoney] said Rich had come [sic] to him complaining about Chester and then we got into the day off and stuff like that and . . . Dan said that Rich had been talking to him about [how] no good Chester is and he shouldn’t be working here, that we should have terminated him a long time ago.” “That’s what Dan said,” Focht added. Aside from the fact that Mahoney did not corroborate any of that account and, to the contrary, gave testimony which, at least, tended to contradict some of Focht’s testimony—given that Mahoney denied that Damron had suggested that Florian should be fired during their then-most recent conversation about Florian—there are three inherent problems with Focht’s account.

One, not for the only time when testifying, Focht confused the timeline that he was attempting to portray. The subject of work was preceded by questioning about Damron’s objections to Focht having given Florian, Phillips, and Crylen records in connection with their effort to be qualified to run in the 1997 unit election, as mentioned in subsection B above and as further discussed below. After that questioning, and Focht’s answers to it, Focht was asked, “Now, *about that same time*, which would have been *prior to the election in 1997*, did you have a conversation with Mr. Damron about granting days off to employees?” (Emphasis added.) There is no room for assertion that that question had been mis-transcribed. It was put a second time to Focht, when he said he was confused about what had been asked: “About that same time, which was *before the election in 1997*, did you have a conversation with Rich Damron about granting days off to employees?” (Emphasis added.)

As the sequence of questions and answers, in response to those initial questions, unfolded, Focht testified that he learned that Florian had not gotten the Saturday off, even though Focht supposedly had excused him from work that Saturday. So, he had gone to Mahoney to ask “why Chester’s day [off] was canceled after I had granted it,” testified Focht. The problem here is, so far as the record discloses, there had been only one time that Damron had protested about Florian having been excused from a scheduled Saturday’s work and, in addition, only one occasion when Focht had discussed that Saturday with Mahoney. Yet, as set forth three paragraphs above, Focht testified that his conversation with Mahoney had occurred “1998, in March, late March, early May,” while the above-quoted questions had led Focht to testify that the excuse from Saturday work had been countermanded “prior to the election in 1997” and “before the election in 1997”—at least a year before Focht had the conversation, that purportedly “stemmed from the day Chester wanted the day off,” with Mahoney. That discrepancy was never explained.

Two, Focht claimed that it had been Mahoney who had “canceled” Florian’s Saturday off. Yet, Focht had been Chicago production manager during the entirety of 1997 and until, at the latest, the following mid-May, as discussed in subsection D below. During that almost 17-month period, he acknowledged having been the highest-ranking on-site official at Respondent-Employer’s Chicago plant. In contrast, Mahoney had been a production foreman until March of 1997, then a material handling foreman. In neither of those capacities has it been shown that Mahoney possessed authority to countermand then-Production Manager Focht’s personnel decisions. Even assuming that the incident had occurred as late in the game as “early May,” there is no basis for concluding that Mahoney had possessed such authority. Of course, if it had occurred after May 20, then Focht concededly had no longer possessed any supervisory authority over Chicago plant employees and, obviously, he had no authority to have even granted Saturday off to Florian.

Three, Focht’s own internally contradictory testimony on the point ended up refuting any implication that Damron had objected to excusing Florian from Saturday work because of some sort of personal hostility harbored by Damron toward Florian—

such as because of activities in connection with the 1997 unit election and possible activities during the 2000 election. During cross-examination, Focht was asked if Damron had said that Focht was violating the collective-bargaining contract by granting Florian that Saturday off. “No, he did not tell me that,” answered Focht. “No,” Focht continued, Damron had not given any reason for opposing a Saturday off for Florian. However, those denied were contradicted by what Focht had said in his prehearing affidavit, given on August 31: “Damron complained that I was breaking the bargaining agreement by granting a day off to Florian and Crylen.” Interestingly, the affidavit also states, “During the end of May 1998, I had approved time off for a Saturday for Florian and Crylen after they arranged for coverage.” As pointed out in the preceding paragraph, and as discussed further in subsection D below, Focht lacked supervisory authority over Chicago personnel by “the end of May 1998” and, consequently, should not by then have been granting anybody’s time-off request.

Confronted with that portion of his affidavit, Focht backed off his above-quoted denials, contradicting them in the process. “Yes,” he conceded, he had told the investigating agent on August 31 that he had been accused of violating the collective-bargaining contract. “I forgot about that,” he claimed somewhat lamely. “Yes,” he further admitted, Damron had leveled the accusation that Focht was showing favoritism to Florian by having allowed the latter to have Saturdays off, while not excusing other employees from Saturday work. Indeed, as to Florian and Saturday work, Focht conceded, somewhat grudgingly, “I can’t say that he [Florian] worked most of the time he was scheduled,” though Focht was unwilling to say that Florian had proffered dentists’ or doctors’ excuses for almost every one of those excused Saturdays: “I would say possibly, maybe I’m wrong, eight times that it might have happened” within a year. But, Focht added hastily—perhaps because he feared that there might be records which could contradict whatever he said about the number of excused Saturdays—“I’m just guessing eight times. I don’t count them.” As it turned out, while the record reveals that the General Counsel had subpoenaed a number of records, no records were produced to show the exact number of Saturdays that Florian had been excused from work due to dentists’ or doctors’ notes, though there is neither evidence nor representation that such records were not made available to the General Counsel.

Aside from Focht’s internal contradiction, the significant aspect of point three is that the evidence shows that Damron was not complaining about allowing Florian a Saturday off for no legitimate reason. As Focht admitted ultimately, Damron was protesting an asserted contractual violation, regardless of who might be advantaged or disadvantaged by his complaint. Employee-protests about contractual violations are protected by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835–836 (1984). Such protection is not somehow lessened by the fact that the complaining employee happens also to be a labor organization’s officer, as well. No party here has contended that granting an excessive number of discretionary excuses from scheduled work would not violate Respondent-Employer’s collective-bargaining contract with Respondent-Union. Nor is there evidence showing that favoritism

toward a particular employee, or toward particular employees, would not be a valid reason for employees, be they union officers or not, to complain about such seeming favoritism. Consequently, so far as the evidence discloses, Damron’s complaint about excusing Florian from scheduled work on that Saturday—whether it occurred before the 1997 unit election or during 1998—had not been motivated by electoral opposition, past or potential, by Florian, but had been generated by a belief, not shown to have been formulated other than in good faith, of contractual impropriety. And it was not the only instance when Damron pursued such a course.

A second specific area in which Focht’s testimony was aimed at demonstrating a specific illustration of Damron’s asserted animus toward Florian, for having tried to run for unit chairperson, arose in connection with Focht’s production of records to Florian, Phillips, and Crylen concerning possible Sunday work during the 2 years preceding March 1997. No question that Damron had protested about Focht having produced those records for three employees to inspect. Yet, as it turns out, the evidence does not show that his protest had been rooted in any supposed concern that examination of those records might reveal that Florian would be eligible to run for unit office. Rather, the record reveals that Damron had been voicing a complaint about bypassing an exclusive bargaining agent, in favor of dealing directly with employees represented by that bargaining agent.

Focht gave the three would-be candidates two sets of records: the personal attendance records of each of them and, secondly, copies of all work schedules. There seems to have been no problem in connection with production of personal attendance records. To an extent, it seems that examination of those records would have provided basis for Florian, Phillips, and Crylen to determine when they had and had not worked. In other words, there is some basis for questioning the need to have also given those three employees work schedules on which the names of all unit employees were listed.

True, Focht testified, “it’s a work schedule that we post on a weekly basis that lets everybody know what shift they’re working.” Based on such testimony, it seemingly is a legitimate point that, because those work schedules had been posted each week, all employees would have seen them. Presumably, anyone so disposed could have copied down each week’s list. Yet, there is no evidence that any employee of Respondent-Employer had ever done so. So far as the record shows, once a list is taken down, it no longer is made available to employees. And Focht admitted that employees have no right under the collective-bargaining contract to see past work schedules. So, it is somewhat overly facile to argue that because each list had once upon a time been made available to unit employees, therefore an employee given a stack of past lists is being shown nothing different than was once made public. The ability to compare lists, itself, is an added feature of making such a stack available to one or a few unit employees.

Employee work schedules are one subject encompassed by the phrase “wages, hours, and other terms and conditions of employment,” in Section 8(d) of the Act. Accordingly, exclusive collective-bargaining representatives are entitled to bargain about work schedules. More importantly, in the context of the

instant situation, such representatives are entitled to inspect past work schedules, both to prepare for bargaining and to ascertain if those schedules might disclose grievable information. Where such information is given directly to unit employees, who hold no union positions, such production sounds, at least, in direct dealing with represented employees, to the disregard of their collective-bargaining representative. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 771 (1999). Such conduct inherently disregards the “statutory obligation to deal with employees through [their] union,” in supplying information about unit employees, “and not with the union through the employees.” *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 735 (11th Cir. 1998), quoting with approval from *General Electric Co.*, 150 NLRB 192 (1964).

At no point, so far as the record reveals, had Florian, Phillips, or Crylen attempted to approach Respondent-Union’s officials, at either unit or local level, to secure past work schedules through their bargaining representative. At no point, so far as the record reveals, had Focht given notice to Respondent-Union that he was supplying Florian, Phillips, and Crylen with the work schedules.

Direct dealing was one specific component of Damron’s objection to production of the work schedules to those three represented employees. “Number one, they’re not Union officials,” testified Damron. In fact, Focht acknowledged that Damron had said, “that he felt I should have come through, they [the three employees] should have come through him to get” the work schedules. “Yes,” Focht admitted finally, Damron had complained that Focht should not have allowed bargaining unit people to bypass Respondent-Union. There is no evidence refuting the genuineness of Damron’s objection on that basis.

Beyond that, Damron voiced another reason for protesting, one which arose because of asserted past dealings with Focht. “Then number two, I can’t even obtain those” records, Damron testified, because Focht’s response, when asked for records in the past, had been that “it would be too difficult to get this information for us.” That assertion was disputed initially by Focht. “Rich always got records,” Focht claimed. Well, perhaps not always, for Focht later testified, “*Sometimes* I did” (emphasis added) gives attendance records and work schedules to Damron. During redirect examination, however, Focht retreated somewhat from that equivocal concession, claiming that “*Sometimes*” pertained only to work schedules, not to attendance records. Of course, that is not so absolving, as that testimony seems to be attempting to portray: Focht gave both attendance records and work schedules to Florian, Phillips, and Crylen. Even if he only “[s]ometimes” gave requested work schedules to Respondent-Union, he still was giving some records to Florian, Phillips, and Crylen that he (Focht) did not always give to Respondent-Union, when the latter requested them.

In fact, during recross-examination, Focht retreated from any assertion that he had always given requested attendance records to Respondent-Union: “Most of the time I did. A lot of times we would just talk about them and he [Damron] would just say, I don’t need them. I would [have] given him the dates or something.” Well, half a loaf is better than none. At that, Focht then

returned to his initial flat assertion that, “I never refused him [Damron] any files that he asked about.”

It is unnecessary to flog that second point advanced by Damron. It is not actually significant whether or not Focht had honored Respondent-Union’s past requests for information concerning unit employees. What is significant is Focht’s above-quoted acknowledgment that Damron had complained that Focht “should have come through” him, as Respondent-Union’s chairperson, when producing records pertaining to unit employees. On its face, that is a legitimate objection for a statutory bargaining agent to voice. Nothing in the record supports even an inference that Damron had voiced his objection for the hidden, illegitimate, reason that disclosure might somehow validate Florian’s desire to run for unit chairperson. To the contrary, given the three considerations enumerated near the beginning of this subsection, there is no objective basis for even inferring that candidacy by Florian would have been of much concern for Damron. In the totality of the circumstances, it simply cannot be concluded that Damron’s protest had been other than one genuinely aimed at what he believed to have been bypassing and direct dealing by Focht.

To understand a third specific area aimed at showing with specificity that Damron had harbored animus toward Florian because of the latter’s internal union activity, some understanding is required about Florian’s reputation in one area. Fairly or unfairly, Florian had acquired a reputation for seeking small items—a cup of coffee, money for a cup of coffee—to load, and sometimes unload, commercial trucks faster. For example, Production Foreman Wayne Joseph Dedina<sup>16</sup> testified that, when he had first started working at Respondent-Employer’s Chicago facility during approximately 1994 or 1995, as a bargaining employee in operations support, “I heard on several occasions” about Florian “trying to shake down truck drivers to get a couple bucks to unload the trucks quicker or he’d tell them that he’s load their trucks quicker if they bought him a cup of coffee, stuff like that.” Dedina acknowledged that he had never seen Florian do any of those things. Rather, he testified that he had “heard it from several people,” though he did not name any of them. Of course, had he been trying to fabricate that testimony, Dedina seemed perceptive enough to recognize that fabrication would have been strengthened were he to testify that he had actually seen Florian “shak[ing] down” drivers or, at least, named some employees who had told him that. That Dedina did not do so seemed some indication that he was trying to testify honestly about what he knew.

Furthermore, testimony about such conduct by Florian was not confined to Dedina. Roy Hurd, a shipping clerk who had worked 35 years for Respondent-Employer, testified that, at some point during 1997 or during early 1998, he had been approached by a truck driver, whom Hurd could not identify by name, complaining “[a]bout somebody trying to get money off him for loading or unloading him.” Hurd acknowledged that he had never told any official of Respondent-Employer about that driver’s complaint. But, another employee, who had heard similar complaints by drivers, testified that he had approached

<sup>16</sup> Sometimes misspelled “Deddina” and “Didina” in the record.

Florian about what the drivers had been saying, though he did not report those complaints to Respondent-Employer.

Michael George Podlasek, an employee who had worked in shipping and in receiving for 7 years, testified that drivers had said that Florian had been asking for “stuff” from them. Podlasek testified that he spoke to Florian about what those drivers were saying: “I said to him, on a couple occasions, . . . stop sticking your hand out. Stop asking for stuff. Just do the job. Don’t shake nobody down.” According to Podlasek, Florian replied, “I’m not doing nothing like that,” a reply which, at least, tends to indicate that Florian had not been doing what the drivers had complained about to Hurd and Podlasek. Still, Florian never denied having been told by Podlasek to “stop sticking your hand out” and, “Don’t shake nobody down.” So, it is uncontroverted that Florian had been told that by Podlasek. The fact that Podlasek had done so is at least some indication that, in fact, drivers had made such complaints about Florian—complaints which, in turn, had led Podlasek to admonish Florian to stop doing so.

In fact, there was one employee who testified that he had actually seen Florian seeking money from a driver. Ricky Hollins had been employed by Respondent-Employer as a packer in C-bay and D-bay for 4-1/2 years. As noted in subsection A above, annex operations support employees, such as Florian, occasionally did work in those bays, unloading incoming shipments. Hollins testified that he had overheard Florian charge a truckdriver, picking up a shipment destined for Jim Walters Company, two dollars apiece for skids which ordinarily were provided free to drivers who needed them, at least when skids were available.

Hollins also testified that he had heard, and had related to other employees that he had heard, Florian “tell drivers if they give him a coffee, buy him a coffee or money [sic] that he would unload them faster.” Hollins testified that he was unable to recall when those incidents had occurred, but he asserted that Florian had “asked a lot of times.” Given Podlasek’s above-described undisputed admonitions to Florian, it seems likely that Florian had been making requests for, at least, coffee and coffee-money to unload drivers’ deliveries. More importantly, in the context presented here, is Hollins’s testimony that he had related what he had seen to other employees. Florian acknowledged that the Chicago facility is a small plant and that people talk constantly. “Small plant, that if something is said it spread out pretty quick,” testified Florian. So, if Hollins had told only a few employees, it is likely that what he had said to those employees would have spread to other employees. Of course, that is how rumors circulate. And such a rumor would be significant. For, Focht conceded that “you don’t charge people to unload them fast,” and, further, that such conduct would have been a dischargeable offense at Respondent-Employer while he (Focht) had worked there.

All of which leads to Focht’s testimony about events during a December 1997 labor-management meeting. Such meetings are conducted monthly, to allow local labor and management to, in essence, clear the air between them, pursuant to article XXVI, Section 3 of the 1995–1999 collective-bargaining contract. Normally attending such meetings at that time would be

Focht, Damron, as many grievance committeepersons as were able, and sometimes Abbott and Mahoney.

With respect to the December 1997 labor-management meeting, initially Focht testified that, during it, Damron “had brought up the fact that Chester was taking money from truck drivers to unload steel fast[er].” “I told Rich I don’t believe that,” testified Focht, but Damron “looked at . . . Ed Morales and Manny Escobito [sic],” saying to them, “You guys know it, you heard the truck driver telling” it. After Morales and Escobedo agreed with Damron, Focht testified that he had told those unit officials, “I’m not going to do anything about this. You have to bring me proof,” and, “They said they would”—that “a truck driver would come forth,” and that, “They were supposed to bring them [drivers] to me to testify.”

According to Focht, Damron continued by saying “that Chester was lazy and no good and shouldn’t be working there,” a remark seconded by Morales and Escobedo. Then, continued Focht, “at the close of the meeting Rich had said and they were all three in agreement that Chester, Wayne Cryland [sic], Tom Phillips and Glen Thomas should all be fired. None of them should be working at this plant.” Focht testified, “I just dropped it right there.” But, Focht’s testimony shows that he had not “just dropped it right there”; he claimed to have pursued Damron’s asserted accusation “right after that meeting” when “I went out tried to clear this matter up,” by summoning Mahoney and telling him about “the [accusations] that had [been expressed] in this meeting and that I didn’t believe it and I would like to have him talk to Chester.” “Dan came back and told me that he had talked to Chester and Chester denied it,” testified Focht.

Nor, Focht testified, did the matter of Florian and truckdrivers end for Damron after the December 1997 labor-management meeting. “Once or twice” after that meeting, according to Focht, Damron had repeated his accusation about Florian and truckdrivers. Focht claimed that he repeated that he needed proof and Damron assertedly said that it would be forthcoming. But, that never happened.

Morales denied that he had attended the December 1997 labor-management. Furthermore, he denied that, at any meeting he had attended, Damron had ever told Focht that he should fire or discharge Florian. And Morales denied that Damron had ever made an accusation that Florian was charging truckdrivers money or had ever accused Florian of taking money from truckdrivers. Morales also denied that he had ever said, at a labor-management meeting, that Florian should not be working at Respondent-Employer or should be fired.

For his part, Damron acknowledged having attended the December 1997 labor-management meeting. But, he denied having brought up the subject of Florian taking money from truckdrivers, denied looking toward Morales and Escobedo for affirmation of such an accusation, denied having told Focht that Florian was lazy, no good and should be fired, and, further, denied having said that Florian, Crylen, Phillips and Thomas should be fired.

Escobedo also acknowledged having attended the December 1997 labor-management meeting. He corroborated some of Damron’s denials by denying that Damron had accused Florian of charging money to truckdrivers, denying that he (Escobedo)

had ever agreed with such an accusation by Damron, and denying that he (Escobedo) had told Focht that Florian should not be working at Respondent-Employer and should be fired. Of course, some support for Damron's and Escobedo's, as well as for Morales's, denials is provided by the discussion above concerning the lack of support for Focht's testimony regarding Damron's purported ongoing demands and requests for Florian's termination. Beyond that, the accounts of Damron and Escobedo regarding the December 1997 labor-management meeting consisted of more than denials of the statements about Florian and others which Focht attributed to all three of them, but primarily to Damron.

Both Damron and Escobedo testified that it had been Focht who had brought up the subject of Florian taking things to unload trucks. "He just said that he had heard a rumor that Chester Florian was taking the truck drivers for loading and unloading and selling skids," testified Damron. Similarly, Escobedo testified that Focht "said that he had heard that Chester Florian was hitting the truck drivers to unload them, and selling skids." Damron and Escobedo each testified that those accusations had not been left unchallenged. "I asked Mr. Focht could he verify that," or, "Do you have any evidence, a verification of this," or, "Could you verify. Can you verify this," Damron testified. According to Damron, Focht had "said he could when he gets ready to, when it comes down to it, yeah," or, "when the time comes when necessary or something like that statement. He can, he can prove it." In like vein, Escobedo testified that "Rich told Jack" that "you've got to prove it Jack, you've got to show us some proof," or, "you've got to prove that Jack, that's a serious offense," to which Focht retorted, "when the time comes," or "give me time and I will."

As the meeting had been nearing its conclusion, Damron testified, "I threw a little rib into" Focht, by telling him that, "Mr. Boyle was going over to Portidge [sic], Indiana and straighten out the mess that [Focht] made over there." According to Damron, Focht "got mad," and "called me a little ass hole. And that I was a no-good son of a bitch," among "other words," after which Focht said "that he's going to get me," and "threw his chair back and went out the door." Escobedo corroborated that account by Damron: "Rich Damron told Jack that he heard Jim Boyle was going to be—was coming or was there in Portage to clean up his mess," or "the mess that he caused over there," after which, "Jack got up," saying "you little c—ksucker, I'm going [to] get you," and "stormed out of the door—out of the room." Not only were those accounts by Damron and Escobedo essentially corroborative, but the account of each remained basically consistent, with their accounts during direct examination, in the face of relatively thorough cross-examination about what had been said during that December 1997 meeting.

On the other side, during cross-examination Focht was asked if he had been the one who repeated the rumor about Florian and truckdrivers. Afforded that opportunity, Focht denied generally that he had done so. Still, Focht was never called as a rebuttal witness and, consequently, never contested the above-described specific accounts by Damron and Escobedo regarding Focht's initiation of discussion about Florian and truckdrivers, nor the remarks attributed to Focht during that discussion. As

mentioned already, there seems little objective basis for concluding that Damron would have likely been concerned by December of 1997 about Florian's failed unit chairperson candidacy 9 months earlier, nor about some possibility that Florian might again attempt to run for that position over 2 years in the future. Moreover, Focht's account encounters heavy seas when compared with the record of Mahoney's testimony.

While he testified that Damron's statements about Florian and truckdrivers had occurred during the December 1997 labor-management meeting, Focht stated in a prehearing affidavit that the meeting could have been that of "December 1997 or January 1998." After being shown that portion of his affidavit, Focht claimed that he could not recall which month it had been. Later during cross-examination, however, he reasserted, as he had done during direct examination, that Florian had been accused by Damron in "1997." And during redirect examination Focht repeated unequivocally, "That was the December meeting." No question, by the time that his testimony concluded, Focht was testifying firmly that Damron had made his asserted remarks during the labor-management meeting of December 1997.

In addition, Focht's testimony leaves no room for doubt that, as quoted above, it had been "right after that meeting" that he had spoken to Mahoney about what Damron had purportedly said about Florian. "Yes," answered Focht, when asked during cross-examination if it had been after that meeting that he had told Mahoney about Damron's accusation. The problem with that placement of his comments to Mahoney is that, when the record of Mahoney's testimony is examined, that testimony by Mahoney contradicts that of Focht.

It "had to be early 1998, January, February, somewhere around there," testified Mahoney, when Focht had spoken to him (Mahoney) about Florian taking money from truckdrivers. That could not have occurred in December 1997 because, Mahoney testified, Focht had raised the subject of Florian and truckdrivers after a labor-management meeting that Mahoney had attended. But no one, including Mahoney, claimed that Mahoney had attended the December 1997 labor-management meeting.

It could be that all three witnesses—Focht, Damron and Escobedo—had been off a month in their accounts of the meeting when there had been an exchange regarding Florian and truckdrivers. That seems unlikely, however. And if that had been the case, that would mean that the exchange had occurred during the January 1998 labor-management meeting when Mahoney had been in attendance. Aside from the fact that not one of the three other witnesses—Focht, Damron and Escobedo—had placed Mahoney at the meeting when there had been an exchange about Florian and truckdrivers, Mahoney denied flatly that anything had been said about Florian and truckdrivers during the labor-management meeting that he had attended. "No," Mahoney answered unequivocally, when asked if he had been present when an accusation had been made about Florian and truckdrivers. In fact, Mahoney's description of what Focht had said to him, after the labor-management meeting that both had attended, gives rise to further conflict between the accounts of Mahoney and Focht.

Focht was asked specifically if he had told Mahoney that the committee had come to him after the meeting and raised the subject of Florian and truckdrivers. "No, I did not," answered Focht, tell Mahoney that. Yet, that is precisely what Mahoney testified, repeatedly, that Focht had said: "he said something was said after a meeting that Chester did something"; "apparently this was said after the meeting"; "The meeting was over and apparently this was said after the meeting"; "Jack said after the meeting that the committee said that Chester was shaking down truck drivers and that one of the drivers was going to come today and identify him." "I was in the meeting, yeah," testified Mahoney. "No," he responded, when asked if he had been around when the exchange about Florian had occurred.

In sum, contrary to Focht's testimony, Mahoney's account precludes any conclusion that Focht had spoken to Mahoney, about the exchange concerning Florian and truckdrivers, immediately after the December 1997 meeting when that exchange had occurred. Mahoney had not attended that meeting, and nothing had been said during the January 1998 labor-management meeting after which, according to Mahoney, Focht had told him that something had been said about Florian and truckdrivers after that meeting had adjourned. That was not the only conflict between the accounts of Focht and Mahoney in connection with this subject.

As described above, Focht testified that he had directed Mahoney to "talk to Chester," and Mahoney "came back and told me that he had talked to Chester and Chester denied it." Now, both Focht and Mahoney testified that the former had talked to the latter about the exchange concerning Florian and truckdrivers. However, Mahoney never testified that Focht had asked him (Mahoney) to "talk to Chester" about that subject. Mahoney testified merely, "I just wanted to get down, get to the bottom of it, that's all." "So, I investigated it," testified Mahoney. So far as his testimony reveals, Mahoney had undertaken on his own to speak with Florian.

A conclusion that, contrary to his testimony, Focht had not asked Mahoney to speak with Florian gathers greater force upon examination of Mahoney's testimony regarding what happened after he had spoken to Florian. Asked if he had reported back to Focht what Florian had said, Mahoney answered flatly, "No." Later during examination that question was again put to Mahoney. "Not that I recall, no," responded Mahoney. Well, the questioner's thinking seemed to proceed, possibly Focht had asked Mahoney what Florian had said. When first asked that, Mahoney seemed uncertain: "Not that I know of. I can't remember if he did or not." As questioning continued, however, Mahoney seemed to be trying to think whether or not that had happened. For, when that possibility was later pursued further, at that point Mahoney answered unequivocally, "No," Focht had never come back to him about the matter.

Some contradiction of Mahoney's testimony, about being told by Focht in 1998, appeared to arise from Florian's testimony. Initially, he agreed that he had spoken to Mahoney, about the subject of truckdrivers, during December of 1997. But, his placement of that conversation with Mahoney was based upon a suggestion in the question, which led to his agreement: "Directing your attention to December of 1997, did you have a conversation with Mr. Mahoney about a complaint

made against you?" As cross-examination commenced, however, and no "December of 1997" suggestion was made to Florian, he began somewhat of a retreat from that month and year.

"I believe it was in December of '97," he first testified during cross-examination. Then he was shown an "AMENDED COMPLAINT," date-stamped as "RECEIVED" on January 20, 1999, filed on behalf of Florian and Kenneth Rolfe in the United States District Court, Northern District of Illinois, Eastern Division. The complaint's Count III, paragraph 5, on page 14, states, in pertinent part, "On or about, January, 1998, defendant Damron . . . stated Florian solicited bribes from truck drivers to unload their respective trucks first and/or faster. This false statement was made to Jack Focht, . . . and Manny Escobedo and Ed Morales. . . ." Well, Florian tried to explain, "I believe it was . . . on or about January. December, January, that's pretty close to me. On or about." Later during cross-examination, Florian continued to try having it both ways. Asked when Mahoney had come to him, about the truckdrivers, Florian answered, "No, I believe sometime in December of '97, January of '98." He agreed that Mahoney had only come to him one time. That conflict between Florian and Mahoney might be regarded as nothing more than a discrepancy over detail. But, it was not the only conflict between the accounts of Florian and Mahoney.

Another one arises when their accounts of their conversation are compared. Florian testified that, after being asked by Mahoney about "soliciting truck drivers," he had inquired of Mahoney, "Who did you get this information from and he told me, his exact words were, your friend Mr. Damron came in and had made these statements." Those were not "his exact words" according to Mahoney. "I just told him [Florian] that the word is that you're shaking down truck drivers," testified Mahoney, to which "his response was that that was Rich Damaron [sic]. He was making that up."

Counsel for Charging Parties later took up the subject of that conversation, asking what Florian had said. "His reaction was it's not true and it's that Damaron [sic]," responded Mahoney. Asked, then, "Did you say anything to Chester in that conversation to make him feel it was Damaron [sic] that made the statement?" Mahoney answered unequivocally, "No." Pressed further, and perhaps alerted by the very repetition of questioning that his answers might be hurting Florian, Mahoney testified, "All I remember telling Chester is the committee, so-called, it was that the word is that your were doing this" (emphasis added), thereby contradicting his own earlier above-quoted "the word is" testimony. Perhaps realizing that he was now contradicting himself, Mahoney quickly reversed field by testifying, "I don't know if I said the committee," and by reiterating that he had said to Florian merely, "Chester, the word is that your [sic] doing this."

The point of the foregoing review of testimony is not that there was no accusation made during a labor-management meeting about Florian and truckdrivers. Clearly that did happen. The issue is whether it had been made by Damron or by Focht. As to that accusation, Focht was the only witness to attribute the accusation to Damron. Of course, Focht had been the only nonofficial of Respondent-Union present during that

meeting, since it obviously could not have been the one conducted in January 1998, given Mahoney's testimony. Even taking into account Focht's solitary status during the December 1997 meeting, however, his own internal contradictions and the inconsistencies between his account and that of Mahoney, leaves Focht's assertion that Damron had made the accusation as unreliable as much of Focht's other testimony. To be sure, the obvious question arises as to why Focht would have chosen to make such an accusation, since seemingly he had no reason to attack Florian in front of Damron and Escobedo. The answer to that question emerges when the testimony of another witness is examined.

Harry J. Jann was employed in Respondent-Employer's Portage plant by the time he appeared as a witness in this proceeding. But he had worked in the Chicago plant before being transferred to Portage. While working there, Jann and Focht had been friends. In fact, a couple of times Jann had been invited to Focht's summer trailer. Jann testified generally that Focht "liked to brag about how he could start rumors flying in the plant with union employees." Pressed, as a result of objection, for greater specificity, Jann testified that Focht "would tell one union employee" that "[t]here's going to be a layoff. He'd tell another union employee there's not going to be a layoff." Pressed again for greater detail, Jann supplied it, becoming more convincing in the process. He testified that, as he and Focht were talking together "[o]n the top of the platform" during "around '93," Focht had said that he had told one employee there was going to be a layoff, but told another employee that there would not be a layoff. "I like to see how they conflict this," said Focht, according to Jann.

Inasmuch as Focht was not called as a rebuttal witness, he never denied having made those above-quoted statements to Jann. If nothing else, those statements tend to show a disposition by Focht to say things which play both ends against the middle. That disposition tends to be further shown by another incident, involving the newly appointed vice president of manufacturing, as described in the immediately following subsection. As pointed out in the immediately preceding subsection, Florian acknowledged that Focht was anything but enamored at having to deal with Damron as unit chairman. As Jann's own above-described, more specific account shows, Focht was not reluctant to tell one person something, while telling another something else. Given those considerations, it is hardly implausible that Focht simply chose to accuse Florian of misconduct to see how Damron and Florian would "conflict" that accusation. In short, Focht leveled the accusation to make trouble between two individuals—Damron and Florian—who did not particularly care for each other. When no "conflict" appeared to result, Focht upped the ante by mentioning Florian and truckdrivers to Mahoney. Although there is no credible evidence that Focht told Mahoney to relate the accusation to Florian, it was not unforeseeable that Mahoney would do so. Sure enough, Florian bit and attributed the accusation to Damron—even though Mahoney could as easily have heard it from anyone else in the Chicago facility, given the above-described rumors about Florian and truckdrivers.

The events covered in this subsection fall under the analytical heading of background evidence. Testimony about them

was elicited to show a background of antagonism on the part of Damron toward Florian and, furthermore, a willingness by Damron to act on that antagonism by making unlawful "attemp[s] to cause" Respondent-Employer to discharge Florian, in violation of Section 8(b)(2) of the Act. Given the discussion in this subsection, that showing has not been reliably—credibly—made. Nonetheless, as discussed in succeeding subsections, the effort was not abandoned.

#### *D. Roger L. Kramer In—Jack Focht Out*

As will be seen in subsection below, Roger L. Kramer<sup>17</sup> is the official who made the late summer early fall decisions to put Focht on leave of absence, offer Focht a last chance agreement, and discharge Focht. Even earlier, during May, Kramer made the decision to transfer Focht out of the Chicago production manager position which Focht then occupied, a matter discussed in more detail below.

Kramer had begun working for Respondent-Employer during June of 1990 as a regional manager for the Northgate plant in Granite City and for St. Louis plant—a parallel position to the regional manager position held by Druke for the Portage and Chicago plants. In February of 1998 Kramer became vice president of manufacturing, with authority over all seven of the plants operated by Respondent-Employer. Not long thereafter, Kramer experienced an incident with Focht, which further shows Focht's willingness to play both ends against the middle, as mentioned near the end of the immediately preceding subsection. It was also an incident which introduces Kenneth Rolfe to the overall sequence of events.

Kramer testified that his review of February labor utilization at Respondent-Employer's plants disclosed, in his opinion, that labor was not being aligned very well with production at some of those plants, one of which was the one in Chicago. Ordinarily Kramer would have spoken with then-Regional Manager Druke about that situation. However, testified Kramer, Druke then was on vacation. So, Kramer called then-Production Manager Focht and said that it appeared that Chicago labor costs were too high and, from the number of employees there, that four shifts were being worked. According to Kramer, Focht replied, "That's right it is. I've been talking to Ray [Druke] for the last couple weeks saying we should go to three shifts." When Kramer said that that should be done, he testified that Focht protested, "Well, Ray said not to make any changes while he was gone," and Kramer replied, "Look, I'll take the responsibility for you doing something that Ray maybe told you not to make because" the shift-reduction was necessary. Unrecalled as a rebuttal witness, Focht never denied any of the foregoing testimony by Kramer, particularly have made the statement, "I've been talking to Ray for the last couple weeks saying we should go to three shifts."

Upon his return from vacation, according to Kramer, a "pretty irritated" Druke telephoned Kramer and leveled the accusation that, "Jack told me that you called up here and demanded that we take Chicago back to three shifts," adding, "Don't you know that we can't do that because there's a [collective-bargaining] contract requirement that requires a one

<sup>17</sup> Sometimes misspelled in the record as "Krammer."

week notification before you change from four shifts to three shifts.” In reply to those remarks, Kramer testified that he had denied having made a “demand” for the shift-reduction, and had told Druke that “Jack agreed that you should be on three shifts. In fact he said that he had talked to your about this,” adding that it was Druke and the production manager’s responsibility to be aware of contractual terms and to comply with them. Druke appeared as a rebuttal witness, but never contested any aspect of Kramer’s foregoing testimony about their telephone exchange.

The foregoing two telephone exchanges, and their underlying events, appear to have bred two attitude-consequences. First, the second one led Kramer to become suspicious of Focht: to feel that he had said one thing during their telephone conversation, but had said something different to Druke. Of course, in the context of the instant case, that is essentially the same sort of both-ends-against-the-middle attitude that Focht had displayed when describing to Jann during 1993 what he (Focht) had been telling union employees about a layoff. That is, Focht had left Druke and Kramer to “conflict this.”

Second, when he testified Druke displayed a sympathetic attitude toward Focht. Indeed, that went so far that Druke admitted he had not believed that Focht had made certain statements to government investigators, as discussed further below, even though another official of Respondent-Employer overheard some of what Focht had said to those investigators. There is no reason to believe that Druke had felt any more willing to believe Kramer’s assertion that Focht said he (Focht) “agreed that you should be on three shifts” to Kramer. Indeed, Focht may never have spoken to Druke about shift-reduction, but merely had chosen to say that to Kramer. In any event, the shift-reduction incident appears to have generated some hard feeling by Druke toward Kramer.

One of the employees laid off, as a result of the March shift-reduction, was Kenneth Rolfe. There is no allegation that Respondent-Employer—nor Respondent-Union, for that matter—had somehow violated the Act in connection with that layoff, nor by Rolfe’s selection as one of the employees laid off.

Rolfe had begun working, in operations support, for Respondent-Employer on October 15, 1997. Under article IX of Respondent-Employer’s then-effective 1995–1999 collective-bargaining contract with Respondent-Union, newly hired employees served a 60-day probationary period, but that period could be extended an additional 30 days “upon written notification to and discussion with” Respondent-Union. Once employees’ probationary periods are completed, those employees become “regular employees and have continuous service from date of hire.” Thus, by the time of his March layoff, Rolfe had completed his probationary period and was a “regular employee[ ].”

Although Rolfe acknowledged that he was not contending that he had been laid off improperly, the record discloses testimony that he had become angered at being selected for layoff. Steven or Stephen Thomas Wright was twice called as a witness: first during the General Counsel’s case-in-chief, then during that of Respondent-Employer. Like Rolfe, Wright had been included in the March layoff. During his second appearance as a witness, Wright testified that, on the day of the layoff,

an angered-appearing Rolfe had said that he had not said anything when he had earlier injured his arm while working, “but they ain’t going to pull this shit on me,” referring to his selection for inclusion in the layoff. Apparently Rolfe was no more impressed by the layoff criteria in the collective-bargaining contract, than Phillips had been about contractual criteria in connection with his own selection to work a shift that conflicted with his school schedule, as discussed in subsection B above.

According to Wright, Rolfe continued that day by saying, “they’re going to have a lawsuit on their hands for this case,” and, “I’ll sue them for it.” Alluded to when Wright appeared the second time as a witness, some months after his original appearance as a witness for the General Counsel, was the fact that he now was appearing as a witness for Respondent-Employer. Yet, Wright seemed no less candid during his second appearance, than had been the fact during his earlier appearance. His description of his March conversation with Rolfe was specific and detailed. Most importantly, Rolfe was never called as one of the rebuttal witnesses, with the result that Wright’s above-described testimony was never refuted. Not only does it tend to demonstrate Rolfe’s general attitude toward collective-bargaining contract compliance, but it shows as well Rolfe’s disposition to retaliate whenever he felt disadvantaged, even though no impropriety had occurred.

Rolfe filed a workers compensation claim against Respondent-Employer. But, not as a consequence of his layoff and not as a consequence of his earlier-injured arm. As to the latter, Rolfe had cut his arm while working during February. He had left work and gone for treatment to the hospital. He testified, “I went back to work that night with stitches in my arm.” Despite that injury, Rolfe continued working steadily thereafter at Respondent-Employer, until laid off during the following month. So far as the evidence discloses, that injury had never subsequently incapacitated him for work.

Yet, when initially asked if his workers compensation claim had been related to his cut arm, Rolfe answered, “Yes, it was.” But as questioning progressed, Rolfe admitted that his workers compensation claim had been for bilateral carpal tunnel syndrome, a condition not shown—at least from the record made in this proceeding—to have been related to a cut arm. Beyond that, by the time of his layoff, Rolfe had been employed by Respondent-Employer for less than 6 months. Anything is possible. Yet, it seems somewhat of a stretch to infer that carpal tunnel syndrome had developed in so short a period. Certainly nothing inherent in Rolfe’s operations support work has been shown to naturally lead to that condition. That is, there is no evidence was adduced to show that carpal tunnel syndrome might naturally result from the duties which Rolfe had performed for Respondent-Employer. And there is no evidence that any other operations support employees, working for Respondent-Employer, had ever developed that condition. In short, there was every basis for Respondent-Employer to become genuinely suspicious of the reason underlying Rolfe’s workers compensation claim. Nevertheless, Rolfe tried to portray Respondent-Employer’s eventual challenge to that claim as somehow rooted in animus toward him because of activity protected by the Act, more specifically because of a supposed

close relation to Florian, even though no such allegation appears in the complaint. And Rolfe attempted to portray Respondent-Union as hostile toward his effort to file a grievance against Respondent-Employer, supposedly also because of a close relationship with Florian.

In a sense, that is a somewhat difficult argument for Rolfe to make. He admitted that when Respondent-Employer initially contested his workers compensation claim, he had gone to Staff Representative Langele and had asked for the name of an attorney to help him prevail on his claim. Langele pointed out that Steelworkers did not handle workers compensation claims, but gave Rolfe a list of attorneys, from which Rolfe could pick one. Rolfe never explained why he had chosen to approach a staff representative, instead of an officer of Respondent-Union, concerning this subject, but the fact is that he admitted that Langele had been willing to supply him with a list of attorneys.

As mentioned above, the primary thrust of the argument in support of the allegation against Respondent-Union regarding Rolfe is that Rolfe was perceived as being some sort of ally of Florian. In fact, Rolfe testified that he had applied for work at Respondent-Employer as a result of Florian's suggestion. According to Rolfe, he had "met Mr. Florian while watching a neighbor bowl" during the 33-week bowling season preceding October of 1997. "Twice," testified Rolfe, he had spoken to Florian during that time. In one of those conversations, testified Rolfe, Florian had said "that there was a job available at" Respondent-Employer and Rolfe "went over for an interview," which led to his being hired. Two points should not escape notice in connection with that account by Rolfe. First, Florian never corroborated it. Second, more importantly, there is no evidence that officials of Respondent-Union had any knowledge that it had been Florian who had assertedly suggested that Rolfe apply for employment with Respondent-Employer.

In an apparent effort to supply evidence of a link between himself and Florian, as well as between himself and Phillips, Rolfe described an incident occurring at work during November of 1997. The record shows that during direct examination Rolfe claimed that, "right after I attended a Union meeting" in November of 1997, "Manny [Escobedo] had come back and told me I had better stay away from Mr. Florian and Mr. Philips [sic] because they'd get [me] in trouble. It was right after I attended a Union meeting." When counsel then asked Rolfe to describe "the whole conversation," Rolfe modified somewhat what Escobedo supposedly had said about Florian and Phillips: "I had asked Manny some questions about the Union. He, regarding my, if holidays were counted as days towards your probationary period," testified Rolfe, "and I told him I had spoke[n] to Mr. Florian and Tommy Philips [sic]. He told me I better stay away from Tommy Philips [sic] and Chester and listen to what the union had to say." No accusation by Rolfe at that point about Florian and Phillips getting Rolfe "in trouble" After Rolfe provided that lengthier explanation, he was asked if Escobedo had said anything else. "No," answered Rolfe. "Yes," Rolfe responded, when asked if Escobedo then had left.

Escobedo never denied having participated in such a conversation with Rolfe. But, Escobedo denied explicitly having told Rolfe to stay away from Florian and Phillips because they would get him in trouble. And as cross-examination pro-

gressed, Rolfe's above-quoted accounts encountered some heavy seas.

As pointed out, Rolfe testified that his conversation with Escobedo had occurred, at work after a union meeting during November. No question Rolfe was claiming, at least initially, that the union meeting had been one which had occurred during November and, further, that he had attended that meeting. No one appears to contend that Local 3911 had more than one monthly meeting. When the subject was probed during cross-examination, Rolfe was asked specifically if he had attended the union meeting during November. "That's correct," Rolfe answered unequivocally, "On 65th Street," and, "I believe that's the hall." "Yes, I did," sign a sign-in book at that meeting, responded Rolfe. "Yes, it was the first meeting I went to. I signed in," he reiterated.

Rolfe was shown the sign-in sheet for Local 3911's November 2 meeting and was asked to locate his name on it. He was unable to do so. "This wasn't the meeting I attended," he testified, somewhat lamely. Yet, he never suggested that there had been some other November meeting that he had attended, such as a unit meeting. Nor did Rolfe suggest, in light of the November 2 sign-in sheet that he had been shown, that there had been some later specific meeting to which he had been referring. And that was not the only problem with his above-quoted account that emerged from cross-examination.

As pointed out above, after first claiming that Escobedo had said that he could "get in trouble" if he did not stay away from Phillips and Florian, Rolfe then testified that Escobedo had said merely to "stay away" from them "and listen to what the Union had to say." Well, the latter is not so extraordinary a statement, given that Rolfe was inquiring about a particular application of a collective-bargaining contract's particular provision. During cross-examination Rolfe was afforded an opportunity to reaffirm his first account. "Correct," he responded, when asked if Escobedo had said, "All they're [Phillips and Florian] going to do is get you in trouble." Then, however, Rolfe volunteered that Escobedo had said, "Don't pay attention to Phillips and Florian," and agreed that Escobedo had advanced a "slightly different" opinion, of whether holidays were included in calculating probationary periods, than had Phillips and Florian. "That's correct," agreed Rolfe, Escobedo had been saying to talk to Respondent-Union's representatives, rather than to those guys. On its face, such a statement does not show some sort of advice or admonition unique or confined to Phillips or Florian. So far as it goes, Rolfe's testimony, as it concluded after modification, shows no more than that Escobedo had been saying that a relatively new employee should speak with union officials, not coworkers, about how the contract's provisions applied.

There is no evidence that Escobedo's advice or admonition would have been any different had Rolfe said that he had spoken with employees Smith or Jones. To the contrary, Rolfe's own eventual testimony seemed to confirm such a conclusion. For, as cross-examination concerning the conversation with Escobedo neared conclusion, Rolfe testified, "he told me to stay away from *other people* in the plant." (Emphasis added.)

Also not to be overlooked is one other aspect of Rolfe's testimony about his foregoing asserted conversation with Esco-

bedo. During cross-examination about what Escobedo had said, Rolfe abruptly volunteered, "He [Escobedo] gave me the wrong advice." No question that Rolfe was claiming that he had been given the wrong advice by Escobedo. "It was the wrong advice," repeated Rolfe. Yet, Rolfe never explained what he meant by that assertion. Moreover, it is difficult to understand how Escobedo could have given wrong advice about the subject of holidays being included in calculating passage of probationary periods. After all, that's a pretty straightforward, narrow subject. To be sure, Escobedo gave Rolfe a somewhat different answer than had Phillips and Florian. Yet, Rolfe never explained exactly how Escobedo's answer had been "wrong." So far as the record shows, the only plausible purpose for advancing such a generalized accusation would be to portray Escobedo—and, derivatively, Respondent-Union—in as unfavorable a light as possible, given the above-mentioned internal contradictions in Rolfe's testimony about a supposed November, or whatever, conversation with Escobedo.

There was a second area in which Rolfe made an effort to portray Escobedo's hostility toward Florian and, in this instance, Focht. As set forth above, the collective-bargaining contract's article IX provides a 60-day probationary period, which may be extended for another 30 days. Rolfe had begun working for Respondent-Employer on October 15, 1997. Thus, his 60-day probationary period should have concluded in mid-December of 1997.

It seems undisputed that Respondent-Employer extended probationary periods of some employees during December, before their 60-days of employment had passed. Rolfe was not one of those employees. Later, after Rolfe's 60-day period of employment had passed, Mahoney brought an extension of probation notice to Rolfe who, in turn, took it to Escobedo. He and Escobedo went to Mahoney's office where, after verifying the number of days worked by Rolfe, testified Rolfe, Mahoney "said you're in the Union, go on back to work," or that Rolfe had "completed my probation. There will be no probation," and, "You are a member of the Union," or, "You are a member of the company now." Surely, it cannot be contended with any persuasion that Respondent-Union, specifically Escobedo, had not assisted Rolfe ensure that he ceased to be a probationary employee, given the acknowledged trip to Mahoney by Escobedo. By the time of this hearing, however, Rolfe was seeking remedial, possibly monetary, relief from Respondent-Union. So he attempted to attribute adverse remarks to Escobedo.

According to Rolfe, later that day, as he and Florian were together, Escobedo "came up to me and he said, I want, you better keep your f—king mouth shut about being in the Union because my guys were all extended and I don't want this getting back to them. He left." "No," Rolfe answered, when asked if he had said anything to Escobedo. Of course, all that account shows is that Escobedo wanted to avoid friction in the unit, arising from other employees' reaction to Respondent-Employer's failure to give timely notice of extension of Rolfe's probationary period.

Rolfe contradicted his above-quoted denial, however, when asked later during direct examination if Escobedo had said anything else:

He said I guess it paid to know Mr. Focht and Chester. That's why you snuck by the Union. I said that's not so. I worked all kinds of overtime to get those days in. I worked a lot of hours to get my probationary period in. I never had any problems.

I said that had nothing to do with knowing Mr. Focht or Chester. He didn't really want to hear that. He walked away.

Obviously, by that testimony, Rolfe was attempting both to portray some sort of knowledge by Escobedo that Rolfe enjoyed a special relationship with Florian and Focht and, in addition, that Escobedo was antagonistic toward Rolfe because of the latter's special relationship with Florian and Focht.

For his part, Escobedo testified that the situation had been a little different than Rolfe's above-described testimony showed. According to Escobedo, other probationary employees had received extension notices, but Rolfe had not. Rolfe mentioned that to Escobedo and the latter said "just keep quiet, don't say nothing, they probably forgot about it[,] don't worry about it," Escobedo testified. Then, testified Escobedo, Rolfe returned about 15 minutes later, saying that he had spoken to Focht, about not have received a notice of extended probation, and Focht had said he was not going to extend Rolfe's probation because Rolfe was "a good worker." Escobedo testified that he said, "okay, forget about it. If he's not going to extend it, don't worry about it," or, "don't say nothing. Let it go, don't worry about it."

On the following Monday, according to Escobedo, Mahoney brought a 30-day extension notice to Rolfe who, then, reported that fact to Escobedo. Escobedo testified that he admonished Rolfe, "didn't I tell you to be quiet?" and went to Mahoney who, after checking records, tore up Rolfe's extension notice. Afterward, Escobedo testified that he cautioned Rolfe, "now, keep it quiet because these other guys are going to be mad because they got extended and their [sic] not going to get a raise," or, "keep it down because he got a raise and the other guys might get made [sic] because he got extended." As with Rolfe's initial description of the incident, Escobedo's testimony demonstrates willingness to help Rolfe.

With regard to the above-quoted addition to Rolfe's account, added later during examination, Escobedo denied expressly having told Rolfe that he had gotten his probation as a result of being friends with Florian and Focht. Certainly, as an objective matter, that denial seems more credible than Rolfe's addition to his description of what Escobedo supposedly had said. In the first place, as mentioned above, Rolfe claimed that Florian had been present during the December 1997 Rolfe-Escobedo conversation about the extension. However, Florian never testified that he had even been present during such a conversation between Rolfe and Escobedo concerning Rolfe's probationary period. Nor did Florian corroborate Rolfe's added account about Escobedo having said, in effect, that Rolfe had avoided extension of his probationary period because Rolfe knew Focht and Florian. Surely, had he been present during such a conversation, when his own name was mentioned, Florian would have remembered and recounted what had been said.

Beyond that, such an assertion by Escobedo would simply have been absurd, on its face, given the circumstances leading to cancellation of the probationary-extension notice. Under either the account of Rolfe or that of Escobedo, the latter obviously knew that neither Florian nor Focht had anything whatsoever to do with rescission of the extended-probationary notice. Escobedo obviously knew also that the notice had been rescinded because it had been issued belatedly, after Rolfe's probationary period had already been completed. After all, Escobedo had been a participant in the conversation when Mahoney rescinded the notice given to Rolfe. Against that background, Escobedo would have had to be some sort of loon to be saying that the notice would not have been rescinded had Rolfe not known Focht and Florian. Lest there be any doubt, as he testified Escobedo did not appear to be any kind of loon.

Turning back to Rolfe's workers compensation claim, he testified that, during May, his doctor "just gave me light duty," while Rolfe was "[w]aiting for an operation." There is no evidence that any operation would involve Rolfe's cut arm; so far as the evidence shows it would pertain only to his carpal tunnel syndrome. There seems no dispute about the fact that Respondent-Employer had allowed other employees to work light duty in the past. Rolfe identified several. Yet, Rolfe was never recalled from layoff by Respondent-Employer to perform any light duty work. Of course, there is no allegation that Respondent-Employer had violated the Act by having failed to do so. Nor is there an allegation that Respondent-Union had violated the Act by somehow attempting to cause Respondent-Employer to deny light duty work to Rolfe. Nevertheless, at some points as he testified, Rolfe appeared to be trying to portray Respondent-Employer as having improperly deprived him of light duty work during the spring and summer. In the end, that effort would founder on Rolfe's own description of what he had been told by Mahoney.

Despite Respondent-Employer's past willingness to allow employees to work light duty, Rolfe acknowledged that when he had spoken to Mahoney about doing so, after having been released by the doctor to perform such work, Mahoney had "said there was no such work." "Yes," conceded Rolfe, he had been told that Mahoney needed a full-time employee. There is no evidence whatsoever of a change in that situation at Respondent-Employer's Chicago plant after May.

In fact, Rolfe further acknowledged that he had been scheduled for surgery during June. But, he testified, that surgery had been canceled as a result of Respondent-Employer's challenge to the surgery's coverage under workers compensation. Again, there is no allegation that either Respondent had acted unlawfully under the Act in connection with cancellation of Rolfe's June surgery. That is, there is no evidence that Rolfe had been engaged in any activity protected by the Act prior to the surgery's cancellation and, while he made efforts to align himself with Florian, there is no evidence that any such association with Florian had occasioned Respondent-Employer's decision to challenge the workers compensation claim, nor, even, that any official of Respondent-Employer was aware of some sort of alignment between Rolfe and Florian during or before June. In fact, there is no evidence which would support a conclusion that Respondent-Employer had somehow concluded for an

unlawful or otherwise improper reason that Rolfe's brief period of work for it had not truly occasioned his bilateral carpal tunnel syndrome.

To the contrary, Rolfe acknowledged that, when he asked Abbott about the canceled June surgery, she had told him, "Well, we're not following this as a Workman's Comp claim. You have to get a release now from Workman's Comp," and "a letter stating that this will now be an insurance claim rather than a Workman's Comp claim . . . to have this operation schedule[d]." Abbott thought this would "only take three days," but Rolfe was unable to have his first surgical operation until the following October. Not until the following December 31 was he released for full-time duty. By then, his contractual recall rights had expired. The point, however, is that while Respondent-Employer was not willing to have the surgery covered by workers compensation, it seemed willing to allow it to be covered by a different type of insurance. And there is no allegation that that decision had violated the Act.

By June another sequence of events had run its course—one which led to Focht's loss of his Chicago production manager's authority, though not the title. This really should have been completely a background issue, of no major significance. There is no room whatsoever for disputing that loss of authority. By memorandum dated May 20, Drufke notified all employees that, inter alia, "Jack Focht will not be at work this week because of medical reason. I have appointed *Dan Mahoney* as *Acting Production Manager* during this time," and, further, "This appointment may continue past Jack's return depending on our training needs in appointing a new Product Quality Manager. Displaying what seemed to be an ongoing tendency to testify in other than a candid manner, Focht at one point denied that he had been absent from work due to a medical problem—thereby contradicting Drufke's above-quoted memorandum—only to later concede that he had missed at least a week's work during early 1998 due to a medical problem.

There also is no room for disputing that, by memorandum dated May 26 Drufke gave added notice to all employees of "several organizational changes," among which were:

*Lisa Karpel* has been appointed *Technical Service Manager* to help us better identify and reduce our external rejections. Lisa will also play a key role in our new product development efforts by coordinating our trial orders.

*Ernie Javier* will replace Lisa as *Product Quality Manager*. Ernie will be responsible for our Wet Section, our Laboratory and our Physical Testing.

....

*Jack Focht* continues as *Production Manager*. However, Jack will devote his entire time and experience in helping Lisa and Ernie in their new duties. This will allow me the time to work with Maintenance and our Production Department.

Our Production Department, including our foremen, will now report to *Dan Mahoney* who in turn will report to me.

As even Focht acknowledged, he was no longer supervising any Chicago employees. Moreover, both memoranda had issued over 3 months before Focht gave his August 31 affidavit

to the Regional Office and, beyond that, well before even the first unfair labor practice was alleged to have been committed by Respondents. For whatever reason, however, an effort was made to litigate the propriety of Focht's loss of supervisory status. In the end, all that was accomplished by so doing was to further illustrate Focht's unreliability.

As mentioned in subsection A above, Respondent-Employer is not a party to any government contracts, but Sequa is party to such contracts. Because of its relationship to Sequa, consequently, Respondent-Employer's hiring practices are subject to periodic audit by the Department of Labor's Employment Standards Administration Office of Federal Contract Compliance Programs, herein OFCCP. One such audit was conducted at Respondent-Employer's plants during the first part of 1998. On April 23<sup>18</sup> two auditors arrived at the Chicago plant. Three of Respondent-Employer's officials were involved in the audit conducted: Director of Equal Employment Opportunity and Business Ethics Richard Delk, Director of Human Resources John Christopher and then-Production Manager Focht.

One aspect of the audit is known as a "walk around." A representative of the employer shows the auditors around the facility being audited. Of the three above-named officials, Focht was most knowledgeable about, and familiar with, the Chicago plant and its operations. So, he walked around with the auditors. Delk and Christopher accompanied them but, Christopher testified, he and Delk "generally laid back and watched to see what the postings looked like." As a result, Delk and Christopher did not overhear all comments being exchanged between Focht and the auditors.

Following the walk around, the auditors began individual interviews of employees and management personnel, in the Chicago plant's meeting room. Delk was not involved in that process. Christopher was permitted to sit-in when management personnel were interviewed, though not when nonsupervisory hourly-rated employees were being interviewed. Thus, Christopher was present when Focht was interviewed.

Christopher testified that there had been nothing particularly unusual when the interview began with Focht. Then, testified Christopher, the auditors began to ask about specific female applicants who had not been hired since Focht had become production manager in early 1997. No question that Focht had been occupying that position, and had conducted the second interview—after Abbott had conducted a preliminary screening interview—of Maurita Gill, Charlene Johnson and Sheila Schmidt during the fall of 1997. And no question that Focht

had been the official who had made the decisions not to offer employment to any one of them.

Christopher further testified that, as to one of those three applicants, Focht told the auditors that "he didn't hire her or didn't even interview her because she had a brother who worked there and he was having trouble with the gentleman and he didn't think it was wise to hire her." In fact, Exhibit A of OFCCP's May 19 predetermination notice states that Schmidt had applied on October 21, 1997, but that her application had been rejected because "the Production Manager said that 'he was having problems with her brother, who was also employed there at the time.'"

With respect to another of those applicants, Christopher testified that Focht had told the auditors that "he did not hire her because she had a good job and didn't want to take a chance of her getting laid off." In fact, OFCCP's Exhibit A states that Johnson, who had applied on October 16, 1997, had been rejected because "the Production Manager said that 'he had a gut feeling that the 4th shift wouldn't last long and she would be wasting her time.'" Of course, as described above in this subsection, the fourth shift had been discontinued—but not until March 1998, approximately 5 months after Johnson had applied. Furthermore, according to the Exhibit, at the time of her application Johnson had "5.5 years experience as a Machine Operator, Truck Loader and Certified Fork Lift Crane Operator," the type of work which, it is unrefuted, Respondent-Employer has available in the Chicago plant.

As to the third female applicant, Christopher testified that Focht had told the auditors that she had been "simply not qualified for the job." OFCCP's Exhibit A recites with respect to Gill, who had applied on September 30, 1997, "the Production Manager said that 'he felt her experience was mostly office and not related to the job.'" Yet, according to that portion of the Exhibit, at the time she applied with Respondent-Employer Gill possessed "1 year experience as a Construction Foreman, as well as an unspecified amount experience in Carpentry and Repair."

Christopher further testified that the auditors had asked Focht what he looked for when hiring and Focht told them "that he asks about marital status," later saying that "he has hired some men in the past that have big families and needed the money." In fact, on page 3 of the May 19 predetermination notice appears the statement, "The Production Manager conducts the second interview whereby basic qualifications, experience, personality, marital status, family and need for a job is considered." While Respondent-Employer contended that it "chose most qualified candidates" to justify its rejection of "all Females," the Notice continues, the specific reasons advanced during "interview with the Production Manager" further "illustrat[ed] the Disparate Treatment accorded Females."

"They don't usually ask specific questions about individuals," Christopher testified, and so he asked the auditors, "there's obviously something going on here. What is it?" One of the auditors replied, according to Christopher, that "during the walk around Jack told us he didn't hire women because they didn't work out in the plant," and the other auditor "made a comment about it as well." Indeed, page 3 of the Notice further states, in pertinent part, "the Production Manager admitted that

<sup>18</sup> The date is taken from "EXHIBIT A," paragraphs 7 through 9 of OFCCP's predetermination notice to Respondent-Employer, dated May 19. It may come as somewhat of a shock to some people that statements in this government document, to the extent that it sets out "matters observed" by the auditors during their investigation and "factual findings resulting from [their] investigation," are "not excluded by the hearsay rule, even though the [auditors might have been] available as [ ] witness[es]." Fed.R.Evid. Rule 803, preamble and subdivision (8)(B) and (c). As pointed out in the Advisory Committee's Note for that subdivision, there is an "assumption that a public official will perform his duty properly" which, in part, underlies the reliability of statements about matters observed and the factual findings.

no females were interviewed given past experience with female Operations Support staff,” even though, “the Production Manager admitted that [Respondent-Employer] offers an excellent training program that allows him to make exceptions for those applicants lacking in experience.”

Having heard what the auditors were saying, and having listened to their questions, Christopher testified that he knew Respondent-Employer was in trouble. He immediately reported what Focht had said to Delk and to Kramer. Delk testified that he felt Focht should be fired immediately. Kramer testified that his reaction had been “to remove Jack from the Chicago location and possibly [from] the company.” But, even though Christopher had overheard some of Focht’s remarks to the auditors, Kramer acknowledged that Drufke—ever faithful to Focht—questioned whether Focht had made at least some of those statements. Of course, at that stage it was late April and Respondent-Employer had not yet received OFCCP’s predetermination notice.

Both Christopher and Kramer testified that the former had advised the latter to hold off before taking any action concerning Focht. Christopher testified that “the problem with it is, with the investigation ongoing, . . . we didn’t want to take any hasty actions until we knew exactly what we were up against.” Kramer testified that Christopher had voiced “two reasons. One was at the time in April time frame we didn’t have a final report on the audit, nothing in writing. So it was a—at that point in time we had nothing but verbal reports.”

Beyond that, testified Kramer, “there was some question in my mind,” based upon conversations during which Drufke had voiced his above-mentioned doubt, “whether Jack actually made some of the statements that were supposedly made by him,” particularly the ones not overheard by Christopher. Yet, Focht was not helping himself. Christopher acknowledged that Focht had denied the statements attributed by the auditors to him during the walk-around. Still, the reliability of those denials for Respondent-Employer’s officials was diminished by the fact that Focht “also denied the statements that I heard him” make, testified Christopher. Nevertheless, Christopher cautioned, according to Kramer, “Look, I’m sure they were made but there will be a final report that comes out that should remove all doubt,” and, in any event, “in answering some of the audit items we’ll need to possibly have Jack’s help.” To ignore the legitimacy of that latter possibility would be “to promote the Ostrich over the farther-seeing species, *Partington v. Brayhill Furniture Industries*, 999 F.2d 269, 271 (7th Cir. 1993), since removing Focht might leave Respondent-Employer, at least, without a particularly sympathetic witness, should more information be needed from him once OFCCP issued its written determination. At worst, it might leave Respondent-Employer with a former official willing to tailor his subsequent accounts to injure Respondent-Employer even further as, in fact, has occurred during this proceeding.

Any suggestion that Focht was some type of whistle-blower in connection with OFCCP’s investigation would be a ridiculous one. He hardly had been reporting to a government agency misconduct by other officials of Respondent-Employer. Instead, he had admitted his own unlawful hiring practices. To regard him as some type of protected whistle-blower, for hav-

ing done so, would be tantamount to regarding an embezzling employee as a whistle-blower, entitled to some sort of statutory protection, for have given a written statement about his embezzlement to the police. Nowhere does the law protect an employee against discipline by his employer for unlawful conduct, which that employee chooses to confess to a government agency.

The predetermination notice is dated May 19. On May 20 Drufke issued his above-described May 20 memorandum, appointing Mahoney as acting production manager. On May 26 Drufke issued the above-quoted memorandum effectively removing Focht as supervisor of production employees and their foremen. There can be no question that the effect of those memoranda had been to remove Focht as a supervisor over Chicago operations—indeed, to remove him altogether as a supervisor. “I was replaced as production manager,” testified Focht, and left “in limbo.”

Even so, Focht remained at Respondent-Employer’s Chicago facility. As to that Kramer testified that, upon receipt of the predetermination notice, he had wanted to take the action which he earlier had contemplated taking: terminating or, at least, transferring Focht to the Jackson, Mississippi facility. However, according to Kramer, Christopher “advised me to wait,” because “this was not final findings[,] this was a preliminary document with some findings but they were still subject to answers by the company and this was not the final document.” Christopher agreed that he had explained to Kramer that the predetermination notice “was [a] preliminary finding . . . and that Mr. Delk and I would be making an appearance with them [OFCCP], and we needed to sit tight on the situation until we knew exactly what we had.” Accepting that advice, Kramer testified that he made the decision to allow Focht to remain at the Chicago plant.

Cross-examiners displayed a certain amount of cynicism about that explanation. Yet, that the predetermination notice did not constitute a final determination is shown by some of its wording: “The purpose of the Notice is to set forth facts which, if not adequately rebutted, would establish that discrimination occurred.” “If an adequate rebuttal is not received a final determination that discrimination occurred will be issued.” “Please respond to this letter within fifteen (15) calendar days if you wish to rebut any or all of the preliminary findings.” “If you do not respond, the preliminary findings made in this Predetermination notice will be incorporated into a Notice of Violations which will be sent to you by certified mail, return receipt requested.” Surely, OFCCP could not more clearly have stated the preliminary nature of its position as of May 19. Obviously, Focht could still have been a resource-person either in support of Respondent-Employer’s position with OFCCP or, more ominously, someone who might want to make a bad situation worse for Respondent-Employer, were it to remove him from the Chicago plant by termination or transfer.

Not a great deal of particularized evidence has been presented regarding Respondent-Employer’s dealings with OFCCP after May 19. Kramer testified that he had no knowledge about whatever had happened, aside from “general knowledge there were actions going on that led me to believe there should have been a rebuttal or answer submitted but I don’t ever remember

actually seeing those.” Christopher testified that no rebuttal was ever submitted by Respondent-Employer concerning the statements attributed to Focht in the predetermination notice: “Because I sat there and listened to what Jack had to say and I would look like a fool going in trying to rebut information that they and I heard at the same time.” The Notice covered additional violations, however, beyond those pertaining to Focht’s hiring. Of course, contrary to the implication of prolonged cross-examination, the fact that there were other violations does not somehow erase the fact that OFCCP had determined that Focht had engaged in unlawful hiring procedures. In fact, those were the violations for which Respondent-Employer would have to pay backpay to three of the four female applicants who had not been hired. It is an interesting question whether OFCCP would have made any determination that Respondent-Employer had unlawfully failed to hire female applicants, had it not been for statements its auditors had heard from Focht.

In any event, there is some evidence that Respondent-Employer’s officials did meet with those of OFCCP after May 19. “We had a meeting with the representatives of the Department of Labor where we discussed the situation and the liability we had with them,” testified Christopher, ascertaining in the process, “what they were going to seek as remedies.” Perhaps, as seemingly suggested by cross-examination, Respondent-Employer could have more-stridently contested the findings in the predetermination notice. But, Christopher’s above-quoted explanation, for not challenging the statements attributed to Focht, seems logical and, given what he had heard, hardly can be faulted. Challenging a government agency’s procedures can sometimes be a perilous course, resulting in even more adverse consequences, as perhaps illustrated by the description during the beginning of the tenth day of hearing in the instant case of what had occurred after the hearing had concluded the preceding evening. In any event, some exchange had been occurring. OFCCP had given Respondent-Employer 15 calendar days to respond to its May 19 predetermination notice or that notice would “be incorporated into a Notice of Violations,” as quoted above. That did not then occur. OFCCP did not complete its “review” until August 7, according to the letter of its district director.

In sum, well before Florian had been suspended and filed his unfair labor practice charges, and well before Focht had given an affidavit in support of Florian’s charges, Focht had been replaced, in fact though not in title, as production manager at Chicago. There is no evidence of any activity by Focht that would supply some type of nexus between Focht’s May replacement and any activity protected by the Act. To the contrary, the only nexus shown is between his replacement and the predetermination notice. But, it should not be overlooked that, by replacing Focht as Chicago production manager and by relieving Focht of his supervisory authority, Respondent-Employer had reduced his status to that of employee within the meaning of Section 2(3) of the Act.

*E. Arrival of Jim Boyle, Jr. and Robert Moore at the Chicago Plant*

Mahoney did not remain long in charge of Chicago production after May 26. As set forth near the end of the immediately

preceding subsection, Drufer did not believe that Focht had made the statements to OFCCP which Christopher attributed to Focht. However, Drufer testified that he realized that there were problems at the Chicago plant. “We had both quality and productivity problems in Chicago,” testified Drufer. White was more blunt about the situation at that Plant. He testified that “the place was a wreck,” pointing out that the plant “was filled with machinery. Docks were filled with arbors and equipment that has been so old that it needed to be tossed.” Such testimony is hardly a sterling tribute to Focht’s supervision of Chicago operations, while production manager prior to May 20. On the other hand, neither is it a tribute to Drufer’s performance, given that the Chicago plant was one of the two plants for which he served as regional manager.

“Yes,” Drufer answered, when asked if he had requested help at the Chicago facility from Jim Boyle, Jr., then working at Respondent-Employer’s Portage plant. Drufer further testified, “Jim has a lot of experience in—in coating. He’s as good in—coating as anyone I know. We definitely needed help in Chicago and I asked him to come to Chicago.” As will be seen in following subsections, Drufer appeared to have become somewhat disenchanted with some aspects of Boyle’s performance by early August. At this point, however, some notice must be taken of Boyle’s background. For, it seems uncontested that, by spring of 1998, Boyle had a demonstrated record of straightening out poorly performing plants.

As pointed out in subsection A above, the Northgate plant in Granite City had been opened because of Respondent-Employer’s problems at its St. Louis plant. Boyle had started in the Northgate plant on August 13, 1982, as an operations support employee. According to Boyle, excellence in performance had been demanded at that plant. “Very structured. Very disciplined. Everyone was well trained. Work rules were strictly enforced” there, he testified. Thus, testified Boyle, “that’s the environment I grew up in.”

Boyle worked at Granite City until January of 1988, he testified, when he was offered a production foreman’s position at Respondent-Employer’s Houston facility, then paired with the Chicago facility as Lithostrip, a point made in subsection A above. At that time, according to Boyle, conditions at the Houston facility were “very poor.” In mid-1990 he was offered the position of production manager for that facility, the same position as Focht would occupy at Chicago from early 1997 until May of 1998. By mid-1990, Boyle testified, conditions at Houston “had improved, but it was still in poor condition.” “Basically at Houston there was no structure, no discipline,” explained Boyle, “The productivity was 40 [percent] below probably the Granite City facility. Quality was in very bad shape. And no enforcement of the work rules.”

“I remained in Houston, Texas as production manager until 1991,” Boyle testified, during which time he had improved the work environment and performance at that plant. “Basically what I did was I adopted what I had learned in Granite City,” he testified. That is, “I tried to create a disciplined, structured work environment,” testified Boyle, “through work rules and extensive training of the hourly employees.” By the time that he left Houston in 1991, according to Boyle, the facility there “month to month was either first or second in the Company.”

Indeed, it appears to have been Boyle's performance at Houston which led Respondent-Employer to offer him the position of advisor at Lithostrip's other plant, the one in Chicago. According to Boyle, that occurred because "there were problems [at Chicago] that were almost identical to [those formerly existing at] Houston," and Boyle was being asked to "do in Chicago what I had done in Houston." Boyle testified that his "brother recently had been killed in an auto accident," and he desired to get out of Houston. But, not permanently. He did not move his family from Houston.

When he arrived at Chicago, testified Boyle, "I observed initially a close comparison between Chicago and Houston. There was no structure, discipline. The quality and productivity were poor and low. Work rules weren't being enforced," and, for example, "[a]ttendance was a big issue." After serving as advisor for approximately "45 days," Boyle testified, "I became acting production manager," in "probably early, mid June" of 1991. "I tried to put structure in the facility," he testified, "I enforced all the rules. I was real big on documentation. And teaching the hourly employees the fundamentals of operating the various pieces of equipment." Boyle left Chicago during October 1991, after his advisor/acting production manager stint there had resulted in the Chicago facility being "in the black for the year," he testified. He wanted "to go back to Houston and be with [his] family," Boyle testified, and Respondent-Employer offered him the job of plant manager there.

Boyle occupied that position until mid-1996 when he accepted an offer from another firm to become general manager, at a "substantially higher" salary, at its Arkansas facility. "The condition of that facility was probably at that time [when he arrived there] the worst I'd been to," according to Boyle. After working there almost a year, Boyle testified that he had been contacted by Respondent-Employer which offered him the position "running the Portidge [sic] facility," on terms better than those which he had been enjoying as plant manager when at Houston. Boyle accepted that offer.

He began at the Portage plant during May of 1997. At that time, testified Boyle, that plant was in last place among Respondent-Employer's seven plants: "It was totally unorganized. There was no structure, no discipline. The work rules were not uniformly enforced." As to what measures were taken by him at Portage, Boyle testified, "Basically I tried to institute the structure and discipline and give everybody, all the management people there and hourly employees my philosophy, which I'd adopted from Granite City on how to run a business." That "philosophy" was based on "[s]tructure, organization, discipline, documentation," according to Boyle, "And I commanded excellence." Following that philosophy, Boyle testified that he turned around operations at Portage: "Portidge [sic] is now number two facility in [Respondent-Employer] in terms of productivity."

Boyle's employment history shows two things that are of significance to the issues presented in this proceeding. First, it made him a logical choice to correct what Druke described as the "quality and productivity problems in Chicago." Secondly, by the time that he arrived in Chicago, Boyle had a firm belief in observance of work rules, as one means to improve operations at plants which had been performing poorly.

Boyle's arrival at Chicago also ended Mahoney's tenure as acting production manager. Robert Moore was selected by Boyle to occupy that position. Moore had worked with Boyle in Houston prior to mid-1996. After Boyle became employed in Arkansas, he hired Moore to work for that firm. When Boyle was reemployed by Respondent-Employer at Portage, Moore was hired to work there, also. Boyle testified that he brought Moore from Portage to Chicago, "because I wanted somebody there that could help institute my philosophy of doing business until I'd had a chance to evaluate all the supervisors and managers that were at that facility." In effect, Moore would be serving as second in command at Chicago, at least until Boyle could familiarize himself with operations there and, then, implement procedures for improving those operations.

Before arriving in Chicago Moore had not known Damron. Of course, Boyle and Damron were familiar with each other. As pointed out in subsections A and B above, Damron had been president of Local 7045 before its merger into Local 3911 and its concomitant designation as Respondent-Union. In consequence, Damron had been serving as union president in Chicago when Boyle had served as advisor/acting production manager there during 1991. Considerable effort was made to prove that there was some sort of alignment between Damron and Boyle, as a means of urging that the latter had done the former's bidding in suspending and discharging Florian. In the end, that effort amounted to nothing. At this point it should be noted that there is simply no evidence that would support a conclusion that any type of special or close relationship had developed between Damron and Boyle during 1991. Nevertheless, attention should be paid to evidence, supplied mostly by Phillips, of some sort of list or lists of employees that Damron and/or Boyle was out to get.

Boyle and Damron each denied having possessed such a list. At this stage, the significant account by Phillips is of a conversation with Grievance Committeeman John Robinson during June, as the two men were at the lower coater segment of Respondent-Employer's Chicago production line. During direct examination, Phillips testified that Robinson "pulled me aside and he warned me, he said to be careful. He said you better watch yourself because I heard there's a list out. Your buddy's got a list and you[r] name's on it. And he's out to get you." "Your buddy is how John Robinson and I refer to Rich Damron because at one time we were buddies," claimed Phillips. "Yes," he answered, when asked if Robinson had made reference to Damron as "your buddy" in the past. Like other aspects of Phillips's testimony, however, this one began to unravel during cross-examination and, in the end, is left in tatters when compared to testimony given by Robinson.

Phillips was confronted during cross-examination with his prehearing affidavit. In it, the following account of his conversation with Robinson is recited as, "Around June 1998, Robinson told me that Rich Damron had a list and that I needed to be careful because they were out to get me. Robinson did not expand on this." No reference appears in that affidavit to any remark about "your buddy," Phillips conceded. As described below, Robinson testified that he had used that phrase to refer to Damron, when speaking with Phillips. But, the circumstances of such reference, as described by Robinson, were con-

siderably different than the context of a purported warning about Damron being “out to get” Phillips. The fact is that Phillips, who presumably had access to his affidavit before he had testified, never bothered to explain why he had attributed that phrase, when testifying, to Robinson during their June conversation. Moreover, even after conceding that “your buddy” did not appear in the affidavit, Phillips would later repeat that Robinson had said “your buddy” on that June day. “No, he did not” mention Damron’s name, Phillips ended up testifying. Yet, if Robinson had not mentioned Damron’s name, and had not said “your buddy,” as the affidavit shows, then a question naturally arises as to how Phillips would have known that Robinson had been referring to Damron during their June conversation.

His story became even more contradictory as cross-examination progressed. Asked if he ever had “a conversation with anyone in the plant about a list?” (emphasis added), Phillips answered, “Yes, that was in my testimony earlier, I believe.” Then asked, “Who did you talk to about a list?” (emphasis added), Phillips responded, “John Robinson and Ed Morales.” The latter’s purported remarks to Phillips are described in subsection L below. Phillips denied specifically that a list had ever been mentioned to him by Focht. Cross-examination progressed to other topics. Later, however, it returned to that subject of a list.

“Well, at one time I did talk to Chester” about a list, Phillips testified at that later point, when asked if Florian had ever mentioned a list to him (Phillips). “After Robinson had warned me,” testified Phillips, such a conversation with Florian had occurred. “No, no, it’s not in my affidavit,” he acknowledged. Still, Phillips proceeded to testify, “I had mentioned to Chester that Robinson had warned me that I was on a list.” “I just told him that Robinson warned me,” Phillips testified thereafter.

Florian never corroborated that testimony. To be sure, that might not be particularly surprising, given that any testimony by Florian about such a report by Phillips would surely have been challenged, by objection, given the course of what had been happening over the course of the hearing, on the grounds of hearsay and relevancy. Even so, there is one aspect of the testimony by Phillips, concerning his asserted conversation with Florian, which should not pass without notice.

According to Phillips, when he told Florian about what Robinson had said, Florian replied, “Well, watch yourself. He said, you know, if Robinson’s telling you something, Robinson ain’t going to lie to you.” Later during cross-examination, Phillips reaffirmed that testimony about what Florian had said about Robinson. Now, as pointed out in subsection A above, certain officers of each of the Respondents appeared to have at least some interests which were at odds with the Respondent for whom they were, or had been, officers. Robinson was one, appearing to feel that Florian’s suspension and discharge had been unjust and, as discussed in succeeding subsections, that Damron had somehow failed Florian by having failed to prevent that suspension and discharge. And no question that Phillips and Florian believed that Robinson lined up with them in the dispute with Respondents.

Asked if he thought Robinson had anything to do with Florian’s discharge, Phillips answered unequivocally, “No, I do not.” Phillips also answered in the negative when asked the

same question about While’s suspension and discharge. “Robinson’s our friend. He’s the only one that we have in that plant as far as a union issue,” asserted Phillips, “the only one that stepped forward to defend me in any way. And to this day is the only one who will step forward to defend me.” Maybe so. But, for Robinson, apparently that did not extend to the point of advancing fabricated testimony.

Robinson agreed that he had participated in a June conversation with Phillips. Phillips denied that Robinson had said, during their lower coater June conversation, that Phillips had been leaving his (Phillips’s) job too much: “Robinson never told me I’m not leaving, that I’m leaving my job too much.” Yet, in describing what he had said to Phillips during that conversation, Robinson testified, “I told him he better watch himself and stop leaving the line so much”—thereby contradicting Phillips’s above-quoted denial. Furthermore, asked if he had said to Phillips that Damron was “out to get” Phillips, as the latter claimed that Robinson had said, Robinson answered, “No, I don’t recall saying that.” From the tenor of that answer, it seemed clear that Robinson was not using “recall” in the sense of might or might not have said that. Rather, as his initial “No” made plain, Robinson was testifying that he had not said that to Phillips.

Robinson did acknowledge having mentioned Damron to Phillips during their June conversation. “More or less, I did,” acknowledged Robinson. But, he continued, “I more or less said I know you two guys have got bad blood between each other and more or less I was telling Tom [Phillips] certain things Tom do[es], little things. I told him more or less that he’ll have to cut it out.” At no point did Robinson claim that his admonition about those “certain things” had been connected to his (Robinson’s) remarks about “watch himself and stop leaving the line so much. So far as Robinson’s account shows, two separate subjects—stop leaving the line and, secondly, stop doing things that annoy Damron—had been discussed in a single conversation, not a horribly unusual situation in the normal course of human affairs. Apparently, in an effort to buttress a case against Respondent-Union, Phillips simply merged them in his recitation of what Robinson had said.

Robinson also agreed that he had sometimes, when talking to Phillips, referred to Damron as “your buddy.” But, Robinson did not specifically testify that he had done so during his June conversation with Phillips; as Phillips had done in his affidavit, Robinson gave no testimony that he had referred to Damron as “your buddy” during his June conversation with Phillips. Asked about the circumstances when he had used that phrase to refer to Damron, Robinson answered, “Oh, when we’re on a clean up we tease each other and I know Tom and Rich, they don’t get along and sometime I tease Tom.” Asked if that answer meant that he had referred to Damron as “your buddy” when talking to Phillips, Robinson responded, “Well, I have referred to Tom as Damron’s buddy. I could be teasing,” and, further, that such references could have been made, “Either way.” “Possible,” answered Robinson, as a confusing sequence of questioning continued even further.

Apparently, the point of that questioning was to show that Robinson possibly could have referred to Damron as “your buddy” when speaking to Phillips during June. But, anything is

possible. The simple fact is that at no point did Robinson testify that he had used that phrase during that June day. Even had he done so, his testimony shows that he had used the phrase only in conjunction with advice to Phillips about not doing “little things” to annoy Damron. For, as described above, Robinson denied specifically that he had warned that Damron was “out to get” Phillips. The only warning that Robinson testified that he had given Phillips was to “stop leaving the line so much.” Not only did Robinson not testify that that warning had anything to do with Damron, but Phillips chose to deny that it had ever been said by Robinson.

There is one further aspect to Robinson’s testimony concerning his June conversation with Phillips. As must be obvious from what has been said above, periodically throughout the record appear references to lists and hit lists. Sometimes those references are related to a list purportedly possessed by Damron. Other times they refer to a list supposedly possessed by Boyle. Both men denied having possessed such a list. “No,” Damron answered, when asked if he ever created, saw or formulated a hit list. “I never had a hit list,” testified Boyle.

Damron did acknowledge that there had been “rumors on the floor” about such a list. Robinson testified, “I guess a rumor was out that Tom [Phillips] was on the hit list,” and, also, that Florian was on that hit list. Moreover, Robinson testified that, “[t]he rumor is it was Damron’s hit list,” and that the rumor about Damron’s hit list had been circulating, “[r]ight after Jim [Boyle] started. I guess that would probably be in June.” Asked how he had become aware of that rumor, Robinson responded in an uncertain manner which tended to indicate that he had not placed much reliance of the accuracy of what he had been hearing. “You know how you’re in the washroom and you hear people talking. That’s how I discovered it,” he answered initially. Asked if somebody had talked directly to him about such a list, Robinson answered, “No, nobody directly talked to me,” but added, “I just, I just asked, I guess some of the guys.” The only one “of the guys” whom Robinson was able to identify was Glen Thomas: “I asked him, . . . ‘You heard anything about a list, a hit list?’ He told me . . . ‘Where [have] you been?’ He said, ‘I was on the hit list.’ He said, ‘Why [do] you think I got called in the office?’”

As discussed further below, Thomas’s answer obviously referred to a list possessed by Boyle, as opposed to one possessed by Damron. Thomas was the only one identified by Robinson as the source of a rumor about Damron’s supposed list, even though Robinson testified, “I guess, several times” he had heard the rumor about such a list: “Like I say, you know, I heard. I heard more or less you hear these rumors from the guys in the shift change upstairs,” and, “Well, people talking.” Thomas was never called as a witness to possibly supply firsthand knowledge about a list or a hit list, though there was neither evidence nor representation that Thomas was not available to appear as a witness to supply such knowledge. Robinson acknowledged that he could not do so. “I never seen no hit list,” he testified. “I never saw a hit list” possessed by Damron, Robinson later reaffirmed. Beyond that, even had Damron truly possessed such a list, there is no evidence whatsoever that he had ever communicated the names on it to Respondent-Employer, particularly to Boyle.

As pointed out above, Robinson testified that Thomas had mentioned a “hit list” which had led to his (Thomas) being “called in the office.” It is apparent that Thomas had been referring to a “hit list” possessed by Respondent-Employer. As described above, Boyle had denied possessing “a hit list.” But, shorn of the pejorative adjective, it is possible that there had been some sort of list from which Boyle had called people to the office. After Boyle had arrived in Chicago, Robinson testified, “a whole bunch of guys that particular week, they were called into the office *for attendance problems* and I guess Jim had a, had a talk with them and I guess more or less I think Rich Damron was in there.” (Emphasis added.) Of course, Robinson’s account is not based on firsthand knowledge, at least not so far as it shows. There is no such evidence concerning Boyle speaking to attendance-challenged employees, nor is there such evidence concerning Damron being present when such “talk[s]” occurred. Even if there had been such an event, however, that does not advance any of the complaint’s allegations.

In the first place, there is no evidence that either alleged discriminatee Florian or alleged discriminatee White had been among that, “bunch of guys” called to the office by Boyle “for attendance problems.” Nor, for that matter, is there any evidence that either Phillips or Crylen—the other two would-be candidates for unit office during 1997—had been among that “bunch of guys.” In consequence, even if Boyle had a list, it obviously was not one connected with the statutorily-protected activity in which any of those four employees, and two alleged discriminatees, had engaged.

In the second place, for employer-action to violate the Act, there must be some nexus between that action and activity protected by Section 7 of the Act on the part of those employees affected adversely by the employer-action—“a causal connection between an employee’s protected activities and an action by the employer detrimental to the employee’s tenure or terms and conditions of employment” (footnote omitted), *P. W. Supermarkets*, 269 NLRB 839, 840 (1984); see also, *Taos Ski Valley, Inc.*, 332 NLRB No. 32, slip op. at 1 (2000). Surely it cannot be contended with the least degree of persuasion that unsatisfactory attendance, of itself, is some sort of statutorily-protected activity. So, had Boyle possessed a list of attendance-challenged employees, such a list would hardly support a contention of unlawful motivation directed toward Florian and White, neither of whom had been on any such list.

That raises a related point which sometimes seeps into the testimony in support of the complaint’s allegations: that Boyle had arrived in Chicago with a list, obviously different from the above-mentioned possible poor attendance one, that had the names on it of Florian, White, Phillips, Crylen and other employees. Now, there is no evidence whatsoever of any communication between Respondent-Union, in general, or between Damron, in particular, and, on the other hand, Boyle, before the latter had arrived in Chicago. Furthermore, there is no evidence showing—or, even, likely showing—that the dissidents’ failed attempt to run for unit office during 1997, nor the prospect that one or more of them might run for office in 2000—concerned Respondent-Employer in the least, much less concerned Boyle. There is simply no evidence that Respondent-

Employer had anything to gain by making efforts to retain Damron as unit chairman. To the contrary, while serving as production manager Focht had desired to have Damron replaced as unit chairman, as described in subsection B above. Beyond that, there is no evidence of any other type of union or concerted protected activity by Florian, White, Phillips or Crylen from which some sort of improper animus against one or more of them can be inferred. Given the totality of these considerations, there is no basis whatsoever for concluding that Boyle had arrived in Chicago during 1998 with some sort of list prepared as a basis for unlawfully discriminating against Florian, Phillips, or Crylen.

Certainly Respondents' interests have become aligned in this proceeding, by virtue of some of the charges and complaint's allegations. Yet, as pointed out in subsection A above, the situation as it came to exist by the time of the hearing—after arbitration proceedings, depositions in District Court, investigations of the various charges—is not necessarily the same as the situation which existed during mid-1998. In fact, White testified that, at that time, Boyle had said that “[h]e didn’t care about the Union because he would do what he wanted to do and he would fight anything if he thought he was right.” Indeed, soon after he had arrived in Chicago, Boyle took an action corresponding with such an expressed attitude.

When he arrived in Chicago, Boyle testified, “There didn’t seem to be any adherence to work rules.” In particular, he testified, employees were not remaining at their workstations, were “sleeping on duty,” and were, “Reading newspapers. They had televisions. They had stereos.” So, he set out to correct some of those perceived problems, as well as some others, by reposting the five pages of work rules that had been in existence and posted in the Chicago facility. Those rules covered some of the above-described problems about which Boyle was concerned. For example, delaying operations and loitering were prohibited by those rules, as was, “Sleeping while on duty.” However, Boyle added two more prohibitions to the previously existing rules; “No papers, magazines, crossword puzzles, etc., at the work station,” and, secondly, “Insubordination.”

There can be no question that those rules had been posted. The ones presented during the hearing bear the legend, at top right on each page, “(Revised) June 25, 1998.” Respondent-Union’s officers referred to those revised rules and, as will be seen in the immediately succeeding subsection, took action to protest what they perceived to be Boyle’s high-handed action in having posted new rules, without having given prior notice to Respondent-Union. In fact, Focht acknowledged that, “Jim Boyle had changed some [rules] when he came in, I think, June or July of 1998.”

Those revised work rules were not the first posting made by Boyle after he had arrived in Chicago. By notice dated June 22, he reminded all Chicago employees that mere presentation of a doctor’s excuse does not suffice to be credited with a nonchargeable absence. Only certain medical reasons, and medically related situations, support nonchargeable absences. Apparently no one contests that notice’s recitation of existing procedure and, moreover, apparently no one disputes that it had been a procedure which was being largely ignored prior to Boyle’s arrival in Chicago. That is, seemingly employees had

been receiving credit for nonchargeable absences whenever they submitted a doctor’s notice and, possibly, sometimes when they were merely saying that they had been absent to seek medical attention. Although there is no evidence that Respondent-Union had challenged Boyle’s managerial right to post the June 22 notice, its message would give rise to some acrimony during a July unit meeting, as discussed in subsection F below.

What Respondent-Union’s officers did become upset about were the two newly-added work rules: no periodicals nor crossword puzzles at work stations and express prohibition on insubordination. “The Union became very upset,” Boyle testified. Grievance Committeeman Escobedo testified that, “we demanded a meeting because they were supposed to inform us before they put them [new work rules] up.” Focht confirmed that testimony. Under the collective-bargaining contract, Boyle “should have went [sic] to the Union to change” rules, he testified, “Because when you change a work rule, according to the contract, you’re supposed to sit down with the Union, tell them what you’re changing and why you want to change it, and then the Union has a right to object to it, and possibly grieve it.”

In connection with the posting of those revised work rules, with the two above-quoted additions to them, White testified, “I had a discussion with Rich Damaron [sic] telling him I didn’t think it’s right that they can just post the board because, post the new, the new work rules because it’s in our contract, Union contract, it states that they should be discussed with the Union before [it’s] gone and done.” According to White, Damron “said they didn’t” discuss those added rules with Respondent-Union, before having posted them. However, claimed White, Damron “said something about, well, they’re not that important and if anybody gets hurt by it, we’ll settle it through the grievance procedure.” That may have been Damron’s ultimate intention—to grieve the addition of two work rules—but the record leaves no doubt that he had not just blown-off their posting, as White’s testimony appears to imply.

During direct examination, Focht testified that the work rules “were just changed and posted and then the Union seen that he had changed them and then there was a meeting held.” No question that Focht was testifying that Respondent-Union, particularly Damron, had become irritated at Boyle’s unilateral addition to the work rules. For Focht testified specifically, “when Rich came in, he got upset because they didn’t take it through the Union committee to sit down with them on the changes they were going to make. Then they had a meeting.”

In fact, as described in the immediately succeeding subsection, such a meeting was conducted. The fact that it occurred, and occurred as a result of Damron’s irritation at Boyle’s additions to work rules, as described by Focht, is some evidence that relations between Damron and Boyle had not been so close during that summer that the latter would naturally be willing to do the former’s bidding, as argument in support of the complaint’s allegations would have it believed.

#### *F. June–July Meetings*

As set forth at the end of the immediately preceding subsection, there was a meeting between Respondents to discuss the revised rules that had been posted. Apparently it occurred during late June, possibly on the same day as Damron discovered

that the revised rules had been posted. Four witnesses—Damron, Escobedo, Boyle and, to a brief extent, Moore—testified about what had been said during that meeting. Interestingly, Damron, Escobedo and Boyle each was asked who had been present during the meeting and each one responded that John Robinson had been present. Of the three only Damron expressed the least certainty about Robinson having attended the meeting: “I’m not a hundred percent certain, yes, I think so.”

Seemingly Robinson was available to all parties as a witness. In fact, he was called by the General Counsel as a witness. As pointed out in subsections A and E above, he seemed favorably disposed toward Florian. At no point during that appearance for the General Counsel did Robinson deny having attended that late June meeting, generated because revised work rules had been posted. True, at that point—relatively early during the General Counsel’s case-in-chief—it could be argued that counsel for the General Counsel and counsel for Charging Parties may have felt that it was premature to inquire about such a post-revised-work-rules meeting. Yet, by the end of Respondents’ cases-in-chief, those counsel were surely aware that statements made during that meeting—as related by Escobedo, Boyle and Damron—had a direct bearing on the defense to Florian’s suspension and ensuing discharge.

Robinson was not one of the witnesses called during rebuttal. Thus, there was no testimony by him about whether or not he had attended that late June meeting and, if he had, about what statements may or may not have been made during that meeting. Failure to call Robinson during rebuttal would not seem to warrant application of the absent witness-adverse inference doctrine, though some might be willing to apply that doctrine in circumstances such as those presented here. See, *NLRB v. MDI Commercial Services*, 175 F.3d 621, 627–628 (8th Cir. 1999). Even so, failure to call him as a rebuttal witness leaves uncontradicted the testimony that one subject specifically discussed during that meeting had been that of allowing or not allowing employees to drive between the two Chicago buildings after having punched in and before having punched out. Given Robinson’s obvious sympathy for what he appeared to regard as unfair treatment of Florian, failure to call him to rebut such testimony is some evidence that had he been called during rebuttal, Robinson would not have contested those remarks described by Escobedo, Boyle and Damron.

Turning to what had been said during that meeting, there seems to be no challenge to the testimony that Respondent-Union’s officers protested posting of added rules without prior notice to them of intention to do so; that Boyle and Moore apologized, claiming that they had not read the collective-bargaining contract—a response which Escobedo characterized as “a bunch of bullshit,” hardly a phrase which shows any sort of collaborative relationship between Respondents at that time; that Boyle said that he intended to post even more new rules, but backed away from posting at least one of them in the face of Respondent-Union’s objection and opposition; that Boyle did not back down, however, in connection with the two above-quoted rules already added; and, that Boyle said he intended to enforce work rules strictly and without favoritism. The testimony of those witnesses was challenged during cross-

examination, however, in connection with their descriptions of an exchange between Escobedo and Boyle regarding driving between buildings while on the clock.

As pointed out in subsection A above, work rule 11 prohibits, “Leaving Company premises without permission of supervisor during scheduled work hours.” Work rule 4 prohibits, “Gambling or conducting gambling rackets.” Morales, who had been unable to attend the late June meeting, testified that “before the meeting they [Damron, Escobedo, Robinson] had with the company regarding the rules,” he had been told by Escobedo that, in light of Boyle’s reputation for strict enforcement of work rules, Escobedo “was going to” bring up gambling and driving between buildings.<sup>19</sup> According to Morales, Escobedo said that he intended to do that “[b]ecause we were doing it [sic] at one time.” “We’re were [sic] also driving around,” added Morales. Escobedo agreed that that had been his purpose for asked about those two matters: “Yes, because I was doing it. That’s what I was doing and I wanted to know if that—you can get fired for that.”

Escobedo testified that, after Boyle had agreed to withdraw the above-mentioned additional work rules that he orally announced intention to add to the already-revised work rules, “I asked him about does he think that the 13 run pool and the football pool is considered gambling?” According to Escobedo, Boyle asked “does money exchange [sic] hands?” When Escobedo answered in the affirmative, he testified that Boyle said “then it’s gambling.”

“Then I asked him,” testified Escobedo, “is there a rule about punching in and driving to the other building,” which led Boyle to “look[ ] through the work rules,” after which Boyle replied, “yes, that’s work rule 11, you can’t leave the building once you’re on the clock,” or, “that would be breaking rule 11, because you are leaving company property.” According to Escobedo, Moore interjected, “that’s something like the one in Houston where you can’t clock in and go back to your vehicle.” Escobedo testified that Boyle had not responded to Moore’s remark: “That was just a statement” by Moore, requiring no response, testified Escobedo.

Scant effort was made to obtain a full account from Moore as to what had been said during the meeting. However, he did testify that there had been an occasion, with “all the committeemen there,” when he had asked Boyle “[i]f Work Rule 11 was going to be treated the same [way] it was [in Houston] and he told me yes and that was being in your vehicle on company time. It was not allowed.”

<sup>19</sup> Examining counsel, who did not represent Respondent-Union, confused the situation in connection with that testimony by Morales, seeking answers about what had been said after the late June meeting, while apparently not listening to Morales’s answers about what had been said to him by Escobedo before that meeting. As pointed out in subsection A, and as will be shown in another area later in this subsection, miscommunication between questioner and witness was one of several types of problems that occurred during interrogation conducted by all counsel during the hearing. In this instance, a review of the entire sequence of questions and answers leaves no doubt that Morales was trying, at least, to describe what had been said to him by Escobedo before the latter, Damron and Robinson met with Boyle and Moore.

By way of explanation, there is a not insignificant amount of testimony concerning the purpose for work rule 11, when it was formulated and as it had been applied prior to Boyle's arrival as Chicago plant manager. That testimony shows that, when formulated, the rule had been aimed at stopping employees from leaving Respondent-Employer's premises during, for the most part, their lunch breaks to engage in personal business and, then, not returning until after work had resumed, thus leaving Respondent-Employer understaffed for part of the remainder of workdays. No question that work rule 11 had never been applied to driving between the main and annex buildings, along South Kilbourn Street, after having clocked in and before having clocked out. No question that employees who parked by or in the Annex had regularly been making that short drive, after having clocked in and before having clocked out. No question that no employee had ever been disciplined prior to August of 1998 for having done that.

Still, decisions concerning application of work rule 11 to those short drives along South Kilbourn, between buildings, prior to Boyle's arrival were decisions that had been made by supervisors other than Boyle. Accordingly, such earlier decisions "cannot serve as evidence that [Boyle] engaged in disparate treatment when he," *Arlington Hotel Co.*, 278 NLRB 26 (1986), chose to apply work rule 11 to driving on South Kilbourn between buildings while on the clock. See also, *Frierson Building Supply Co.*, 328 NLRB 1023 (1999). In consequence, past toleration of such driving along South Kilbourn Avenue, while on the clock, is not the so-persuasive factor in support of the complainant's allegations, as General Counsel and Charging Parties would have it found to be.

Nor is there any basis for concluding that application of work rule 11 to driving, on South Kilbourn between buildings while on the clock, was somehow irrational on its face. South Kilbourn Street is a public thoroughfare, not a part of Respondent-Employer's premises. Read literally, work rule 11 prohibits "[l]eaving company premises . . . during scheduled work hours," thereby encompassing driving on South Kilbourn after having punched in and before having punched out for the workday. Such an application of the rule to those relatively brief drives might seem petty. In fact, in some circumstances the very insubstantial nature of an employee's asserted misconduct might be regarded as an indicium of unlawful motivation. See *Detroit Paneling Systems*, 330 NLRB 1170, 1171 (2000); *Douglas Aircraft Co.*, 308 NLRB 1217, 1224 (1992). Yet, as pointed out in both of those decisions, neither the Board nor its administrative law judges are permitted under the Act to substitute their own business judgment for that of respondents. See also, *Ryder Distribution Resources*, 311 NLRB 814, 816-817 (1993).

As discussed in subsection E above, it is uncontroverted that, by the time that he arrived in Chicago during mid-1998, Boyle had a proven track record of improving performance at poorly-performing facilities, both those of Respondent-Employer and one of another company. One element of Boyle's philosophy for accomplishing such plant performance-improvements had been strict enforcement of work rules. It is hardly surprising, consequently, that Boyle would opt for stringent application of work rules at Chicago—including that of a work rule which, on

its face, prohibits the slightest departure from the premises while on the clock. Such an approach is corresponds perfectly with the course ordinarily followed by Boyle when attempting to shape up performance at a plant. Beyond that, were an accident to occur during an employee's brief drive between buildings on South Kilbourn while on the clock, it hardly requires great imagination to ascertain whose counsel would be in a superior position in an ensuing lawsuit between the person injured in such an accident and Respondent-Employer.

The foregoing factors tend to lend support to Escobedo's testimony about what Boyle had said, about application of work rule 11 to driving between buildings while on the clock, in response to Escobedo's question. Even so, an effort was made during cross-examination to undermine his testimony. It was pointed out that during his October 27, 1999, arbitration testimony, Escobedo had mentioned neither gambling nor work rule 11 when testifying about the meeting with Boyle. "I didn't ask about rule 11, I asked about driving my car around the building," answered Escobedo, in the instant proceeding, when confronted with his arbitration testimony. In fact, that was his testimony during direct examination, as quoted above. Furthermore, Escobedo pointed out, when testifying in this proceeding, that during the arbitration "[t]hey never asked me" about gambling or driving around. "No, I did not," testified Escobedo, "offer that up"—presumably, volunteer that information—during the arbitration. "The arbitration was for Chester," Escobedo began to explain, before an effort was made to cut-off any further answer by him on that point. Yet, that segment of Escobedo's testimony should not escape unnoticed.

In the instant proceeding it is alleged, inter alia, that Respondent-Union had failed and refused to fairly represent Florian. Escobedo was one of Respondent-Union's officers. It hardly would have advanced Florian's arbitration-position for an officer of Respondent-Union to volunteer during arbitration that Boyle had warned before August that he regarded driving between buildings, while on the clock, as prohibited conduct. Of course, no one suggests that Escobedo should have lied, had he been asked a question requiring such an answer about what Boyle had said. Nonetheless, had he simply volunteered an account of what Boyle had said, is there the slightest doubt that such volunteered information would now be pointed to, as evidence supporting the allegation that Respondent-Union had failed to fairly represent Florian—that by volunteering such unrequested information, Escobedo had effectively been undermining Florian's position in the arbitration.

Cross-examined, next, about what had been said about driving between the buildings, Escobedo testified, "He said—when I asked about driving—punching in and driving your car around, I said is that breaking any rules, they looked at it and they said rule 11," after which, "Moore looked at Boyle and said is that similar to one in Houston about punching in and going to your vehicle and he said yes." Aside from the difference between Moore asking Boyle if the rule was similar to the one in Houston and Boyle responding affirmatively, that testimony by Escobedo during cross-examination is similar to what Escobedo testified during direct examination had been said: Escobedo asked if punching in and driving to the annex violated a rule, Boyle examined the work rules, Boyle said that

such conduct would violate work rule 11. In other words, Escobedo's recitation was essentially the same during direct examination and cross-examination. That essential correspondence between his accounts further tends to illustrate the reliability of Escobedo's description of what had been said by himself and Boyle.

The reliability of Escobedo's description gathers even further force when the record of Boyle's testimony, about the meeting, is examined. Escobedo "asked me about gambling," testified Boyle, and "I said it's against the work rules." According to Boyle, "Escobedo asked me if it was okay to drive around the building after you clocked in. And I said no," or, "is it okay if we clock in and drive around to the annex building? I said no," after which "Moore said are you going to enforce that work rule the same way you did in Houston as far as getting into your car? And I said I'm going to enforce it the way I always have enforced it." The only difference between that testimony by Boyle, and that of Escobedo, is that Boyle made no mention of having checked over the work rules and having specifically mentioned work rule 11, in addition to the relatively insignificant difference between whether Moore did or did not ask a question and Boyle did or did not advance an answer to Moore's question. Despite those differences, the fact remains that Boyle's account essentially corroborates that of Escobedo in the important respects that Escobedo had inquired about driving between buildings while on the clock and Boyle had said that he regarded such conduct as a violation of work rules.

During cross-examination about what had been said during the meeting, Boyle was not again taken in detail through his direct examination description of what had been said. Instead, his attention was directed to an account of that meeting given by him when his deposition, in connection with the District Court proceeding, had been taken on September 15, 1999. Asked if Escobedo or Morales had said anything during the meeting, Boyle answered, "Just general conversations about the work rules." Of course, that deposition answer is hardly inherently contradictory with the above-quoted testimony given by Boyle in this proceeding. Furthermore, it seems that, at that point in his deposition, Boyle had been focusing on what had been said about the revised work rules of June 25. For, when he was asked if he recalled "anything specific that they said about the work rules?" Boyle answered, "They were all, I don't recall specifics, *protesting the work rules in general at the start of the meeting.*" (Emphasis added.) As mentioned above, there seems no dispute that the meeting had started with Respondent-Union's officers protesting posting of added work rules without prior notification to them—indeed, that had been the very purpose for convening that meeting.

Questioning on the point continued, nevertheless, during cross-examination. "Do you remember any one specific *protest* that they [Escobedo or Morales] had?" (emphasis added), to which Boyle answered, "Not really, no." Relying on that answer to that question, cross-examination continued: "And today, with all certainty and clarity, you come here and you've told us, under oath, of a very specific *question* that Manny Escobedo asked you, correct?" (Emphasis added.) Well a "question" is not inherently a "protest." In fact, Boyle's above-quoted testimony about Escobedo's questions, during the meet-

ing, do not show that Escobedo had been asking in a confrontational manner. And, with reference to that last-quoted answer, during cross-examination Boyle pointed out, "You asked me [during the deposition] if they made a statement [sic]. They did not make a statement [sic]. They asked me a question."

Still, cross-examination was pursued: "And that's your distinction? That's why you told me *they didn't make any, they didn't say anything at the meeting?*" (Emphasis added.) Well, of course, that simply is not what Boyle had said during his deposition-answer. Rather, he had answered, as shown by the above-quoted portion from the record of the deposition, that they had said, "Just general conversations about the work rules," and, "protesting the work rules in general at the start of the meeting." "That's not why I told you they didn't say anything at the meeting," protested Boyle, in reply to the question about having said during the deposition "they didn't say anything at the meeting."

By that point the questioning appeared, not surprisingly, to be totally frustrating and confusing to Boyle. In fact, it is another illustration of the already-mentioned confusion sometimes caused by counsels' own confusion and efforts to shoe-horn-witnesses' testimony into a factual framework which counsel sought to create. Thus, a seemingly frustrated and confused Boyle answered, "At the time I may not have remembered it," when asked why he had said on December 15, 1999, that Escobedo or Morales "talked about general work rules but didn't have one specific protest? Why did you say that to me?" Well, in fact, Boyle had not said that. As quoted above, his deposition shows that he had specifically said "I don't recall specifics"—precisely the "At the time I may not have remembered it" answer that he gave to the "Why did you say that to me?" question in this proceeding. "No," reiterated Boyle during cross-examination in the instant proceeding, when asked, "At that time you didn't remember it, correct?"

"I've lived my life [in] this case the last 30 days. I am very clear on that meeting," affirmed Boyle. In fact, as quoted above, his account of his exchange with Escobedo was not only clear, but corresponds essentially to the above-quoted one given by Escobedo, as well as to that of Moore, to the extent that whatever Moore said to Boyle and Boyle to Moore may be of any import. No truly internal contradiction emerges from comparison of Boyle's testimony in this proceeding with the portions of his deposition utilized when cross-examining him.

Given Escobedo and Boyle's mutually corroborative accounts of what had been said during that meeting about driving between buildings, there might seem little to be gained by also reviewing the record of Damron's testimony concerning that meeting. Yet, Damron is a principal witness in the proceeding, given certain allegations directed particularly at him. Thus, some attention should be paid to what was revealed during cross-examination of him.

As had Escobedo and Boyle, during direct examination Damron testified that, during the meeting, Escobedo had asked about gambling—"would it be wrong, if you or would be against the company rules if you, if you run basketball pools, football pools in the plant"—and, after asking if money changed hands and receiving an affirmative answer, Boyle had said that such activity was against the rules. Moreover, Dam-

ron testified, during direct examination, that Escobedo then “asked Boyle was, coming in, driving in, punching the time clock and driving through the Annex Building, and then from the Annex Building coming over and punching out. Was that going to be a suspension or termination on that? And Boyle said, yes.” Now, obviously, Damron added a little—“suspension or termination”—to the accounts of Escobedo and Boyle. And unlike Escobedo, but like Boyle, Damron made no mention of work rule 11 having been identified specifically during that meeting. Even so, his account is essentially the same as those of Escobedo and Boyle: Escobedo asked specifically about driving between buildings after having punched in and before punching out, and Boyle said that it was prohibited.

Cross-examination about the meeting consisted largely of an effort to develop some sort of contradiction between Damron’s above-quoted testimony and his responses during a deposition given on September 21, 1999. As with Boyle, that proved to be a not particularly successful effort. For example, during the deposition’s taking, Damron had answered, “Not that I recall,” when asked if Boyle had said that “he was going to make any *changes or deletions* to the work rules?” (Emphasis added.) Well, no one, including Damron, testified in this proceeding that Boyle had said a word about “changes or deletions to the work rules,” though possible work-rule additions had been discussed. Boyle was asked if the rules prohibited particular conduct and he replied that they did. So far as the testimony shows, neither Escobedo nor anyone else specifically told Boyle, during the meeting, that employees were driving on South Kilbourn between buildings after having punched in and before having punched out. From Escobedo’s question, Boyle may have suspected as much. But, there is no evidence that he had said he was going to “change[ ]” anything in the rules to prohibit such driving. So far as Boyle was concerned, the rules as written already covered such conduct.

Damron acknowledged that he had not said anything about Escobedo’s question when the deposition had been taken. Yet, there is no evidence in this proceeding that any question had been asked, while taking his deposition, that would naturally have led Damron to describe Escobedo’s questions to Boyle. From the deposition questions described during this proceeding, it appears that when the deposition had been taken, as also at some points during this proceeding, questions so focused on a change in application of work rule 11 that completely disregarded were words actually spoken during the meeting.

For example, during the deposition process, Damron was asked, “I’m asking you what your understanding of these statement[s] was and whether you understood that statement from Mr. Boyle to mean that work rule 11 would somehow be enforced differently than it was in the past.” Obviously, that question seeks Damron’s subjective understanding and opinion about what Boyle had been saying during the meeting. In response, the deposition shows that Damron focused on what Boyle had said, as opposed to his own interpretation of what Boyle had been saying: “All I recall about that time is what he said about he was going to enforce the rules. I don’t recall anything about it being 11 or six or eight or anything like that.” Which, of course, is perfectly consistent with Damron’s above-quoted testimony in the instant proceeding: he made no men-

tion of Boyle having specified work rule 11, nor any other numbered rule, when responding to Escobedo’s question during the meeting. “I did not know exactly when you say 11, 10, 9, 8 for which company work rule was. I know that that was mentioned in there about driving. Which company work rule it was I didn’t know,” testified Damron.

Certainly, by that point in his testimony during this proceeding, it did appear that Damron was not being totally candid. Of course he knew “[w]hich Company work rule it was” that covered driving between buildings while on the clock. Moreover, contrary to his later answers, given in response to questioning put to him during the deposition, obviously Damron knew that a “practice that had been going on at the plant was going to stop or was then going to be outlawed” as a result of Boyle’s answer to Escobedo’s question. That such a practice, driving between buildings while on the clock, had existed was, in fact, the very reason for Escobedo having asked Boyle about its continuation. Those answers by Damron were less than candid and, further, serve as another illustration of a principal witness’s willingness to tailor answers so that, at the moment when given, they would be most helpful to the party whose interest the particular principal witness—in this instance, Damron—was attempting to further, in this instance that of Respondent-Union. However, Damron’s unwillingness to be candid on those points—about his understanding of the implication of Boyle’s answer, to the question posed during the meeting by Escobedo, on a practice which clearly had been going on—hardly serves to demonstrate that there had not been an exchange between Escobedo and Boyle about driving between buildings after having punched in and before punching out for the workday.

The foregoing accounts by Escobedo and Boyle show that the former had asked whether employees would be allowed to drive between buildings after clocking in and, in addition, that Boyle had answered in the negative. Damron’s description of what had been said corresponds to the testimony given by Escobedo and Boyle on those points. And those accounts tend to be further supported by the uncontested evidence of what occurred following the meeting with Boyle.

As to that, Boyle apparently did not back down from his intention to implement the two newly-formulated and already posted new work rules, though he did back away from implementing at least one of the additional new work rules that he had sprung on Respondent-Union’s officers during his meeting with them. Either during that meeting or soon afterward, Respondent-Union requested that Respondent-Employer hold off enforcement of new rules until employees could be informed about those two new rules—no papers, magazines, crossword puzzles, etc. and, secondly, insubordination—and, also, strict enforcement of rules already prohibiting gambling and leaving the premises. Boyle agreed to do so.

For the General Counsel and the Charging Parties, particularly Florian, the crucial point in this subsection is not what Boyle may have said during his and Moore’s meeting with Damron, Robinson and Escobedo. Rather, the crucial point is what those three officers of Respondent-Union may have told employees about Boyle’s statements, particularly about leaving the premises and driving between buildings. For, Florian denied generally that, prior to the end of his workday on August

3, he had been aware of any revision to work rule 11, so that it prohibited driving from the main building to the annex after having punched in and, as well, driving from the annex to the main building to punch out. Yet, there is a certain high degree of illogic to concluding that a union's officials would not pass the word to employees they represented, after being told by those employees' employer that rules would now be enforced strictly.

In general, Damron, Escobedo and Morales testified that Morales, who had not attended the meeting with Boyle, was informed of what Boyle had said during that meeting. The three unit officers further testified that they agreed to communicate to employees what Boyle had said, as they went about their duties during that and succeeding work shifts. Further communication to Chicago unit employees would be made at a unit meeting scheduled for Sunday, July 12. Before describing the testimony about those communications concerning what Boyle had said, one overall point should be brought into focus.

Prior to Boyle's arrival at least some employees had been regularly punching in at the main building's timeclock and, then, driving along South Kilbourn to park in the Annex or the area of the Annex. At the end of their shifts they had been reversing that process: driving from the Annex or the area of the Annex along South Kilbourn to the main building where they punched out. Driving along South Kilbourn, a public thoroughfare, meant that those employees had left Respondent-Employer's premises, albeit for relatively brief periods. Read literally, however, work rule 11 absolutely prohibited "[l]eaving company premises . . . during scheduled work hours," and, consequently, prohibited those relatively brief driving-trips on South Kilbourn.

The overall point, as will be seen in the following description of testimony, is that some testimony shows that work rule 11 had been mentioned specifically to unit employees. Other testimony shows that there had been mention only of driving back and forth between the buildings after having punched in and to punch out. In still other testimony there is reference only to leaving or driving off the premises. Based largely upon Florian's above-described general denial, and some other testimony by him to the same effect, General Counsel and Charging Parties take the position that Florian could not have been faulted for violating work rule 11 on August 3 because he had never been told, in so many words, that driving between buildings while on the clock would be regarded by Respondent-Employer as a violation of work rule 11.

The riposte to that position is that, even had work rule 11 never been mentioned specifically, Florian had been told that work rules were going to be enforced strictly by Boyle and, in addition, that leaving the premises would no longer be permitted. Thus, the riposte continues, even though work rule 11 may never have been mentioned to Florian, he should have understood that leaving Respondent-Employer's premises to drive on South Kilbourn between buildings would no longer be tolerated and, also, should reasonably have understood that it was work rule 11 that prohibited doing so. All else aside, that is the only rule which deals with leaving Respondent-Employer's premises. As Maintenance Mechanic Michael Kuliczkowski testified, "The only way to leave the premises is to go on the

street." That same point was made by Morales. Asked during recross examination about driving "either back and forth from the annex to the main building to punch in or punch out," he answered, "That was part of driving off the company premises."

Indeed, it appears to have been that commonplace equation—driving on South Kilbourn between buildings while on the clock—leaving Respondent-Employer's premises—violation of work rule 11 as read literally—which occasioned problems for some of the witnesses when they testified about statements by Respondent-Union's officers about what Boyle had said. By the time that these witnesses testified, it was no secret that Florian, and White also, had been suspended and discharged for violating work rule 11 by having left Respondent-Employer's premises and driven on South Kilbourn from the Annex to punch or clock out at the main building. At some points it appeared that accounts of what Respondent-Union's officers had said were genuinely influenced by witnesses' commonsense conclusion from what had actually been said by those officers: that leaving the premises would now be prohibited under Boyle's strict enforcement policy and such strict enforcement would logically extend to leaving the premises to drive on South Kilbourn between buildings after having clocked in and before having clocked out. Thus, at some points witnesses appeared to be testifying that the above-stated equation had been expressed explicitly, in some instances to fortify Respondent-Union's position, but in other instances because the equation seemed so obvious to those witnesses from what had been said to them.

After the meeting with Boyle, Damron testified that he and Escobedo had described to Morales what Boyle had said. According to Damron, Escobedo did "most of the talking," in the process "explain[ing] to Eddie [Morales] that if you drive back and forth to the building, punch in and all. He [Boyle] wasn't going to have that. The gambling wasn't going to happen and that he was going to be firm on the company work rules and he was going to go by the contract." "Yes," answered Damron, when asked during cross-examination if he also had told Morales about driving between the buildings while on the time clock. Of course, Damron's testimony accurately describes some of the remarks made by Boyle, during the above-described meeting with Respondent-Union's officers. However, neither Morales nor Escobedo testified that those remarks had been related to Morales in the fashion portrayed by Damron.

Escobedo denied flatly, both during direct examination and during cross-examination, that Damron had said anything during the conversation with Morales. But, Morales testified, "Rich Damaron [sic] told me that we have a new plant manager and the rules that are in effect, it's going to be handled in the proper manner. He's going to go through the work rules with us, supposedly with the committee, that he's going by the work rules. Strictly by the work rules, and there's no exceptions to that." Morales reaffirmed that testimony during cross-examination. At that point he was asked if the only thing he had been told by Damron was that Boyle was going to enforce all the rules and had no favorites. "Right," answered Morales, along with the direction "[t]o let everybody know about it."

Aside from the inconsistency between Escobedo and Morales concerning whether or not Damron had said anything at all, during the three men's meeting after the one with Boyle, Morales did not corroborate Damron's above-mentioned affirmative answer to the question about his having also told Morales about driving between buildings and the time clock. Of course, that hardly bars a conclusion that Escobedo had done so, as Damron testified had also occurred during that particular conversation.

As to that, Escobedo agreed that, following the meeting with Boyle, "me and Rich talked to Eddie Morales" and, "I informed him that Jim Boyle said he was going by all the work rules and the contract," with no more favoritism. "Right," agreed Escobedo, he had also told Morales that "Boyle said to pass the word to everybody." Escobedo made no mention of having said anything specific to Morales about work rule 11, about driving between buildings while on the clock, nor about leaving Respondent-Employer's premises. In fact, Morales agreed that, "Not, no, they didn't tell me everything that happened at the meeting [with Boyle] or what was really said, or what rules really came up about that meeting." Instead, testified Morales, all that he had been told by Damron and Escobedo was that, "Everybody was supposed to go by all the rules. Not just one particular, two particular" rules. But, that does not mean that Escobedo had never informed Morales about what Boyle had said about leaving the premises to drive between buildings while on the clock.

Morales described a conversation between himself and Escobedo: "Just me and him. Manny and myself." At one point during the overall sequence of questioning Morales testified that his conversation with Escobedo had occurred "before the meeting they had with the company regarding the rules." Yet, he also testified that during this conversation, Escobedo had "said that the new plant manager is going to enforce all rules, especially driving around the building. That we shouldn't be driving around the building no more." As set forth above, Boyle had said that to Damron, Escobedo and Robinson. But, obviously, Escobedo could not have related Boyle's statement to Morales until after the meeting with Boyle. In fact, Morales's testimony, about Escobedo having said that, occurred during the overall confused sequence of questioning mentioned in footnote 19 above, when counsel and Morales were going back and forth about what had been said before and after the unit officers' meeting with Boyle. Although Escobedo did not corroborate the foregoing account by Morales, it seems quite clear that Boyle had said to pass the word concerning his intention to enforce the work rules and, further, that gambling and leaving the premises to drive between buildings would be prohibited. So far as the record discloses, Escobedo had nothing to gain by concealing the latter remark from Morales.

In any event, even had Boyle's position on driving between buildings not been communicated specifically to Morales, that does not inherently mean that Boyle had never said that such conduct would be prohibited. To the contrary, the testimony about what Boyle had said during the meeting leaves little doubt that Boyle had said that he regarded the prohibition of work rule 11 to encompass leaving the premises to drive between buildings. That testimony tends further to be confirmed

by certain other events, ones occurring after the meeting with Boyle.

Escobedo testified that he had told other employees about what Boyle had said during the meeting. For example, Escobedo testified that he had told George Hollins "you can't drive your car around no more," but Hollins replied that he had not been doing that. George Hollins corroborated Escobedo's testimony. After Escobedo had said, "The guy ain't playing. The guy [is] enforcing the rules," testified George Hollins, Escobedo had mentioned specifically a couple of rules: "He said about being late, being absent," and mentioned gambling. Asked during cross-examination if Escobedo had mentioned that Boyle had said that he intended to crack down on driving back and forth between the annex and main buildings, George Hollins answered, "No. He didn't tell me like that. He was just telling me about absent and being late and stuff like that." That is, testified George Hollins, Escobedo had said only that Boyle was "just going by the rules." To be sure, George Hollins did not describe Escobedo as having said anything about driving between buildings. Still, his testimony does tend to support Escobedo's testimony about having passed the word to employees about what Boyle had said during his meeting with Respondent-Union's officers.

Ricky Hollins, the brother of George Hollins, did corroborate Escobedo's testimony about having told employees that Boyle's position was that employees were prohibited from leaving the premises. According to Ricky Hollins, he had been told by Escobedo, "You all have to start paying close attention to the work rules because Jim is going to start enforcing the work rules," and, by way of "examples," had added, "you have to watch your attendance, the gambling pools and leaving off company property." During cross-examination, Ricky Hollins identified addition "examples" which Escobedo had listed as being prohibited. He also agreed that Escobedo had never said specifically that prohibited by Boyle was "driv[ing] from the Annex building to the other building," nor punching in and driving around and, at shift's end, driving around and punching out. But, Ricky Hollins remained firm during cross-examination that Escobedo had said "leaving company property" was going to be strictly prohibited by Boyle.

All else aside, the above-described testimony by George and Ricky Hollins does provide some corroboration for Escobedo's testimony that he had been relating to employees what Boyle had said. To be sure, neither George nor Ricky Hollins' testimony shows that Escobedo had been precise as to what had been said by Boyle, especially that leaving the premises to drive between buildings constituted a violation of work rule 11. Yet, testimony by Ricky Hollins does show that Escobedo had mentioned "leaving company property" and, as maintenance mechanic Michael Kuliczkowski and Morales pointed out, an employee driving along South Kilbourn, between the main and annex buildings, was obviously leaving Respondent-Employer's "property." Moreover, the fact that such conversations, between Escobedo and at least some employees, had taken place provides a backdrop for Escobedo's account of a particular conversation with Florian.

On "the next day" after the meeting with Boyle, "[b]y the loading dock in the annex building," at "about a quarter to 8:00

in the morning when Chester relieved me,” testified Escobedo, “I told him we can’t drive our cars around no more. Jim Boyle said we can park here, don’t punch in and drive around, bring your car, park it, walk over and punch in.” Escobedo further testified that he had told Florian, “we got to cut out the baseball pool, the 13 run pool.” According to Escobedo, “He just said okay.” Even though Escobedo’s testimony shows that he had not specifically mentioned work rule 11 to Florian, it does show that he have given notice to Florian that Boyle was taking the position that driving between buildings would be prohibited after having punched in and before having punched out.

True, the testimony by Escobedo, concerning what he had said to Florian, portrays a more complete explanation of Boyle’s comments than, as set forth above, Escobedo had conveyed to George and Ricky Hollins, though the latter did testify that Escobedo had generally mentioned “leaving off company property.” Yet, there is testimony by Escobedo from which it can be inferred that a more complete explanation would likely have been provided to Florian: “Chester’s my friend. He was breaking the same rules [sic] I was.” Aside from the less than reliable testimony by Focht set forth in subsection C above, so far as the evidence shows no animosity had developed between Florian and Escobedo between the time that the former had asked the latter to be on his (Florian’s) slate, as mentioned in subsection B above, and late June of 1998. So far as the record shows, relations between them did not sour until later during 1998.

Regardless of what he may or may not have said to other employees about Boyle’s comments, Escobedo remained firm during cross-examination about having made the above-quoted statements to Florian. “I told him the next day by the loading dock next door when he relieved me,” and, “I told Chester after we had the meeting about the work rules with Jim Boyle and Robert Moore, the next day I told Chester,” answered Escobedo to questions put to him during cross-examination. “About a quarter to 8:00 in the morning,” he reasserted, “By the loading dock in the annex building. He was my relief.” Throughout his testimony about this conversation with Florian, Escobedo’s testimony was specific and detailed.

Furthermore, Escobedo’s testimony concerning that conversation was never denied with particularity by Florian. Generally, Florian denied having been made aware of any prohibitions by Boyle against driving between buildings while, in effect, on the clock. But those general denials were provided during the General Counsel’s case-in-chief. Witnesses were called during rebuttal. While he was sitting at counsel table, however, Florian was not one of them. As it turned out, that separate and individual conversation with Escobedo was not the only uncontested notice to Florian about Boyle’s prohibition on leaving Respondent-Employer’s premises, by driving between buildings after punching or clocking in and before punching or clocking out.

Escobedo testified that on Sunday, July 12 there had been a unit meeting—a meeting at which Respondent-Union, and Local 3911 of which it is a part, review with unit employees “problems at the plant, any new changes, any new rules”<sup>20</sup>—at

Steelworkers’ Harlem and 63rd Street facility in Chicago. In addition to himself, testified Escobedo, attending that particular meeting had been Damron, Morales, Recording Secretary Sanquist, then-Staff Representative Langele, Local 3911 President Saunders, and unit employees Florian, Crylen and maintenance mechanic Kuliczkowski. No question that those three unit employees had attended that meeting. Neither Florian nor Crylen denied having attended it. Kuliczkowski testified that he had attended it. The sign-in sheet for the meeting bears the uncontested signatures of Florian, Crylen and Kuliczkowski. Two exchanges of significance occurred during the meeting.

First, Morales chastised Florian about the June 22 doctors excuse notice put out by Boyle, as mentioned near the end of subsection E above. As pointed out in subsection C above, Focht acknowledged that he could not “say that [Florian] worked most of the [Saturday] time he was scheduled” to work and, moreover, that Florian had submitted doctors’ notes at least “eight times” to excuse having to do so. In fact, as also set forth in subsection C above, perceived favoritism toward Florian had led Respondent-Union, as bargaining agent for all unit employees, to protest excusing Florian from scheduled Saturday work, while refusing to excuse other employees. Thus, while Florian’s excuses may not actually have been the circumstance which had led Boyle to post the June 22 notice—and Boyle never claimed that it had been—from the outsider’s perspective of Morales, it was not illogical to assume that it had been Florian’s medical excuses which had precipitated formulation and posting of that notice. After all, there is no evidence that any other unit employee had submitted as many medical excuses, to be relieved of scheduled work, as had Florian.

It cannot be somehow concluded that, in chastising Florian about the medical excuses on July 12, Morales was showing some sort of animus toward Florian, for having attempted to run for unit chairperson during 1997 and for making statements about trying to run in 2000. The substance of Boyle’s June 22 notice affected all unit employees, not only Florian. It effectively put an end to a practice which seemingly had been operating to the benefit of all unit employees, even if they should not have been accorded nonchargeable absences by presentation of medical excuses. Against that background, it hardly displays statutory animus for a bargaining agent’s officer to upbraid an employee whose conduct seemingly had led an employer to announce that a procedure beneficial to all unit employees would no longer be tolerated. Interestingly, so far as the evidence discloses, during the July 12 meeting Florian never challenged the assertion, by Morales, that it had been Florian’s conduct which had led Boyle to promulgate and post his June 22 notice.

Second, according to Escobedo, Damron had told the group on July 12 “we have a new boss, he’s going to go by all the work rules, he’s going to go by the contract, that he’s not going to do like Jack did and play favoritism, everybody’s going to be treated the same, and he’s going by the rules.” To that, Escobedo testified that he added either “that I asked about these certain work rules and the man [Boyle] said that those were dischargeable offenses, okay, as far as the gambling and the driving around,” or more exactly, “we can’t do no more 13 run pools and we can’t drive our cars after clocking in around the

<sup>20</sup> Not to be confused with Local 3911’s monthly meeting for all members of that local, as described in subsection C above.

building.” Not necessarily inconsistent with that testimony, Escobedo had testified during an arbitration proceeding, “I told him [Florian] that no more driving around the building. The management is going to go by work rule 11, they don’t want no one to leave the premises.”<sup>21</sup>

As had Escobedo, Morales testified that Damron had opened the meeting by stating “that the work rules that are in effect are going to be, they’re going to enforce the work rules. The new plant manager is going to enforce the work rules for everyone. And there are no exceptions to the rules,” or, “That Mr. Jim Boyle was going strictly on work rules that they had posted. And that everybody should go by it and, you know, that’s about it.” Then, testified Morales, “I spoke to him [Florian] about the doctor’s note,” because, “Mr. Chester Florian asked about the doctor’s note.” According to Morales, it had been after that exchange that Escobedo had raised the rules against gambling and leaving the premises.

As quoted above, Escobedo testified at one point, in connection with what he had said to Florian, that he had mentioned specifically “work rule 11,” but for the most part testified that he had said “driving around” or “drive our cars after clocking in around the building.” However, Morales testified repeatedly that Escobedo had mentioned work rule 11 at the July 12 unit meeting. For example, during direct examination he testified, “Then Manny Escobito [sic] also mentioned the gambling and Work Rule 11,” and that Escobedo “said that there will no longer be people driving around the building, because that was a violation of Work Rule 11. And the gambling shouldn’t, it’s also [not] going to take place, too.” During cross-examination, Morales testified that Escobedo had “just said that he was, also, Mr. Jim Boyle was also following rules on Work Rule 11 and gambling.” As cross-examination progressed, however, Morales began to back away from his above-quoted testimony that Escobedo had mentioned specifically work rule 11 during the July 12 unit meeting.

“Yes, he answered, when asked if Escobedo had mentioned “Gambling and Rule 11,” and, “he said gambling and Work Rule 11.” Yet then Morales added to that latter answer, “Driving off the company premises.” In fact, during an arbitration conducted on October 27, 1999, Morales had been asked what Escobedo had said to Florian and had answered, “He said Jim Boyle was going to enforce all rules, especially driving around the plant,” though he later had answered affirmatively when asked, “But, you specifically recall Manny Escobito [sic] telling Chester about Rule 11 at that time?” During recross examination in this proceeding, however, Morales was asked if

Escobedo had said anything during the July 12 meeting about “punching in or punching out”; Morales responded to that question, “He didn’t say that. He said about driving around.” Asked, in light of that answer, to describe “what exactly” Escobedo had said, Morales responded, “He said that driving around the, driving off the company premises wasn’t going to be allowed anymore,” as well as that gambling would no longer be allowed.

Well then, Morales was next asked, Escobedo “didn’t say it would be against the rule for an employee to drive either back or forth from the annex to the main building to punch in or punch out, correct?” Morales answered, “That was part of driving off the company premises.” “Yes,” answered Morales, when asked if that was “what you understood [Escobedo] to mean”; “That was basically what he was getting at, yes.” Those are hardly illogical answers. It seemed clear by the end of his testimony that Morales—like Escobedo, for the most part—was testifying that Escobedo had not mentioned specifically work rule 11, but had mentioned conduct which reasonably should have been understood to be encompassed by that rule.

In fact, merely saying that “driving off the company premises wasn’t going to be allowed anymore,” without specific mention of the particular work rule that prohibited such conduct, is akin to what all witnesses agreed that Escobedo had said on July 12 with reference to gambling. As to the latter, Escobedo made no specific mention of work rule 4; he said only that Boyle would no longer tolerate gambling or, more specifically, perhaps, football or baseball or the 13 run pools. Apparently, everyone present had no problem understanding the work rule to which Escobedo was referring. Similarly, the fact that Escobedo had not specifically mentioned work rule 11 does not mean that employees hearing what he said would not reasonably have understood the specific type of conduct to which Escobedo was referring and, further, that it was a prohibition covered by work rule 11, the rule which dealt specifically with leaving Respondent-Employer’s premises.

That is essentially what Damron described Escobedo as having said. “I started off to say that we got a new Plant Manager and he’s going to be firm with the company work rules and go by the contract,” after which, Damron testified, Escobedo later “said that there would be no driving over in [sic] the Annex building, punching in and driving over and no driving over and punching out.” Still, there is some doubt that Damron was being fully candid in testifying that Escobedo had said all of those things.

As set forth above, Morales denied that Escobedo had said “punching in or punching out,” and Escobedo testified, for the most part, that he had said only “driving around,” or “driving around the building.” The extra remarks which he attributed to Escobedo seem to have been Damron’s effort to tailor his testimony somewhat to buttress Respondent-Union’s overall position that Florian had been put on notice that he could not clock in and drive to the annex, nor make the reverse trip at shift’s end. Nonetheless, Damron’s account of Escobedo having said “no driving over [to] the Annex building” is similar to Escobedo’s “the driving around,” and “no more driving around the building” testimony, as well as to the “no longer be people

<sup>21</sup> During the arbitration, Escobedo had also testified, “I told Chester there was no more doctor excuses,” but during the instant proceeding Escobedo testified that, “Eddie Morales talked to him about the doctors notes.” The latter appears to be the more accurate account, based upon the other evidence presented in this proceeding. In any event, regardless of who specifically had initially brought up the subject of doctors’ notes—Escobedo or Morales—it seems undisputed that it had been Morales, not Escobedo, who had chastised Florian during the July 12 unit meeting. In the final analysis, the exchange about doctors’ notes is collateral to the crucial question of what had been said during that meeting about leaving Respondent-Employer’s premises while on the clock, by driving off the premises after clocking in and before clocking out.

driving around the building,” “Driving off the company premises,” “driving around,” and “driving off the company premises” testimony by Morales.

Respondent-Union’s officers were not the only witnesses who testified about what had been said during the July 12 unit meeting. As set forth above, one of the three employees who attended that meeting had been maintenance mechanic Kuliczowski. During direct examination he testified that, with respect to leaving the premises by driving on South Kilbourn between buildings, Escobedo had said, “management is going to enforce the work rules. One of which was you’re not supposed to leave the Company premises when you’re punching in or out by driving to the annex building on the streets of Chicago.” Essentially, he repeated that testimony when initially cross-examined about what Escobedo had said on July 12: “the . . . new manager at Precoat Metals is going to enforce the work rules. And . . . one of the work rules that he’s going to enforce is the driving, the leaving of the premises by car onto the City streets and coming to the main plant to punch out or in.”

As cross-examination progressed, however, Kuliczowski allowed that Escobedo might not have said “punching in and out,” and, during recross examination, he acknowledged that Escobedo might have said only leaving the premises, without specific mention of “City streets.” Even so, during recross examination Kuliczowski reiterated the significant core of Escobedo’s verbal notice of Boyle’s prohibition on driving off the premises while on the clock: “Management at the plant is going to enforce the work rules with disciplinary action. And one of the rules is leaving the plant premises. Or punching in or leaving the premises. Driving around with your cars.”

To be sure, Kuliczowski did retract the “punching in and out” and “City streets” portions of his initial descriptions of what Escobedo had said. To the extent that those retractions might be argued as adverse reflections on the reliability of his testimony, however, it hardly seems likely that Kuliczowski would have made retractions had he been attempting to fabricate testimony that would injure Florian’s position. So far as the record shows, there was no prior statement—affidavit, deposition or arbitration testimony—that compelled him to retract those portions of his testimony. If he had been attempted to advance false testimony against Florian, there seemingly was no reason for him not to have simply stuck with his initial accounts throughout examination. The fact that Kuliczowski did not do so—that he made a seeming effort to reflect upon what had been said and, as examination progressed, what may not have been said—appears to reflect his honest effort to try to remember and recreate what had been said during the July 12 meeting.

Kuliczowski testified that, for him, “punching in and out” was obviously what Escobedo’s statements “pertained to.” In fact, that seems to have been a logical inference for Kuliczowski to draw that day. The only change in what had become normal procedure for employees, made by Boyle’s statements, as related by Escobedo on July 12, had to pertain to clocking in and then driving on South Kilbourn to the annex and the reverse trip. There is no evidence that Respondent-Employer’s Chicago employees had been regularly leaving the premises for any other purpose(s). Driving from those prem-

ises for lunches or other personal business was understood on July 12 to be already covered by work rule 11 and forbidden by its terms. Accordingly, the only reason for Escobedo to be announcing a change in driving off the premises during work time had to mean that he was talking about punching in and driving to the annex, and driving from the annex to the main building to punch out at shifts’ end. A reasonable person should have understood that, as had Kuliczowski, even though Escobedo did not mention specifically punching in and out, nor work rule 11.

Similarly, even if Escobedo had not said specifically “City streets,” that does not mean that Kuliczowski had been lying when initially including that phrase in his initial accounts of what Escobedo had said. “The only way to leave the premises is to go on the streets,” testified Kuliczowski. Well, that certainly is the fact. As described in subsection A above, Respondent-Employer’s Chicago facility occupies a city block bounded by “city streets,” most particularly by South Kilbourn Street on the facility’s east side. So, Kuliczowski’s inference, from what Escobedo had said on July 12, is a quite correct one. If one left the premises, one had to go onto a city street. Boyle said that employees should not leave the premises during work time. Employees should not be driving on city streets during work time. And, as pointed out in the immediately preceding paragraph, the only reason employees had been doing that, as of July 12, had been to drive on South Kilbourn Street after punching or clocking in at the beginnings of their shifts and, in addition, to drive on South Kilbourn back to the main building to punch out at shifts’ end. Indeed, Florian never claimed specifically that he had not so understood that that was what Escobedo had meant by the July 12 recitation of what Boyle had said.

In fact, Florian never disputed any of the foregoing testimony about the July 12 meeting. He never denied having been at that unit meeting. He never denied that, at that meeting, he and others in attendance had been told that Boyle would be more strictly enforcing work rules. He never denied having been informed, specifically, that gambling would no longer be tolerated. He never denied having been informed, specifically, that driving off the premises during work time would no longer be tolerated. For that matter, though called as a witness during the General Counsel’s case-in-chief, Crylen—a witness clearly sympathetic to Florian’s situation—was never called as a rebuttal witness. There is no evidence, nor was there a representation, that Crylen was not available to testify during rebuttal. Consequently, Crylen never disputed having been present during the July 12 unit meeting, nor that the foregoing statements had been made during that meeting.

There are a number of reasons why a witness might not be called during rebuttal: realization that the other side’s evidence presented is truthful and cannot be truthfully rebutted, concern that a potentially rebutting witness may testify untruthfully, concern that such a witness’s untruthfulness might be revealed through cross-examination during rebuttal, a genuine belief that the other side has failed to meet its burden and rebuttal evidence is unnecessary. At the decision-making stage, however, there is no room for speculation concerning why evidence has not been rebutted. The only question is whether or not evi-

dence has been rebutted. As to that determination, “a litigant’s failure to buttress its position . . . is always indulged in at the litigant’s own risk.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 897 (1990).

Here, at best Florian had denied only generally having been aware that driving off the premises, to go between buildings while on the clock, would no longer be tolerated by new Plant Manager Boyle. Florian did not deny with specificity having heard the statements made by Escobedo during the July 12 unit meeting. Nor, for that matter, did Florian deny with specificity the above-described statements which Escobedo testified that he had made to Florian, about driving off the premises, before that July 12 meeting. The testimony concerning those statements to Florian was specific and detailed. I conclude that credible evidence does show that Florian had been put on notice by Respondent-Union that driving between buildings, after having clocked in and before having clocked out, would no longer be tolerated by Respondent-Employer. As will be seen in the immediately following subsection, that is not the only evidence of such notice having been provided to Florian before August 4.

#### G. Suspension of Florian on August 4

As stated in subsection A above, on August 4 Florian was suspended for having violated work rule 11. More specifically, he was suspended for having driven on South Kilbourn from the annex to the main building on August 3 to punch out at the end of his work shift. As set forth in subsection F above, Boyle had told Respondent-Union’s officers that he would no longer tolerate employees doing that. So, the crucial question at this point is not what had been occurring prior to Boyle’s statements concerning such conduct. As pointed out in subsection F above, Boyle had become the new plant manager for the Chicago facility. Nothing in the Act prohibited him from prohibiting practices and procedures that had previously been tolerated. *Arlington Hotel Co.*, 278 NLRB 26 (1986); *Frierson Building Supply Co.*, 328 NLRB 1023 (1999). See also, *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 fn. 3 (7th Cir. 1997). As a result, no weight can be accorded to the testimony regarding what employees had been doing prior to Boyle’s meeting with Damron, Escobedo and Robinson, and prior to the posting of the revised work rules dated July 13.

Nevertheless, testimony was presented in an effort to show that Respondent-Employer had continued tolerating employees driving on South Kilbourn between buildings, after having punched in and before having punched out. Based upon that evidence, it is argued that Respondent-Employer had acted inconsistently when it suspended Florian on August 4 for doing something that, it is urged, the evidence shows that Respondent-Employer had continued to tolerate.

Florian testified that he had continued doing so, as had “the shipper . . . that I worked with,” Roy Hurd. Florian further testified that other employees, who worked in the annex, had continued driving between buildings, after having clocked in and to clock out. He identified White, Crylen, Escobedo, Archie Oliver, Ralph Nelson, and George and Ricky Hollins, as well as Hurd. White agreed that, whenever he had worked in the annex, he had stopped at the main building, punched in on

the time clock, and gotten back into his car and driven on South Kilbourn to the annex. After work, testified White, he had reversed that trip. As had Florian, White identified Nelson, Hurd, Oliver, Escobedo and George Hollins as other employees whom he had seen punching in at the main building and driving to work in the annex, as well as driving back to the main building to punch out at shifts’ end.

Interestingly, called in support of the complaint’s allegations, Crylen testified that he (Crylen) had not worked in the annex since early 1996 and he never testified that he had driven between buildings during July of 1998, contrary to Florian’s above-mentioned identification of Crylen as one employee who had continued to drive between buildings while on the clock. Yet, Crylen did testify that he had seen Florian, Oliver, Nelson, Escobedo, Hurd and John Dresden doing so.

Some of that testimony by Florian, White and Crylen is disputed. Escobedo denied flatly that he had driven between buildings while on the clock, after Boyle had said that such conduct would be prohibited. George Hollins denied that he had driven between buildings while on the clock on any day during 1998. Furthermore, George Hollins denied that Oliver had done so: “I never seen him drive around. We always park our cars and walk over.” Ricky Hollins, who at one time had ridden to and from work with his brother George, testified that he had stopped driving between buildings “[a]fter they [had been] told Jim was going to enforce the work rules.”

Conversely, however, third-shift shipping clerk Nelson testified that he had continued driving between buildings, after punching in and to punch out, throughout the summer, at least until Florian’s suspension. Day shift shipping clerk Hurd gave testimony that tended to straddle both sides of the issue, but in the end seemed to show that he had continued doing that until Florian’s suspension. First, Hurd testified that he had stopped driving between buildings after hearing that the work rules were going to be enforced. Then he testified that Florian was not still employed when he (Hurd) had ceased driving between buildings. That is, he had gone on vacation “either the end of July or first of August,” and “when I came back from vacation Chester was going. And that’s when I quit parking my car in the parking lot.” But, then, he reiterated his testimony that he had begun walking between buildings, to punch in and punch out, even before Florian had been suspended. Even later, however, Hurd testified, “When I went on vacation they said they were going to enforce their rules. So when I came back I didn’t drive around no more.” In fact, discussed below are certain deliveries made in his car by Hurd to the main building. So, it seems fairly clear that he had been driving between buildings after July 13.

Now, if Respondent-Employer had been tolerating such continued conduct after July 13, but then had suspended Florian for engaging in conduct which was being tolerated, at least a facial inconsistency arises from those two facts. In proper circumstances disparity of treatment can be one indicium, perhaps a determinative one, of unlawful motivation. *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998). See also, *Yesterday’s Children, Inc. v. NLRB*, 115 F.3d 36, 48–49 (1st Cir. 1997). So, had Florian and other employees had been engaging in the same conduct—driving on South Kilbourn between buildings

after punching in and before punching out—but only Florian was disciplined for having done so, that could be an indication “that this was not the actual reason [Florian] was [suspended and] fired.” *EEOC v. HBE Corp.*, 135 F.3d 543, 553 (8th Cir. 1998).

Of course, that does not necessarily mean that the actual reason had been rooted in activity by Florian which is protected by the Act. “Nevertheless, an inference of union animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue (i.e., union activity).” (Citation omitted.) *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996). The fact is that there has not been a credible showing here that any disparate treatment of Florian had been rooted in even the least concern by Respondent-Employer about Florian’s internal union activities (having tried or intending to try to run for unit office), nor that Respondent-Employer was concerned in the least by currying favor with any supposed desire by Respondent-Union, particularly Damron, to have Florian fired because of that internal union activity. Indeed, there is neither credible nor objective evidence that any officer of Respondent-Union, including Damron, had ever made any effort to have Florian discharged by Respondent-Employer. At this point, however, discussion is concerned with certain points more directly related to driving between buildings between July 13 and August 3.

First, as described in subsection E above, there is no question that Boyle came to the Chicago facility to try clearing up, as Drufer and White acknowledged, the unsatisfactory situation which existed there. But, the unsatisfactory situation was not that employees had been clocking in and then driving on South Kilbourn to the annex. Nor was it that employees had been driving on South Kilbourn from the annex to punch out on the main building’s timeclock.

As also described in subsection E above, the problems at Chicago existed on a much broader front. Nonobservance of work rules may have contributed to those overall problems. So far as the record reveals, however, nonobservance of work rules was not viewed by Boyle as even a significant contributor to the problems which needed correction. Certainly, driving between buildings while on the clock has not been shown to have been regarded as contributing, even in the least, to the unsatisfactory situation, as Boyle had viewed it. In fact, there is no evidence whatsoever that, when he arrived at the Chicago facility, Boyle had even been aware that employees there were driving on South Kilbourn between buildings while on the clock. To the contrary, so far as the evidence discloses, Boyle had not become aware that employees might be doing that until Escobedo raised a question about such conduct, during the meeting described in subsection F above.

Second, Boyle included strict enforcement of work rules as one feature of his philosophy for correcting poorly performing operations. Yet, as described in subsection E above, it was hardly the only aspect of his philosophy. Consistent with his past approach in poorly-performing facilities, Boyle set out to put in place a number of corrective measures at the Chicago facility. Only one of those measures involved the work rules there. And given what was said the immediately preceding

paragraph, driving on South Kilbourn while on the clock had not initially been a specific target of those corrective measures.

Those two points provide a backdrop for the third point: even after Escobedo questioned whether employees would be allowed to continue driving on South Kilbourn, after clocking in and before clocking out, and even after Boyle answered negatively to Escobedo’s question, there is no evidence that Boyle elevated concern about such conduct to the pinnacle of his efforts to correct operations at Respondent-Employer’s Chicago facility. Indeed, as an objective matter, while Boyle identified those brief driving trips as posing safety, liability and production problems, there is no basis for concluding that preventing continuation of such brief driving trips would somehow improve the Chicago facility’s performance. At best, discontinuance of those trips would be but one feature of overall stricter enforcement of work rules, but not one that had some sort of independent significance for improving Chicago operations—one that would naturally have led Boyle and Moore to set aside all other corrective efforts to run daily to the timeclock, and to direct other supervisors to run daily to the timeclock, to check on whether employees were driving on South Kilbourn after clocking in and before clocking out.

That latter point—that, as an objective matter, driving between buildings while on the clock was not seemingly a significant problem for Boyle, as of the time that he met with Respondent-Union’s officials—tends to be reinforced by the small number of employees—“[s]hipping clerk, a loader and . . . also . . . a paint room attendant over there at times,” testified Focht—who worked in the annex. That is, as an objective matter, those employees were so few in number that their conduct, independent of the conduct of other Chicago employees, was unlikely to be viewed by Boyle as contributing significantly to the problems at Chicago in need of correction. In fact, even after Escobedo had focused on that driving for Boyle, there is no evidence that Boyle or Moore had viewed such conduct as so significant that, to improve Chicago performance, immediate efforts had to be made to put a stop to it. In fact, Mahoney testified that it had not been until after Florian was suspended or discharged that “it was explained to me that [Work Rule 11] was intended on being you cannot get in your car at all while you’re on the clock.”

Of course Boyle and Moore might be faulted for not having made a more affirmative effort to notify employees that they no longer could drive on South Kilbourn between buildings after clocking in and before clocking out. However, the Act is not intended as some sort of vehicle for applying best-management techniques. Boyle had given an answer to the question of an officer of Respondent-Union, the entity with which he was supposed to be dealing under the Act. Boyle had told Respondent-Union’s officers to spread the word to employees about what he had said to them in the meeting. Boyle had allowed time for those officers to do so, before beginning to strictly enforce new work rules on July 13. Against that background, it was hardly illogical for him to conclude that his position, on driving on South Kilbourn between buildings while on the clock, would be communicated to employees, along with other statements which he had made during the meeting—as, it is uncontested, did ensue, both during an individual conversation

between Escobedo and Florian and, as well, during a unit meeting on July 12 that Florian had attended.

Fourth, although some employees, including Florian, did continue driving on South Kilbourn between buildings while on the clock, there is only minimal evidence that Respondent-Employer's supervisors might have seen them doing so. Florian testified that he had done it with Boyle "standing there many a times," and, also, "[i]n front of" Mr. Mahoney. Yet, Florian was unable to specify the days when Boyle had assertedly seen him doing that: "Specific days, no. But I would say many times in July." That testimony hardly establishes that Boyle had actually noticed seen Florian making such brief driving trips after July 13. A more interesting aspect of Florian's testimony is his omission of Moore as having seen him doing that. As described below, it is uncontested that Moore did see Florian making one of his trips, from the annex to the main building at shift's end, and, further, had told Florian to stop doing that because such conduct violated work rules.

Florian was not the lone witness to testify about supervisory observance of parking at the main building, walking in to punch the timeclock, returning to the car, and driving to Annex, nor the only witness to testify about supervisory observance of return trips at shifts' end. Nelson testified that, "during the summer of 1998," he had been observed driving between buildings to clock in and out, by "Bob Buntin, Jack Focht, Dan Mahoney, Mr. Boyle, Robert Moore." Asked how many times he had been observed by Boyle during "June and July," Nelson answered, "Oh, I don't know. Five, six times." With regard to Moore, Nelson testified that, "in June or July of 1998," there had been, "I don't know. Maybe three or four times," when Moore had been standing with Boyle when he (Nelson) drove up to the main building and went in to punch out.

Now, Nelson was a rebuttal witness, meaning that he appeared after Respondents' cases-in-chief and, consequently, after evidence had been received about Boyle's meeting with Damron, Escobedo and Robinson, and about the events which led to posting of the revised work rules on July 13. The significance of that date should have been obvious by the time rebuttal commenced. Against that background, general testimony about "the summer of 1998" and "June or July of 1998" obviously was not sufficiently specific to show that Boyle and/or Moore had knowledge after July 13 that Nelson was continuing to drive on South Kilbourn from the annex to the main building to punch out.

A similar problem arose when Crylen attempted to supply evidence of supervisory knowledge of continued driving on South Kilbourn between buildings while on the clock. He testified that he had observed employees doing that between Boyle and Moore's arrival in Chicago and when he (Crylen) left employment with Respondent-Employer on approximately August 1. Crylen further testified that he thought management knew employees were making those brief drives "[b]ecause they saw them [the driving employees] from the open dock doors." According to Crylen, he knew of those observations because, "[s]ometimes I was standing on the dock, I saw them." Asked for the identities of those management people, however, Crylen identified only "George Hall." As to Hall, Crylen testified, "Well, I happen to be standing there talking to him at the time."

Which employee was it who supposedly had driven up on that occasion? "I don't remember," testified Crylen. When did that occur? "No, I don't remember a date," Crylen testified. In short, the incident could have occurred after July 13, but it could also plausibly have occurred before that date.

In an effort to demonstrate Respondent-Employer's knowledge of continued driving on the clock, a somewhat different approach was taken when Phillips appeared as a witness. He testified that, after starting work, he would move his car to a better parking location, once the outgoing shift had left: "I would just run out there and get my car moved real quick," during the summer of 1998, through July. "Yes, yes they did," management personnel, see him doing that, testified Phillips. Asked which management persons had purportedly seen him, Phillips seemed to be struggling to come up with some names. "Of my personal knowledge, yeah, there are people that I've seen while I was moving my car, so, you know, I'm sure that they saw me," he began. Only after having gone through that did Phillips list Focht and foremen Buntin, Wayne Joseph Dedina, Walter Pulkowski, Sr., Hall and Mahoney.

Now, none of those individuals—some of whom appeared as witnesses, in Mahoney's case for the General Counsel—contradicted Phillips. Still, the general unreliability of his testimony, as reviewed in preceding subsections, and the quoted prefatory statements before he identified them—appearing to have been made to buy himself some time to think of some names to supply—leave in doubt the reliability of Phillips's testimony about which supervisors had purportedly seen him moving his car.

Furthermore, review of all Phillips's testimony about moving his car leads to consideration of a fifth factor in connection with the asserted inconsistent treatment of Florian. As he was describing how he went about moving his car, Phillips explained "there were times even that I, you know, I said [to a supervisory person who had been present], hey, I'm going to move my car real quick. I'll be right back. You know, just let them know what I was doing when I was running outside." Now, work rule 11 prohibits "[I]eaving company premises without permission of supervisor," and, obviously, telling a supervisor that he intended to leave the premises, and not hearing an objection, would naturally be construed by an employee as conferring tacit permission. After all, if a supervisor did not intend to allow Phillips to move his car, that supervisor would obviously have said as much to Phillips.

There also were situations when any observing supervisor would naturally conclude that an employee had received permission, from someone else, to be driving while on the clock. Third-shift shipping clerk Nelson testified that, during the summer of 1998, he had delivered "bill[s] of lading and bills for things that came in" from the annex to "five different places" in the main building's office: "I'd deliver them around to the different women and then come out of the office and wait 'til 8:00 o'clock and punch out and go home." Day-shift shipping clerk Hurd testified that he had seen Nelson "drive around bringing the rest of the paperwork to the front office." Moreover, Hurd testified that whenever someone asked for the bills of lading that came up on the annex printer during his day shift, he would deliver them to the main building's office by driving those bills over at shift's end. Apparently, in addition, sales

over at shift's end. Apparently, in addition, sales department personnel would occasionally ask Hurd to bring boxes of paper or other materials, stored in the annex, to the main building. On those occasions, as he and Nelson did when delivering bills to the main office, Hurd would put the boxes of paper and other materials in his vehicle and drive them over to the main building, park by the docks or bays, and walk those items to where they were wanted, after which he walked to the timeclock, punched out, returned to his vehicle and drove away.

The important thing about Nelson's and Hurd's testimony, described in the immediately preceding paragraph, is that when they were making deliveries of items to the main building, they were not simply driving over from the annex to the main building to punch or clock out. They were performing duties—making deliveries to main building personnel—that resulted in their shifts ending or concluding in the main building on those occasions. At that point, their situations did not differ from those of main building employees. When their shifts ended, they walked over to the timeclock, punched out, got into their vehicles and drove away. On such occasions, Nelson and Hurd had not come to the main building for no reason other than to punch out.

As pointed out above, leaving the premises during "scheduled working hours" is prohibited by work rule 11 only if an employee does that "without permission of supervisor." It seems likely that any supervisor—most specifically, Boyle and Moore—seeing Nelson or Hurd parking and coming into the building with bills, boxes of paper or other materials, would naturally assume that Nelson and Hurd had driven to the main building with supervisory permission to do so—so that they could make their deliveries there. As to other employees who may have been observed driving from the main building after having punched in, or driving to the main building before punching out, there is really no particularized evidence that either Boyle or Moore had actually seen any of them except Florian, as described below, after July 13. Even had Boyle or Moore observed them, it would not have been so illogical for Boyle and Moore to conclude that those employees either had duties to perform in the main building or had their supervisors' permission to drive to the main building.

As to the latter point, Focht pointed out with respect to Florian's driving between buildings, "If he was reporting to Bob [Buntin] and he was driving over, I take it that Bob gave him permission to do it. He just wouldn't do it on his own." "Yes, it is" an assumption on his part, Focht agreed. Yet, if it was so logical for Focht to have made such an assumption, as he claimed that it was, then there is no basis in the record for concluding that Boyle and Moore would not have made a like assumption when one or both of them observed an employee pulling in a vehicle away from or up to the main building. That is, based on an assumption that those employees "wouldn't do it on [their] own," it would not have been illogical for Boyle and/or Moore to assume, as had Focht, that those employees had received their supervisors' permission to drive between the buildings, possibly because of some business-related reason such as led Nelson and Hurd to drive there to make deliveries from the annex. That is particularly logical in view of the fact, as pointed out above, that driving between buildings has not

been shown to have been regarded by Boyle as a particular problem necessitating correction at Chicago—a problem that needed to be eliminated to improve operations there.

In sum, although there is evidence that Boyle had said that he regarded driving on South Kilbourn Street between buildings while on the clock to be prohibited by work rule 11, and while there is evidence that at least some employees may thereafter have continued engaging in such conduct, the evidence fails to show employer-toleration of such continued conduct after July 13. To the extent that there is testimony about supervisors observing employees clocking in and driving from the main building, and/or driving up to the main building and clocking out, such testimony was not so particularized that it can be fairly concluded that the incidents described had occurred after July 13. Beyond that, some of that testimony shows that employees, such as Nelson and Hurd, had not been driving to the main building for no reason other than to punch out at shift's end. They were making deliveries to offices in the main building. To the extent that one or more supervisors may have seen those employees then punch or clock out, as an objective matter that would appear indistinguishable from what was being done by other employees who completed their shifts performing operations support duties in the main building. Punching out there was no more than an incidental aspect of whatever work those employees were expected to perform in the main building, whether that work entailed duties taking four hours or four minutes to complete.

To be sure, Boyle had announced that he intended to strictly enforce work rules and Escobedo's question at least suggested to Boyle that some employees were driving on South Kilbourn between buildings after having punched in and before having punched out. Even so, having told Respondent-Union's officers that work rule 11 prohibited such conduct and having told those officers to spread the word of what had been said to them during their meeting with Boyle and Moore, the evidence discloses no particular reason for Respondent-Employer to start watching to ascertain if employees were continuing to drive between buildings while on the clock. It hardly was illogical for Boyle and Moore to have indulged the same assumption as Focht acknowledged having indulged: that employees would drive between buildings while on the clock only if they had "permission to do it," and that employees "wouldn't do it on [their] own." Certainly there is no evidence of any specific reason why it would have been illogical for Boyle to reach a contrary conclusion.

So far as the evidence discloses, Boyle had not come to Chicago with any knowledge that driving on South Kilbourn between buildings while on the clock had contributed, in the slightest degree, to poor performance experienced at the facility located there. Nor can it be said that Escobedo's question would have naturally alerted Boyle that some sort of special effort would have to be made to begin watching the relatively few employees involved, to ensure that they would no longer drive between buildings while on the clock. There is simply no basis in the record for a conclusion other than that, viewed from a July perspective, Respondent-Employer would foresee need to begin policing employee-conduct at shift-beginnings and shift-ends.

All else aside, however, in the final analysis there is unrefuted specific evidence of at least one occasion when Moore had taken action to warn an employee—Florian—that driving from the annex to the main building to clock out was prohibited. Moore testified that, in “mid-July,” he had been “standing in the—by the time clock area by the steps coming out of the office” when he “witnessed Mr. Florian driving around to the front of the building.” According to Moore, “I had asked Mr. Florian what he was doing as he was walking up to the stairs where he had come from and he told me . . . that he was driving around from the Annex building.” Moore testified that he said, “Chester, this is to stop now. Don’t do it again and you’re violating a work rule.” In response, testified Moore, Florian “told me that he’d been doing it before and that he’s going to have to talk to Jack Focht about it,” or “he was going to check with Jack Focht.” “I told him he didn’t work for Jack Focht[,] he worked for me,” Moore testified, and, “That’s how it ended.”

By the time that Moore testified, during Respondent-Employer’s case-in-chief, Florian had already testified during the General Counsel’s case-in-chief. At that earlier point, during direct examination Florian testified that “never” had anyone from Respondent-Employer, at anytime, told him that there was a problem with driving from the annex to the main building to punch out. During cross-examination he further testified, “I never seen nothing wrong with or a posting of a note or somebody handing me something telling me, no don’t do that. Or here’s a warning. Don’t do this no more. We don’t want that. Never said.” However, as already pointed out, Florian was never called as a rebuttal witness, though he clearly was available to testify at that stage of this proceeding.

Moore’s above-quoted description of his remarks to Florian, and of Florian’s responses, was specific and detailed. As set forth in subsection A above, a general or “blanket” denial does not suffice, as a matter of law, to refute specific and detailed accounts, such as that advanced by Moore. There seemed no reason to conclude that, as he was testifying about that mid-July exchange with Florian, Moore was not being candid. His account tends to be reinforced by the absence of any specific denials of it. I credit Moore’s uncontroverted description of his mid-July exchange with Florian. Given that conclusion, two other points should be focused.

First, Moore specifically told Florian “you’re violating a work rule.” So far as the evidence shows, Florian never challenged that statement nor, even, bothered to inquire to which work rule Moore was referring. As already pointed out, work rule 11 was the only rule that seemingly could have covered “driving around from the Annex building,” the conduct which Florian acknowledged that he was doing, when asked “what he was doing” by Moore. In fact, it is of some significance that, rather than telling Moore that he was punching or clocking out, Florian had responded to Moore’s question by saying “driving around from the Annex building.” Obviously, Florian understood at that time the conduct to which Moore was making reference, particularly as he had only recently been told twice by Escobedo that such conduct would no longer be tolerated by Respondent-Employer.

Second, when told by Moore not to “do it again and you’re violating a work rule,” Florian responded that “he’d been doing

it before and that he’s going to talk to Jack Focht about it.” Such an answer hardly portrays a willingness to discontinue the conduct of driving between buildings while on the clock. Surely Florian must have been aware, from the May postings described in subsection D above, that Focht no longer supervised Chicago employees. Even had he not known Moore’s title by mid-July, surely Florian must have understood that he was being supervised by Moore. It simply is inexplicable that an employee would tell a current supervisor that he (the employee) intended to talk to a former supervisor about a work direction. On its face, his answer to Moore came close to being a refusal to abide by Moore’s direction unless Focht confirmed that direction.

Throughout this proceeding there seemed to be a tacit underlying attitude by employee-witnesses and by some current and former managers that, having tolerated driving on South Kilbourn between buildings after punching in and before punching out, Respondent-Employer was obliged to continue allowing employees to engage in that conduct and, concomitantly, that Boyle was being overly-picky in disallowing employees to continue doing what they always had been doing. Such an attitude is simply not countenanced under the Act. For, so long as not done for discriminatory purposes, there is “room in the law for a right of an employer somewhere, sometime, at some stage, to free itself of continuing,” *NLRB v. Eldorado Mfg. Co.*, 660 F.2d 1207, 1214 (7th Cir. 1981), practices even though previously tolerated. “An employer’s decision to enforce its rule more stringently in the future is within its discretion and does not suggest discriminatory treatment.” (Citation omitted.) *Camvac International*, 288 NLRB 816, 821 (1988). In short, Florian’s “had been doing it before” retort to Moore does not constitute some sort of justification for continuing conduct which had previously been tolerated, but which Florian was being told would no longer be permitted.

Furthermore, there is no evidence concerning what was said between Focht and Florian, after Moore had spoken to the latter. It is difficult to escape a conclusion that Focht told Florian to ignore what Moore had said. For, Florian admitted that he had continued driving on South Kilbourn from the main building to the annex after having punched in and, also, continued driving on South Kilbourn from the annex to the main building to punch out at shifts’ end. Consistent with some of what has been said above regarding the absence of evidence of employer-toleration, neither Moore nor any other official of Respondent-Employer seems to have been watching out to ascertain if Florian was continuing to follow a course which Moore—and Escobedo, as well—had told Florian violated a work rule. So, Florian was able to continue getting away with doing pretty much as he wanted in that respect—until the afternoon of August 3, when Moore again happened to catch Florian driving from the annex to the main building to punch out.

There is no evidence, particularized or otherwise, that Moore had actually seen Florian driving on South Kilbourn from one building to the other between mid-July, when it is uncontroverted that Moore had warned Florian not to “do it again and you’re violating a work rule,” and August 3, when Moore observed Florian arriving at the main building to punch out. As pointed out above, among the supervisors Florian named as

having purportedly seen him driving between buildings “many times in July,” Florian did not include Moore. As a result, there is a somewhat firm basis for concluding that, in fact, Moore had not observed Florian making daily car trips on South Kilbourn from the main building to the annex after having punched in, nor making daily car trips from the annex to the main building to punch out.

Four witnesses—Florian, Moore, Damron and Boyle—testified about what had occurred shortly before 4 p.m. on August 3. There are no contradictions among their accounts about the initial segment of the overall sequence of events occurring at that time on that date, but there are disparities in their accounts of what ensued as that sequence of events progressed to conclusion. Thus, shortly before 4 p.m. Boyle had gone to the main building’s dock or bay area to enjoy a cigarette. As Boyle stood there, Damron was arriving to begin his scheduled second-shift duties. On his way to the timeclock to punch in, Damron had to pass Boyle. Damron stopped, at least momentarily, to exchange greetings, and perhaps converse briefly, with Boyle. Before any meaningful conversation could take place between them, Florian drove off South Kilbourn, parked by the docks and got out of his car to punch out for the day.

Moore had happened to see Florian driving up to the main building and walked over to Florian. According to Florian, during direct examination, Moore “asked me where did you come from? And I told him I came from the annex building and I was just coming over to punch out. He says we got a problem here, that you left company premises. I says, no, sir, I did not. I’m just coming over to punch out and go home. He told me we have a problem here.” During cross-examination, Florian initially repeated that testimony. “That’s true,” he answered, when asked if Moore had approached and asked where he (Florian) was coming from. Later during cross-examination he testified that Moore had said that Florian “left the company premises. And I told him I didn’t. I just came from building, from the Annex building to go to One.” As cross-examination continued, Florian repeated that “he had asked me where I came from,” and “I told him I was coming from the Annex Building. I was just coming to punch out.”

Before that last-quoted answer, there was some questioning about use of the word “premises.” That seemed to disturb Florian. As cross-examination continued after the answer last quoted in the immediately preceding paragraph, Florian began to back away from his earlier above-quoted testimony regarding use of that term. After once more repeating that, “He had asked me where I was coming from and he told me, well, you left company premises,” Florian was asked specifically “did Moore ask you or did he inform you that he observed you leaving the premises?” Florian answered merely, “He had asked me where I came from.” When the question was repeated—“Did he then asked you or inform you that you had left the premises?”—Florian answered in a manner that began to contradict some of his above-quoted testimony: “I don’t remember. I remember telling him what I’d done. But I don’t remember if he had asked me if, you know.” Once more he was asked, “or did he inform you that you had left the company premises?” “I don’t remember,” Florian answered. Yet, quite clearly he ear-

lier had remembered Moore having said “you left company premises,” and “left the company premises.”

As discussed below, leaving the premises during work time would be the reason for his suspension. As cross-examination progressed it appeared that Florian seemed to feel that his position in this—or, perhaps, in some other—proceeding might become compromised, leaving him at a disadvantage, were he to admit that Moore had mentioned “company premises.” So, he altered his account during cross-examination, claiming a lack of recollection about Moore’s having utilized that phrase, in an effort to attempt to diminish, if not retract, his earlier acknowledgements that, in fact, Moore had spoken those words on August 3.

For his part, Moore testified that he had “walked up to Chester and told him that I had warned him once about this and that we had a problem and that I suggest to him get some union representation.” Of course, that is exactly what, it is uncontroverted, had happened during mid-July. As set forth above, Moore had “warned [Florian] once about” driving on South Kilbourn from the Annex to the main building to punch out. And that account by Moore, of what he had initially said to Florian on August 3, was not challenged during cross-examination, though probed during cross-examination was the subject of whether prior warning had been mentioned once Florian and Moore had walked to where Boyle and Damron were standing. Nor was Moore’s testimony, about what he had said when he “walked up to Chester,” contradicted during rebuttal.

As mentioned above, Moore testified that he had not told anyone about his mid-July warning to Florian: not other officials of Respondent-Employer, not any officers of Respondent-Union. Even so, it is undisputed that the mid-July encounter between Moore and Florian had occurred and, further, that during it Moore had said specifically that driving between buildings while on the clock violated a work rule. There is no basis in the evidence for concluding that Moore had likely forgotten by August 3 what a few weeks earlier he had admonished Florian not to do. Nor is there any reason in the record for concluding that, by August 3, Florian would likely have forgotten what he had been told by Moore, not to mention what he had been told by Escobedo. In other words, Moore’s unrebutted account of what he had said initially to Florian on August 3 is consistent with the uncontroverted overall sequence of events from mid-July through near to shift’s end on August 3.

One aspect of the overall argument in support of the complaint’s allegations, concerning Florian’s suspension and discharge, is that Damron had likely prevailed upon Boyle to single out Florian for suspension and discharge, because of the latter’s past and projected internal union activities. Yet, while they obviously had been in a position to see, and perhaps hear, the initial phase of Florian and Moore’s August 3 encounter, it had been neither Boyle nor Damron who had initiated what Moore said to Florian. That is, there is no evidence that Moore had spoken with either Boyle or Damron before approaching Florian that day. Indeed, so far as the record shows, neither Boyle nor Damron would have noticed or said anything to Florian on August 3—likely assuming, as Focht had explained, that whatever Florian was doing, he was not violating a work

rule in his drive to the main building—had not Moore challenged what Florian was doing. Boyle and Damron became involved only after Moore had already done that.

Damron described what occurred in a manner that was not corroborated by any one of the other three witnesses to what took place near first shift's end on August 3. As pointed out in subsection A above, it appeared that most of the principal witnesses, to a greater or lesser extent, at one or more points tried to put their thumbs on the scales, by tailoring some of their accounts. Damron seemed to be doing exactly that concerning what had occurred on August 3, perhaps in an effort to avoid possible criticism about appearing indifferent to what was being said to Florian by Moore—a criticism that, at least, Robinson seemed to be leveling at Damron for not having done something to aid Florian.

Damron agreed that he had to pass Boyle to get to the time clock. "As I was going to the time clock," Damron testified, Moore "hollered for me." Then Moore "brought Chester over," according to Damron, and said to Florian, "here's your union official. Here's your unit chairperson, president. Here he is. Talk to him. Tell him," or, "Tell him. Talk to him. You want to talk to him, talk to him." Florian merely shrugged his shoulders, testified Damron. Damron further testified that Moore had said a second time, "Here's your committee men [sic]," and, for a second time, "Chester looked at me and shrugged his shoulders again. So I turned around and walked over to the time clock." "Not that I recall, no," claimed Damron, had Moore said what Florian allegedly had done. All things considered, that particular answer was virtually ludicrous on its face, given what had been initially taking place between Moore and Florian on August 3. And the other three witnesses' accounts reveal the lack of candor in such an answer.

In a sense there was some basis for Damron to have believed that, while he and Boyle had been standing together, he (Damron) had been the object of Moore's walk to the spot where he and Boyle were standing. As pointed out above, Moore testified that he had told Florian "to . . . get some union representation." And Florian testified that, after having said "we have a problem here," Moore had said, "I'm going to take this up with the union and Mr. Boyle." Now, Moore had been production manager at that time. There is no evidence whatsoever that, in that capacity, he needed permission from Boyle before suspending an employee. To the contrary, as set forth below, Moore and Boyle both testified that it had been Moore, alone, who had made the decision to suspend Florian on August 4. Given those considerations, it seems likely that, when he approached Boyle and Damron on August 3, Moore's true target had been Damron, who happened then to be standing with Boyle.

According to Florian, Moore said to Boyle and Damron, "we have a problem here, that Chester has left company premises," or "we have a problem here, that Chester just left company property," or that Moore "had a problem with Chester," or "we have a problem here with Chester. He had left the company premises." "Yes," answered Florian, when asked whether he had known at that point that Moore believed that he (Florian) had driven off Respondent-Employer's premises. Florian testified that he had said to Boyle and Damron, "I came from next

door and performed my duties for the day and I was coming to punch out and go home," or "No, I did not sir. I just came from the Annex Building. I'm just coming to punch out. I didn't go anywhere." "That's true," answered Florian, when asked if he had told Boyle that he (Florian) had driven his car around to punch out. That answer should not be forgotten when evaluating Respondent-Union's performance during the ensuing grievance proceeding involving Florian's suspension and, later, discharge. Florian had admitted to Boyle having engaged in the very activity for which he would be suspended. Further, that was the very conduct which Boyle had earlier told Escobedo would be regarded as encompassed by work rule 11, as set forth in subsection F above.

In response to what he said to Boyle and Damron, testified Florian, "Mr. Boyle had told me at that time, he would take it up with Mr. Damron and that just punch out and go home for the day." There is corroborative testimony for that directive by Boyle to "Punch out," but there is no corroboration for Florian's testimony that Boyle had said "he would take it up with Mr. Damron." Given what occurred after Florian eventually punched out, it seems unlikely that Boyle had said any such thing about Damron. Rather, that portion of his testimony seems no more than another effort by Florian to connect Respondents in some sort of plot to fire Florian.

During direct examination Boyle testified that "before [he and Damron] even had a chance to talk, Mr. Moore came walking up with Mr. Florian," and "told me he had caught Mr. Florian off Company premises." "At that point I told Chester to clock out," continued Boyle, "And Chester started to walk away. He was about six feet away. And I started to walk in that direction." Boyle's reason for taking that brief walk is discussed below. At this point the significant testimony by him is that, as he was walking in the direction of Florian, "I heard Mr. Moore say he'd warned all you guys before." During cross-examination Boyle agreed that he had heard Moore saying that to Damron. For his part, Damron denied that Moore had said that to him.

There was one aspect of Boyle's account which facially appeared contradicted by his earlier testimony, given during an arbitration proceeding, concerning the events of August 3. At that time Boyle had testified, "Moore told me at that time—he was actually talking to both of us—that he had caught Mr. Florian breaking a work rule, second time he caught him. I asked what he had done. He told me he was off Company premises in his car." Confronted by that earlier testimony, Boyle conceded in this proceeding that Moore had not said on August 3 "second time he caught him." Of course, had Moore said that on August 3, it would be an uncontested accurate description of the situation: Moore had caught Florian driving between buildings while on the clock during mid-July and August 3 was, in fact, the second time that Moore caught Florian doing so. Yet, Boyle admitted in this proceeding that, when appearing during the arbitration, he had chosen to editorialize when describing what Moore had said: "I heard that at the arbitration. I put two and two together. I got four. And that's what I said."

As will be seen below, Boyle actually got five, since Moore testified that the mid-July warning had not been the one to

which he was referring on August 3. Nevertheless, shorn of Boyle's admitted false editorializing during arbitration, the fact remains that in both that and the instant proceeding, he testified that Moore had said that he caught Florian off company premises. As set forth above, Florian agreed that Moore essentially had said as much to Boyle and Damron.

Moore also testified that he had made that statement to Boyle and Damron on August 3: "I told Mr. Damron that I had caught Chester Florian driving from one building to the next without clocking out." Moore further confirmed that account when he testified, "I walked up to Boyle and Damron with Chester and said that we have a problem here. Mr. Florian was driving from one building to the next on company time without a supervisors [sic] permission. We have a problem here." Of course, that pretty much corresponds with Florian's and Boyle's accounts of what Moore had said when he reached Boyle and Damron on August 3.

During the arbitration proceeding Moore testified that he also had said that he had warned Florian once about driving around the building and Florian had obviously ignored that warning. As to that testimony, Moore testified during this proceeding, "I didn't tell Mr. Boyle [that] at the time," but instead "may have told Mr. Damron," as "we were still standing there" while Boyle walked after Florian toward the timeclock. As described above, of course, Boyle testified that, as he had walked toward Florian, he had overheard Moore saying to Damron that "he'd warned all you guys before." Did that arbitration testimony by Moore contradict his testimony in the instant proceeding that he had not said anything to anybody about his mid-July warning of Florian?

Not really. Moore testified that his testimony during the arbitration, as well as his above-quoted testimony during this proceeding about what he may have told Damron, did not refer to the individualized mid-July warning of Florian. "I was referring to that I had warned all the employees about driving around the building," testified Moore, during the "May, June, July 13th when I readvised all the work rules," and when "I warned everyone of the work rules were going to be strictly enforced." Now, in the immediate wake of Respondent-Union's July 12 unit meeting, Respondent-Employer had reposted its work rules on July 13. That unit meeting and that reposting of work rules had occurred in the less-immediate wake of a meeting during which Boyle, seconded by Moore, had specifically told Respondent-Union's officers that driving between buildings while on the clock, after having clocked in and before clocking out, would be regarded as a violation of work rule 11.

All else aside, it is hardly illogical for an employer to assume that a bargaining agent will communicate to employees it represents what their employer had said about application of work rules. So, whether Moore had said on August 3 "warned all you guys," as Boyle testified, or "warned all the employees," as Moore testified, his remark corresponded to what, in fact, had occurred. There had been a warning prior to August 3 concerning application of work rule 11 to employees driving on South Kilbourn after punching in and to punch out. Obviously, Florian was a member of the class "all you guys" or "all the employees."

In sum, even though no weight can be accorded Damron's account of what had been said on August 3, the other three witnesses' accounts show that Florian had driven on South Kilbourn to the main building to punch out, that Florian had been observed doing so by Moore who challenged Florian's conduct, and that the two of them had walked to where Boyle and Damron were standing where Moore complained that Florian had been off the premises while on the clock. It had been Moore, not Boyle, who observed and understood Florian's infraction of work rule 11. It had been Moore, not Boyle, who spontaneously challenged Florian about what the latter had done. There is no direct evidence, nor basis for inferring, that Moore had checked with Boyle or Damron before challenging Florian. That challenge to Florian's conduct was consistent with Boyle's generalized desire for stricter enforcement of work rules and with Respondent-Employer's by-then specifically-articulated position on the scope of work rule 11.

There is one other aspect to the August 3 encounter that must be covered, given the fact that it arises in connection with Boyle's termination decision, as discussed in the immediately following subsection. As described above, Florian testified that he had been directed to "punch out and go home for the day" by Boyle. Boyle also testified that he had "told Chester to clock out," after which Florian started to walk toward the timeclock. However, testified Boyle, Florian did not clock out. Instead, Boyle testified, "he walked over to the time clock, picked up his time card," but "didn't clock out. So I walked over and told him to clock out again." It was during that brief walk that, Boyle testified, he had overheard Moore's remark to Damron about having "warned all you guys before." According to Boyle, Florian still did not clock out, though having been told by Boyle for a second time to do so. Boyle testified that he repeated his direction to "clock out" for a third time, asking Florian, "Why aren't you clocking out." Florian replied, testified Boyle, that it was "not 4:00 o'clock yet." "I just turned around and walked back in the office," Boyle testified. However, as had Moore with regard to his mid-July warning to Florian, Boyle did not forget what took place in connection with his direction to Florian to punch out.

During direct examination Moore corroborated that testimony by Boyle. During cross-examination it was pointed out to Moore that, in a deposition given on December 14, 1999, he had testified to having "once" told Florian to clock out. But, pressed on that point during the deposition's taking, Moore had somewhat backed away from that initial "once" answer: "I think I did, yes." (Emphasis added.) Testifying in this proceeding he explained that, after having the deposition taken, "I thought about it and I didn't clock, I didn't tell him to clock out." That explanation seemed to be a genuinely-advanced one. Nothing in the record suggests any reason for Moore to have been dissembling on that point when his deposition had been taken. The suspension result would have been the same whether Florian had ignored three directions by Boyle to punch out or, alternatively, had ignored two directions by Boyle and one by Moore to do so. Most significantly, Florian never denied that on August 3 he had disregarded three directives to punch out for the day.

As pointed out in subsection A above, under article XIII, Section 3 of its 1995–1999 collective-bargaining contract, Respondent-Employer could not simply discharge an employee. It first had to suspend an employee to allow Respondent-Union opportunity to investigate the situation and, if it felt one was warranted, request a sit-down meeting to possibly head off termination. Before leaving work on August 3, Moore testified, he had decided to suspend Florian. He denied having discussed that decision with anybody. More specifically, Moore denied having discussed his suspension-decision with Boyle or with Respondent-Union. Nothing in the record contradicts those denials.

Boyle denied having participated in the decision to suspend Florian. During cross-examination it was pointed out to Boyle that he had testified during arbitration on October 27, 1999, “The next morning [August 4], we made a decision to, based on the fact that he had done it twice, to indefinitely suspend him.” (Emphasis added.) In this proceeding, however, Boyle testified that, by his use of “we” in the arbitration, he had been “referring to the Company’s position.” That is not an inherently unreasonable explanation. No evidence was adduced to show that Boyle could not have intended “we” in any other sense. Nor is there any other evidence even indicating that Boyle had spoken with Moore, at all, during the remainder of the day on August 3, nor during the morning of August 4 before Moore suspended Florian. “I went home that evening [August 3],” testified Boyle, and “[w]hen I come [sic] back the next afternoon, Mr. Moore told me that he had suspended Mr. Florian.”

Consistent with his uncontested mid-July warning to Florian and, as well, with the event that transpired shortly before 4 p.m. on August 3, Moore prepared a memorandum to Florian which, in substance, states, “As of August 4, 1998 you are being place [sic] on indefinite suspension in violation of Work Rule 11.” It was handed by Moore to Florian shortly after the latter reported for work, and began working, on Tuesday, August 4. That led to a sequence of events described in the following subsection. Given the extensive background evidence covered in this and in preceding subsections, this might be a good point to take some stock of what the overall evidence shows as of the time that Florian was given notice of his suspension.

The argument in support of the allegation that Florian’s suspension had been unlawfully motivated is, in essence, that Boyle had been persuaded to suspend Florian by Damron who, in turn, sought to retaliate against Florian for having attempted to run for unit chairman during 1997 and, also, in an effort to head off another effort by Florian to do so during 2000. But, there is no evidence that Boyle had made the decision to suspend Florian. That decision had been made by Moore. It had been Moore, not Boyle, who had spontaneously challenged Florian when the latter arrived at the main building on August 3. The basis for that challenge was the earlier uncontroverted warning to Florian by Moore that driving to the main building to punch or clock out was not allowed and violated the work rules. That warning, in turn, had been based upon specific notice by Boyle, seconded by Moore, to Respondent-Union’s officers that driving between buildings while on the clock was not going to be tolerated because it was regarded as proscribed by work rule 11. Boyle gave Respondent-Union opportunity to

notify unit members of what he had said and, in fact, Escobedo had twice communicated to Florian that driving between buildings, after clocking in and before clocking out, would no longer be tolerated. As concluded above, there is no credible evidence that, after July 13, Respondent-Employer had knowingly tolerated that conduct. While violation of the prohibition on driving between buildings was not the greatest possible infraction that an employee could commit, it was a prohibition that was rooted in valid business considerations and, in any event, was a prohibition that had been imposed and had been communicated to Florian both by an officer of Respondent-Union and by Respondent-Employer’s production manager prior to August 3.

On the flip side, there is no objective evidence that, had he been allowed to run during 1997, Florian’s candidacy posed any threat to Damron’s continued incumbency as unit chairperson. Nor is there any objective evidence that possible candidacy by Florian during 2000 would present any threat to Damron’s reelection as unit chairperson, assuming that Damron would be running for reelection during 2000. In fact, Florian’s statements of interest in, and intention to, run in 2000 were seemingly no different than similar expressions of intention to run for unit office expressed from time to time by other employees. True, there is evidence that Damron did not think much of Florian and was not reluctant to voice that opinion, just as Damron did regarding other employees for whom he had little regard. However, there is no credible evidence that Damron harbored animus toward Florian for past or projected attempts to run for unit chairperson. More particularly, contrary to the unreliable evidence provided on the point by such witnesses as Focht, there is no credible evidence that Damron ever attempted to have Florian fired or disciplined in any other manner. Nor is there any credible evidence that Damron had been involved in Moore’s decision to suspend Florian, much less caused or attempted to cause Moore to suspend Florian.

In sum, the credible evidence will not support a conclusion that Respondent-Union had caused or attempted to cause Florian’s suspension on August 4. Nor will it support a conclusion that Respondent-Employer suspended Florian on August 4 in an effort to accommodate Damron, or any other union official. There had been no other statutorily-protected activity by Florian, other than having attempted to run for union office during 1997 and possibly attempting to run in 2000, which can be said to have motivated a suspension that would have been unlawful under the Act. In consequence, the credible evidence fails to support a conclusion that Florian’s suspension had been motivated by any consideration proscribed under the Act. Even if such a showing can somehow be said to have been made, a preponderance of the credible evidence supports the conclusion that Florian would have been suspended on August 4 for having engaged in conduct which he had been warned violated a work rule and had to stop. He chose to ignore those warnings. He did so at his own peril. It has not been credibly shown that Florian would not have been suspended on August 4 had he not tried to run for union office a year-and-a-half earlier or had he not expressed interest in, or intention to, try running again a year-and-a-half later.

#### H. Discharge of Florian on August 10

It was Boyle who made the decision to discharge Florian. As should come to probably the great surprise of nobody by this point, however, evidence was adduced concerning other events which supposedly shows unlawful actions and motives by Respondents.

As pointed out in the immediately preceding subsection, Florian was given his suspension notice by Moore shortly after Florian began work on Tuesday, August 4. The conversation between them was brief, though not altogether uncontroverted. Florian testified that he was handed the suspension notice by Moore who said nothing as Florian read it. Moore testified that he had "told [Florian] that I'd warned him once about this offense and this was something I had to do." As set forth in the immediately preceding subsection, it is undisputed that, in fact, Moore had warned Florian before August 3 not to drive between buildings while on the clock.

After reading the notice, testified Florian, "I had told Mr. Moore, what's this all about? And he says, you left company premises and that you're indefinitely suspended and to leave the plant." In response, according to Florian, "I had told him I had done nothing wrong. I tried to explain to him that I was just going from building one to building two," or, "Mr. Moore, that's all I did was drove from Building 2 here to Building 1. And I didn't go off of company premises." Had Florian actually said the latter, Moore obviously would have understood that Florian was not being truthful. He had driven off the premises on August 3. He had driven on South Kilbourn Street. It is undisputed that South Kilbourn Street is not part of Respondent-Employer's premises; it is a public thoroughfare.

Florian's description of the conversation continued. "I had asked him if I could sit down with him and Mr. Boyle and hash this out before it got blown out of proportion, that I never did nothing [sic] wrong, I never went anyplace," Florian testified, or, "can I sit down with himself and Mr. Boyle so we can get this squared away before it get blown out of proportion." "He refused," testified Florian. That testimony was denied by Moore. "No," he answered, when asked whether Florian had made a request to sit down and talk to Moore and Boyle about the suspension. However, Moore never disputed that Florian had asked if, before leaving the premises, as directed to do, he could speak with Robinson, Respondent-Union's grievance committeeman for the day or first shift, the shift on which both Florian and Robinson worked. Indeed, Moore hardly could have denied that request. article XIII, Section 3 of the 1995-1999 collective-bargaining contract accorded an employee that right. And Moore said that Florian could do so. As will be seen, Florian chose to take advantage of that contractually-permitted right to speak not only with Robinson, as contractually allowed, but also with Focht.

At the time Florian was working as loader for fill-in shipping clerk White. Before leaving the annex, Florian reported his suspension to White. That conversation should not pass without notice, since on August 6 White would engage in the same conduct as had led to Florian's suspension, as discussed in subsection I below. Florian testified that he had "explained to [White] that I was indefinitely suspended for driving my car from one building to another." "Chester notified me that he

was being suspended for driving around the building and he was leaving," testified White. No question that White had been informed by Florian of the reason for the latter's suspension. Asked during direct examination whether Florian had said that he was being suspended for driving around the buildings, White answered unequivocally, "Yes."

As mentioned in subsection D above, by August 4 Focht no longer possessed supervisory authority over any Chicago facility production or operations support employees. Florian testified that on that date he had walked from the annex to the main building and entered the main building through a back door. "As I entered the building," testified Florian, "Mr. Jack Focht happened to be standing around there, by the back of the line area." According to Florian, he took advantage of Focht's proximity to report to Focht what had happened. "Yes, I had seen Mr. Focht on my way in," reasserted Florian, "I meant that when I came into the building . . . Mr. Focht was standing there." If so, of course, it might not seem untoward that Florian would have mentioned his suspension, as he passed where Focht was standing. The problem for Florian's account is that Focht contradicted it.

Focht agreed that he had been told by Florian on August 4 about the suspension. His initial testimony appeared to correspond to that of Florian as to where in the main building that had occurred: "Yes, I was on the back end of the line up in the inspection area running the line that day." But as direct examination continued, correspondence in accounts became contradiction between them. "I was in the back end of the Production Line. There's a *platform* where we do all of our inspection at. And I was there looking over the strip," (emphasis added), testified Focht. "Yes,": he had been upstairs, Focht testified when interrogation resumed concerning his location on August 4. In contrast, Focht acknowledged that Robinson had been working that day "back in the Coating Room," which is "[a]t the center of the building" downstairs from where Focht had been located on the platform when approached by Florian that day.

No question that Focht was working on a different level than was Robinson on August 4, and on a level different from the back door, when Florian arrived in the main building. To get to where he was working, testified Focht, an employee coming through that door would "walk up some steps" to where Focht was "on the inspection area, upper platform." "They come in the door. They walk underneath the platform. And there's some steps. They just walk up the steps to get to the area I was in," explained Focht. True, from the back door entered by Florian, Florian could have seen Focht "on the platform," but could not see Robinson's work location on the main floor's coating line. Sight is hardly the point, however.

Pursuant to collective-bargaining contract, Florian had been allowed to remain on the premises to speak with his union representative. Focht acknowledged that someone entering the back door would not have to go upstairs to Focht's location in order to go to Robinson's work location—"No, he would not"—nor would such an employee have to go upstairs to contact Robinson on August 4: "No, he would not." "Yes, he would" have to detour to go upstairs to his work location that day, acknowledged Focht. Obviously, on August 4 Florian had

paid as little heed to the scope of Moore's permission to remain on Respondent-Employer's premises after his suspension, as he had to Moore's warning to stop driving between buildings to punch out because that violated a work rule.

Focht's wife, Gail, worked in Respondent-Employer's office on August 3. In fact, she seems to have been continuing to work there during the hearing. Even were she not actually continuing to work for Respondent-Employer throughout the hearing, there is neither evidence nor representation that she was not available to the General Counsel and Charging Parties as a witness. The significance of that is Focht testified that, as they had driven home from work on August 3, he had been told by his wife "that Chester got put on suspension[.]" Of course, such a report by Gail Focht was hardly inconsistent with Moore's and Boyle's testimony that Moore, and Moore alone, had made the decision to suspend Florian. If there was any purpose to eliciting that testimony about what Gail Focht had assertedly said to her husband on August 3, it got lost in Focht's increasingly guarded answers concerning what his wife had told him.

Asked if his wife had indicated how she heard about Florian having violated work rule 11, he answered, "Somebody out in the plant had told her. And I don't know who. You'd have to ask her that question." Asked if he had simply not bothered to ask his wife who that person was, during all the time that had passed since August 3, Focht responded, "She mentioned the name, but I can't remember who she said it was, so you need to ask her." An opportunity to do so never arose because, as pointed out above, Gail Focht was never called as a witness.

When he had approached Focht on August 4, testified Florian, he said "that I had just got [sic] indefinitely suspended for driving my car from one building to the other and . . . asked him if I had done something wrong," or, "asked him if I had done anything wrong, that I just got suspended for going from building one to building two." According to Florian, Focht replied "that he had heard this was coming the night before and that he said these were ridiculous charges," and "did not want to talk to me here in the plant, but he would call me that night." Later in his testimony Florian reaffirmed—"That's true"—the account in his prehearing affidavit that, "Focht told me this was bogus and that he knew it was coming yesterday." However, Focht refuted some of that testimony concerning their exchange on August 4 in the plant.

Focht agreed that Florian had said "they just suspended me," or "Jack, I've been put on suspension for driving my car over to the annex building," or "he was suspended, put on suspension for driving from the main building to the annex building." He further agreed that he had replied to Florian, "I heard that last night, but I really didn't believe it, then I seen you here this morning," or "I had heard that it happened the night before. I was surprised to see him there that morning." As to Florian's testimony that Focht had said the charges were "ridiculous," and to his affidavit account that Focht had characterized Moore's reason as "bogus," however, Focht denied specifically having used either term. "No," answered Focht, when asked if he had told Florian "it's a bogus charge." "No," answered Focht, when asked if he had told Florian that it was a fraud, or words to that effect. "No, I didn't," Focht answered, when

asked if he had said ridiculous charges. The most that Focht testified in this respect is that he "might have said" to Florian, "I believe he got set up on this."

As to having told Florian "he did not want to talk to [Florian] here in the plant," Focht testified, "I can't really recall what I said to him word for word." Later, however, he testified, "I said just, I don't want to talk right now. I was busy." Of course, being too busy to talk is hardly an indication of concern about being overheard discussing Florian's suspension by someone who might report such a conversation to officials of Respondents, which appeared to be what Florian had been trying to portray as having been Focht's concern.

As quoted above, Florian testified that Focht had said "he would call me that night." Initially Focht testified, "I just said, well let me check into this and let me talk to Ray [Drufke] and I'll see if I could do anything to help you." No mention of having promised to call Florian "that night." Not making such a promise seems reasonable in the circumstances. For Focht testified that Drufke then had been on vacation. So, Focht could hardly call Florian "that night" about having spoken with Drufke regarding Florian's suspension.

Later in his testimony, however, Focht testified, "I told him to let me see what I could do and I would call you this evening." Then, Focht returned somewhat to his initial account, when no mention of calling "that night" or "this evening" had been made: "I just said, you know, *don't do nothing*. Let's see if we can't get your job back." (Emphasis added.) "Yes," answered Focht, he had told Florian not to do anything. As his testimony progressed, however, Focht retracted that portion of his testimony: "I didn't do it right at that [time]. I asked him when I called him on the phone" not to do anything. "Yes. Yes," answered Focht, when questioned about actually having said that during a phone conversation conducted after Florian had left the Chicago facility for the day, "I said, you know, can you hold off on this," and, more specifically, "It wasn't that morning."

Beyond that, as pointed out above, Focht advanced internally contradictory testimony regarding whether he had told Florian not to do anything during the morning of August 4. Of course had Focht said that at that point, as he sometimes claimed, then some question arises as to why Florian immediately had gone to Robinson about the suspension and about arranging a sit-down meeting to discuss the suspension with Respondent-Employer. After all, were Focht going to try to work out the suspension with "Ray," then Florian seemingly would have nothing to lose by holding off speaking with Robinson until Focht had an opportunity to speak with Drufke. As mentioned above, however, it was not possible to Focht to speak with Drufke on August 4.

During cross-examination Focht acknowledged that Drufke "was on vacation" on August 4. To be sure, Focht added that Drufke "was due back in two days." Still, there is no evidence that Focht had been able to contact Drufke until the latter returned from vacation. So, telling Florian that "he would call [Florian] that night," as Florian testified, or "this evening," as Focht testified at one point, would seemingly have been a pointless statement. He would not have been able to contact Drufke, at least so far as the record discloses, by "that night" or

“that evening.” By then, Florian had already taken action to pursue the propriety of his suspension through Respondent-Union.

After having spoken with Focht, Florian testified that he went to Robinson in the coating area. He testified that he gave Moore’s suspension notice to Robinson and “explained to him that I was being suspended for work rule 11.” Robinson “asked me where did you go,” testified Florian, “And I says, John, I didn’t go anyplace. I was going from building one to building two, just to perform my duties for the day. I was coming to punch out,” after which “I explained the conversation I had with Mr. Moore.” According to Florian, Robinson “told me that he would set up a sit down meeting with the company itself and that he would call me and let me know when it would be.” Interestingly, there is no evidence that Florian had mentioned to Robinson having spoken to Focht and that Focht had promised to attempt resolving the suspension with Drufke. More importantly, there is no evidence that Florian had bothered to mention to Robinson the more important facts that he (Florian) had been warned by Escobedo and, again, by Moore not to drive between buildings while on the clock.

Robinson did arrange for a sit-down meeting, to be held on August 7. Before proceeding to description of the testimony about that meeting, however, consideration should be given to four intervening conversations. As a prelude to the first one, it seems quite obvious that Robinson believed that Florian’s suspension, and any discharge arising from it, was unfair. Of course, Robinson had not been present when Escobedo had twice warned Florian about driving between buildings while on the clock, as described in subsection F above. Nor, of course, had Robinson been present when Moore had warned Florian against continuing to drive from the annex to the main building to punch out for the day, because such conduct violated a work rule. There is no basis in the record for inferring that Florian had bothered to tell Robinson about any one of those warnings.

Of course, Escobedo knew that he had individually warned Florian that Respondent-Employer would no longer tolerate driving between buildings while on the clock. Both he and Damron also were aware that Escobedo had again warned Florian not to continue doing that, during the July 12 unit meeting. And Damron had been present on August 3 when Florian acknowledged, to Boyle and Damron in the presence of Moore, that “I was coming to punch out and go home,” or, “I just come from the Annex Building. I’m coming to punch out,” as highlighted above. Thus, Damron was aware that on August 3 Florian had admitted engaging in the very conduct which Damron had overheard Escobedo telling Florian on July 12 to stop engaging in. These background facts set the table for the first of the four intervening conversations.

Robinson testified that he had participated in a conversation with Damron and Escobedo about Florian’s situation. To initiate Robinson’s testimony about that conversation, the question put to him was, “directing your attention to the time after Chester Florian was fired,” which would mean after August 10. Yet, witnesses and counsel were not always precise when referring to the separate suspension and discharge of Florian. Both Escobedo and Damron described conversations—albeit, separate ones—with Robinson following Florian’s suspension.

From the substance of the accounts of Robinson, Escobedo and Damron, it seems clear that the remarks, about which counsel was attempting to elicit testimony from Robinson, were ones made before Florian’s discharge, but after his suspension.

According to Robinson, “I told Manny and Rich that we going [sic] to have to do something about this. How can they fire Chester when everybody in the plant is doing it.” Robinson continued, “I think Rich or Manny told me, I don’t know which one it was, that the people had been told that Jim didn’t want them to do that no more and I, I guess they more or less said Chester had been told and he continued to do it.” Though uncertain as to which one had made those statements—apparently unknown at the time by Robinson to be accurate statements—Robinson testified that it had been Damron who then added that “they didn’t want nothing to do with that was your, which it would be mines in the first place [sic],” because “I usually take care of all the grievance[s] on the day shift.” Straightening out a garbled transcription of what Robinson testified, it appears that Damron said that he and Escobedo wanted nothing to do with the sit-down stage of Florian’s suspension because it was Robinson’s responsibility to represent Florian at that stage of the contractual grievance procedure regarding suspensions and discharges.

Damron denied having ever said to Robinson that he (Damron) did not want to deal with Florian’s case. Which appears to be accurate. The above-quoted comments attributed to Damron by Robinson seem related to the sit-down meeting. In fact, no one disputes that the grievance committeeman for each shift ordinarily handles such meetings for employees on that grievance committeeman’s shift. Still, Robinson testified that, in the normal course of affairs, Damron and other grievance committeemen sat in whenever Robinson was handling grievances. However, given the background circumstances listed above, there seems to have been some basis for Damron’s and Escobedo’s reluctance to become involved in the sit-down meeting arising from Florian’s suspension.

Both Damron and Escobedo had heard Boyle, seconded by Moore, say that driving between buildings while on the clock was not allowed, after having checked the work rules. Both knew that Florian, among others, had been told about that during the July 12 unit meeting. Escobedo knew, as well, that he had individually warned Florian to stop engaging in that conduct. Damron knew that Moore had caught Florian driving from the annex to the main building to punch out on August 3. Some of those very facts—“people had been told”; “Chester had been told”; “he continued to do it”—were ones mentioned to Robinson by Damron or Escobedo, as quoted above. In view of their personal knowledge of those facts, it hardly seems illogical for Damron and Escobedo to try distancing themselves from the August 7 sit-down meeting. Obviously, they could not deny facts of which they had personal knowledge.

The statutory duty of fair representation does not extend so far as to require labor organization officials to lie during grievance-processing. Moreover, were Damron or Escobedo to lie about those facts—deny having heard what Boyle had said, deny what Florian had been caught doing—such lies would have been obvious to Boyle and Moore. Those very lies would have poisoned future relations between Respondents, as Boyle

and Moore would have distrusted anything said in the future by Damron and Escobedo. That would hardly further the statutory interest in promoting meaningful collective bargaining.

In sum, at most Robinson's testimony, about what Damron and Escobedo had said, is so ambiguous in the circumstances that it shows no more than that they would not be attending the sit-down meeting which was Robinson's to conduct. In reality, by staying away from that meeting, Damron and Escobedo would be avoiding being put on the spot—by possibly having to admit that “people had been told that Jim didn't want them to do that” and that “Chester had been told and . . . continue to do” what he had been told to stop doing. Of course, any admission by Damron and Escobedo of those facts would hardly have advanced Florian's cause during the sit-down meeting.

A second conversation was assertedly conducted by telephone between Florian and Focht, as a result of Focht's promise to telephone Florian during the evening of August 4. As set forth above, Focht testified that he had been too “busy” to speak with Florian at Respondent-Employer's facility during the morning of August 4, but had intended to speak with Drufer in an effort to attempt resolution of Florian's grievance. When the subject of that telephone conversation was initially raised during cross-examination, Focht testified, “I called Chester that night.” As to what had been said, Focht testified at that point, “I just told Chester, I said, you know, Ray's on vacation right now. Why don't you just hold tight and wait till Ray comes back and let me go in and talk to him to see if we can't get this settled. And that's what I said. *And then we didn't talk no more.*” (Emphasis added.) But, according to Florian, they did “talk . . . more.”

Florian placed the call as having taken place on “August 4th, 1998,” testifying that, during it, Focht “told me this was a set-up and Mr. Damron had come to him on numerous occasions” to urge that Focht fire Florian. According to Florian, during their telephone conversation, Focht mentioned “a labor management meeting” during which Damron “told him [Focht] that Chester was shaking down truck drivers, soliciting for money to get them loaded and unloaded at a quicker pace,” and offered “if I needed him to come in and testify for any reason whatsoever, just let him know. He'd be willing to.” Of course, as concluded in subsection C above, there is no credible evidence that Damron ever had said any such thing about Florian during a labor-management meeting. To the contrary, a preponderance of the credible evidence reveals that it had been Focht who had accused Florian of improprieties concerning truckdrivers and Respondent-Union's officials, particularly Damron, who had defended Florian against that accusation. So, by telling Florian during the August 4 telephone conversation that Damron had accused Florian of “shaking down truck drivers” during a labor-management meeting, seemingly Focht had been playing his “conflict this” role—trying to sow dissension between Florian and Damron, for whom Focht had little use.

Florian's testimony about what Focht had said, during the August 4 telephone conversation, differs significantly from Focht's initial above-quoted testimony about what had been said. Focht was cross-examined further about, in effect, whether or not “we didn't talk no more.” His answers were

internally contradictory regarding what had been said during that conversation.

Asked if he had ever told Florian that Respondent-Union was trying to get rid of him (Florian) and that the August 3 event was the one on which Respondent-Union had succeeded, Focht answered, “After I was terminated from my employment.” “Yes,” Focht reaffirmed, when asked if that had occurred after November. Clearly, that testimony contradicted Florian's above-quoted testimony. Then, however, Focht was asked if he had told Florian the suspension was a set-up and part of Respondent-Union's purported effort to get rid of Florian. Appearing to perceive that the cross-examiner was trying to secure a negative answer, for whatever reason not then understood by Focht, Focht altered his earlier “didn't talk no more” testimony. “I might have said that, in that sense of speaking,” answered Focht. Given another opportunity to answer that question, Focht moved a little further. “Yes,” he had said that to Florian.

In fact, Focht then went on to revise even further his above-quoted initial testimony, concerning what he had said to Florian during the telephone conversation, even further: “I told him I thought he was unfairly, at that time I told Chester I thought he was really unfairly discharged and I felt he was a [sic] setup by Mr. Boyle and Mr. Damron. That was the statement that I had made,” after which, “I said let me see what I can do to correct this and get your job back here.” Nonetheless, Focht stuck by his guns, at least for awhile, concerning whether he had said anything about Damron trying to get Florian discharged. “That happened later,” Focht first reasserted. Well, no, “I can't recall,” he next testified, “[i]f it was that conversation.” “I can't recall if I talked to him that night about” Respondent-Union's supposed accusations during the labor-management meeting, “or not,” Focht eventually testified, thereby preserving for himself the best of both worlds—preserving somewhat his own earlier denial about having said that, while leaving an open door of not contradicting Florian, had the latter testified that Focht had said something to that effect. All else aside, of course, by the time he finished testifying Focht had contradicted his own initial “didn't talk no more” testimony.

Evidence of a third conversation was supplied by Focht. That supposedly had been the approach to Drufer that Focht had promised Florian on August 4 would be made as soon as Drufer finished the last 2 days of his vacation. In fact, Focht initially claimed that he had spoken with Drufer “I think two days” after Florian's suspension. That would have been on August 6, possibly August 7. Yet, Focht later testified that he had not spoken to Drufer until “[o]n or about” August 11. Given Florian's situation as of that time—suspended, purportedly asked by Focht to hold off taking any action until Focht could speak with Drufer—that is hardly an insignificant difference in date.

When he did meet with Drufer, according to Focht, “first of all I said, did you hear about Chester? He said, yes. I said, can I talk to you about it? And he said, yes. And I just told him my feelings, that I really felt this was wrong and it was unjust and wasn't handled right.” Focht testified that Drufer replied, “I know Boyle was wrong for doing this. This one's going to cost us a lot of money,” or, “I know Boyle was wrong for doing this. I want him to learn a lesson from this and this one's going to

cost us a lot of money,” or “he didn’t feel it was right either, that he felt Jim Boyle was wrong on this one, too, but he wants Jim Boyle to learn a lesson and he said this one’s going to cost us a lot of money.”

Now, even if this purported conversation had occurred as late as August 11, Florian did not file his unfair labor practice charges against Respondents until August 14, as mentioned in footnote I, *supra*. So, obviously, Drufke’s purported “cost us a lot of money” remark could not have referred, at least so far as the record shows, to any possible backpay order by the Board. In fact, as cross-examination progressed, Focht conceded that “I thought he [Drufke] was speaking about” the grievance-arbitration process. Of course, the ultimate inquiry in private disputes resolution extends to a broader number and type of considerations than arise in unfair labor practice proceedings.

In fact, Drufke testified that he had been concerned that Respondent-Employer would be vulnerable in connection with Florian’s suspension and later discharge. But, not because of any motivation proscribed by the Act on the part of Boyle. Rather, Drufke testified that his concern—or disappointment, as Drufke phrased it—had been over the absence of any notice to employees stating, in so many words, that driving between buildings after punching in and before punching out would now be prohibited. And Drufke testified about one other point—one which totally refuted Focht’s above-quoted testimony about an August 6 or 7, or August 11, conversation with Focht.

During his rebuttal testimony, Drufke was asked whether Focht had complained to him (Drufke) about Florian’s discharge or suspension. Drufke answered flatly, “No.” Thus, not only did the seemingly favorable-to-Focht Drufke not corroborate any aspect of Focht’s above-quoted descriptions of their purported conversation about Florian’s suspension, but Drufke contradicted Focht’s testimony about that supposed conversation having even occurred.

That Focht simply had been making up that conversation with Drufke tends to be further shown by an added aspect of Focht’s testimony. As set forth above, Focht had assertedly promised to get back to Florian after speaking with Drufke. Asked if he had done so, during cross-examination, Focht answered initially, “I can’t remember talking to him [Florian] after that.” Well, if that had been the fact, it meant that Focht had asked Florian to hold off until Focht could speak with Drufke, but supposedly having done so, Focht had never bothered to tell Florian that he need no longer hold off on taking some type of other action.

That seemed to occur to Focht who then testified, “I think I did call him back, but I don’t know what day, and I told him I’d talk[ed] to Ray, and there’s really nothing I can do.” Yet, later Focht testified that he had telephoned Florian “the week of the 14th,”; “I think it was the 14th.” Given that Florian was purportedly holding off on other action to ascertain if Focht could persuade Drufke to rescind Moore’s suspension, Focht never bothered to explain why he had waited at least 3 additional days, from the latest date on which he had supposedly spoken with Drufke, to report to Florian that his suspension could not be resolved through Drufke. In fact, Florian never testified to having participated in even an August 14, or “week of the 14th,” telephone conversation with Focht.

A fourth conversation involves Robinson’s report to Florian that the sit-down meeting would occur on August 7. Florian testified that Robinson “called me on the 5th of August” to report that that would be the meeting’s date. But, according to Florian, more had been said during that conversation.

As set forth above, Robinson testified that when he had asked Damron and Escobedo how Respondent-Employer could fire Florian for driving between buildings, one or the other had responded that “people had been told that Jim didn’t want them to do that no more,” and that “Chester had been told and he continued to do it,” so Damron “didn’t want nothing to do with” the suspension and it was Robinson’s to handle “in the first place.” Robinson never testified that he had related those remarks to Florian during their August 5 telephone conversation. However, Florian claimed that, during that telephone conversation, Robinson had asked “do you have a problem with Mr. Damron and Mr. Manny Escobedo,” to which Florian replied by pointing out his effort to run against Damron a year-and-a-half earlier and his intention to run against Damron a year-and-a-half in the future. “I said, why? What seems to be the problem?” testified Florian.

According to Florian, Robinson related that when he had asked Damron and Escobedo how they could “let this go on with Chester, let the company get away with such things,” or “how had they let the company itself suspend Chester for just driving his car back and forth,” or “how could you have let Chester get suspended . . . for a violation of driving from one building to the other,” Damron and Escobedo “raised their hands and said they washed their hands of Chester. They want nothing to do with it. And if he wanted to handle the case, go ahead,” or “raised their hands and stated that they wash their hands of Chester and his case, didn’t want to deal with it. If he wanted to, for John Robinson to go ahead, but they would not get involved,” or, “they raised their hands and said they washed their hands of Chester. If you want to fight for him, you go ahead. We will not,” or “they washed their hands of it and wanted nothing to do with it. If he wanted to, go ahead. But not them.”

When he appeared as the General Counsel’s witness, Robinson was not interrogated about what he had said to Florian during their August 5 telephone conversation. So, he did not corroborate any of Florian’s above-quoted testimony about what Robinson assertedly had said, during the August 5 telephone conversation, about hand-raising by Damron and Escobedo, nor about washing their hands of Florian, nor about it being up to Robinson whether or not to pursue Florian’s suspension with Respondent-Employer.

From what Robinson did testify that Damron and Escobedo had actually said, in the first above-described conversation, at most Damron and/or Escobedo had recited Boyle’s warning and Florian’s disregard of it and, further, that they wanted nothing to do with the sit-down meeting which would be Robinson’s to conduct. It seems unlikely that Robinson would have so distorted those latter remarks, had he related to Florian what Damron and Escobedo had said. Moreover, had Robinson related what had been said to him by Damron and Escobedo, it seems unlikely that he would not have told Florian about what had been said about Boyle’s statement—“didn’t want them to

do that”—and that Florian “continued to do it.” Certainly there would have been no reason for Robinson to have omitted those remarks which, after all, were at the heart of Florian’s suspension. Yet, Florian omitted any mention of Robinson having related what Damron and Escobedo had said about Boyle’s position and about Florian’s continued driving between buildings while on the clock.

There is one further aspect of the August 5 telephone conversation, between Robinson and Florian, which quite clearly had occurred. Florian acknowledged having asked Robinson “for Rich and Manny not to be present at the sit-down meeting.” Given what had been said above to Robinson by Damron and Escobedo, that appears to have been Damron’s intention: not to attend the August 7 sit-down meeting. In fact, had Robinson actually said to Florian that Damron and Escobedo were washing their hands of Florian and wanted nothing to do with processing a sit-down meeting for him, then it seems rather unnecessary for Florian to have asked Robinson not to have either other union officer present at his sit-down meeting. That is, the very fact that Florian had made such a request is some evidence tending to contradict Florian’s testimony regarding what Robinson supposedly had said about Damron’s and Escobedo’s intentions. In fact, it seems that both unit officers had been inclined to allow Robinson to handle the sit-down meeting without their participation which, as pointed out above, could only have been harmful to Florian, given what Damron and Escobedo knew about the events preceding Florian’s suspension. That inclination changed once Robinson related Florian’s request to Damron.

According to Damron, on August 7 he was told by Robinson that “Chester didn’t want me in on any of the meetings.” “I told [sic] Chester [ ] don’t run the Union meetings. He don’t run, he don’t run the Union there,” Damron testified that he retorted to Robinson. Damron continued, “John asked me would I come in the conference room, that he had Chester there,” and when they entered the room where Florian was present, Robinson “said that he would like for me and Chester to get along,” and Damron said, “I have no problems working with Chester,” and “I have nothing against Chester.” Florian, testified Damron, made a “statement that there’s a lot of people, like hearsay, agitators and people listen to those and sometimes people will listen to those people and get you at each other because you don’t go personally to confront someone,” after which “we shook hands” and discussed Florian’s claim that he had permission from Focht to drive between buildings and the need for Florian to obtain a written statement from Focht to that effect.

No one corroborated that testimony by Damron concerning Robinson asking Damron to come into the room and asking for Damron “and Chester to get along,” nor the account of their shaking hands and Florian, in effect, saying that people like to create conflicts by saying things that had no foundation. Of course, that is precisely what seems to have occurred here: in his “conflict this” mode, Focht had sown discontent by Florian against Damron, in particular, and, as well, seemingly toward Escobedo and Morales. Florian had harbored distaste for Damron since early 1997 and that distaste had been inflamed by Focht’s false statements about Damron wanting Florian fired.

Against that background, it seems objectively implausible that, as of August 7, Florian would have merely accepted any assurances by Damron that he (Damron) had “nothing against” Florian.

The testimony given by Florian seems more consistent with the background of relations between Damron and Florian as of August 7—relations which could only have further deteriorated when Robinson told Damron that his presence was not desired by Florian at the sit-down meeting. As quoted above, Damron acknowledged having told Robinson, after being told by the latter “Chester didn’t want me in on any of the meetings,” that “Chester [ ] don’t run the Union meetings.” Consistent with that remark, acknowledged to have been made by Damron, Florian testified that, when he arrived in the room for the sit-down meeting, Damron and Escobedo were already present there. According to Florian, Robinson “explained to me that he brought it [not attending the sit-down meeting] to Damron and Mr. Damron stated that he was the chair person of all committees and has a right to be there.” Then, testified Florian, “Mr. Damron told me at that time who the hell are you to dictate to this union on who and who and what [sic] attend any kind of meeting,” and “that he was the chairman once again, and he has a right to be at any meeting.” Given the events covered in this and in preceding subsections, that seems a more plausible description of what occurred prior to the August 7 sit-down meeting.

As he testified, Damron impressed me as someone who would not lightly abide infringement, by employer-official or by employee, on his prerogatives as unit chairman. Both Robinson and Florian acknowledged that, as unit chairman, Damron had every right to attend every meeting with Respondent-Employer. In fact, as pointed out above, Robinson testified that Damron and, when possible, the other two grievance committeemen ordinarily attended sit-down and grievance meetings with Respondent-Employer, even when it was Robinson who was actually conducting such meetings on behalf of Respondent-Union. So, even though Damron and Escobedo had seemingly not planned to attend Florian’s sit-down meeting, to avoid having to admit or lie about facts adverse to Florian of which Damron and Escobedo had personal knowledge, for Damron Robinson’s report of Florian’s request, that Damron not attend the August 7 sit-down meeting, was essentially waiving a red flag in front of a bull—it virtually assured that Damron and Escobedo would assert their right and practice of attending such meetings, by attending the one on August 7.

In that regard, it should not be overlooked that under the Act employers have no right to pick and choose the particular union representatives with whom those employers will deal. See, e.g., *United Parcel Service*, 330 NLRB 1020 fn. 1 (2000), and cases cited therein. Nor does there seem to be a statutory right for employees to similarly pick and choose which of their bargaining agent’s elected representatives can and cannot act on their behalf. To be sure, employees can object to a particular representative whenever participation by that representative violates some aspect of fair representation under the Act. See, e.g., *Michael Tenorio & Gil Fowler v. NLRB*, 680 F.2d 598 (9th Cir. 1983). But, as concluded in preceding subsections, there is no credible evidence that Damron—or Escobedo, for that matter—had ever done anything prior to August 7 to injure

Florian's employment situation, Florian's subjective view to the contrary notwithstanding. There is no basis for concluding that, by reversing his initial position not to attend the August 7 sit-down meeting, Damron somehow violated Respondent-Union's duty of fair representation owed Florian. In fact, other than having attended, there is no evidence that Damron did anything else during the meeting. For Respondent-Union it was Robinson who conducted the entire meeting, while Damron merely sat there.

Boyle and Moore attended that meeting for Respondent-Employer. It is clear that Robinson, Damron and Escobedo attended it for Respondent-Union. Robinson testified that Morales also had been present. But that testimony appears to have been in error. Morales, the night-shift grievance committeeman, denied that he had attended it and no one else placed him in attendance. Escobedo testified that he had been unable to obtain a relief worker, so that he could attend the entirety of the meeting. So he sat in for "about 15 minutes," but left when he saw a "truck drive up" and did not return to the meeting. As will be seen, that undisputed testimony is not without significance.

Robinson was never afforded an opportunity to describe in narrative form what had been said during the meeting. He agreed that work rule 11 had been mentioned, but did not recall if work rule 10 also had been mentioned: "Only thing we discussed then, I guess, was the eleven."

Boyle testified that, "The meeting started by Mr. Florian telling me that he didn't know that was a violation of the Company work rules," that "he was just driving back and forth. He didn't see anything wrong with it." Given what Boyle had said to Respondent-Union's officers about that very conduct and work rule 11, approximately a month earlier, that was hardly the best argument to address to Boyle. But, Florian would make that bad situation even worse. Florian continued, testified Boyle, by adding, "He would never break a Company, Precoat work rule. He said he would never do it." Florian's less than perfect record is reviewed below. Boyle testified that he had "looked at his [Florian's] file" before the sit-down meeting and, based upon that review, challenged Florian's assertion by saying, "Mr. Florian, I don't know how you can say that when you've broken numerous company work rules in the past." A somewhat surprised Florian replied, testified Boyle, "I thought all that was supposed to be gone," and when Boyle asked what that meant, Florian did not explain. Robinson "asked me for copies of all the basic documentation, previous disciplinary actions against Mr. Florian," Boyle testified. So far as the record discloses, Respondent-Employer provided that information to Respondent-Union. At least, there is no allegation, nor argument, that it did not do so.

As with Robinson, however, very little particularized testimony was sought from Boyle regarding what had been said during the meeting concerning Florian's suspension. Boyle testified that Robinson "made it . . . very clear that they were going to fight the terms, or, they were going to fight the disciplinary action." Moreover, testified Boyle, "I addressed the issue of the fact that I saw a problem with Mr. Florian not clocking out when I told him three times to do so." As will be seen, it was that event that ultimately led Boyle to add violation

of Work Rule 10—"Deliberate falsifying of employment application, medical records, *work records* or other reports" (emphasis added)—as an additional reason for discharging Florian on August 10. But, he conceded that during the August 7 sit-down meeting, "I did not specifically mention 10," though he added that, by mentioning Florian's refusal to punch out, as directed on August 3, "I discussed" work rule 10. As discussed below, that testimony turns out to be not so implausible as it might seem at first blush.

Florian never denied that the exchange about prior work rules violations, as described by Boyle had occurred. In fact, Florian's testimony appeared to corroborate that of Boyle. Pointing to "a coffee table in his office with a bunch of papers on it," testified Florian, Boyle "told John [Robinson] that Chester had been one of the worst employees here, should never have been hired, that I [Boyle] have 35 write ups against him." To that, Florian testified, Robinson responded "we are not here for this reason; we're here for one thing only. If Chester had all these write ups and was not such a good employee, then he should have been fired a long time ago."

With respect to the reason why the meeting was being conducted, Florian testified that Robinson "told Mr. Boyle that nobody has ever been fired for driving a car from one building to the other." "That's true," Florian agreed, when asked whether Robinson had argued that Florian should not have been punished or penalized for the act he committed, since no one else had ever been discharged for doing what Florian had done on August 3. Inasmuch as Respondent-Union is alleged to have failed to fairly represent Florian, albeit primarily because it supposedly had instigated his suspension and later discharge, it is worth reviewing Florian's opinion about the worth of Robinson's August 7 arguments, in Florian's opinion.

Florian was asked if he disagreed with anything argued on his behalf by Robinson. "Not disagreement. No, I did not," he answered. "Yes, sir," Florian testified, he had agreed with Robinson's positions. Asked if Robinson had urged everything that Florian, himself, would have urged, Florian responded, "he was doing a good job of it, sure." "True," Florian answered, when asked if he agreed with Robinson's arguments. Asked again if he could think of any argument Robinson might or could have advanced that day, but had not, Florian replied, "Not that day, no, sir. I really don't remember, let me put it that way. I really don't know what could have been done, said." Those answers should not escape without further notice, in light of later questioning conducted when Respondent-Union and Steelworkers' officers testified.

During cross-examination some of those witnesses were interrogated concerning their failure to argue that, as of summer of 1998, Respondent-Employer had failed to give specific notice to its Chicago employees that work rule 11 would now be covering driving between buildings, on South Kilbourn Street, after punching in and before punching out. In fact, it is accurate that Respondent-Employer never had posted any notice specifically reciting that. So, in light of the later cross-examination, there is some basis for questioning why, even though Robinson had not apparently made a lack-of-specific-notice argument on August 7, Florian had expressed total satisfaction with the arguments Robinson had made that day: "I

really don't know what could have been done, said." After all, Robinson was responsible for advancing the initial arguments on Florian's behalf. Surely if there had been some genuine lack-of-notice argument to be made, that would be an argument that "could have been done, said."

When called as a witness by the General Counsel, Robinson was never asked why he had not made a lack-of-notice argument to Boyle and Moore on August 7. That is a somewhat pregnant omission, given questions about lack-of-notice argument addressed to later witnesses for Respondent-Union. In fact, it is especially pregnant given Florian's expressed satisfaction with Robinson's performance on August 7.

Of course, Robinson could not have then known about Moore's mid-July warning to Florian. As pointed out in subsection G above, Moore had not told anybody else about that particular warning. Even so, during the meeting with Respondent-Union's officers, discussed in subsection F above, Boyle had said specifically that, in Boyle's opinion, the prohibition of work rule 11 extended to driving between buildings after punching in and before punching out. Boyle had given Respondent-Union's officers time to communicate everything he had said during the meeting to Chicago unit employees. It is uncontested that Respondent-Union's officers, particularly Escobedo, had told employees, specifically Florian, at the July 12 unit meeting that driving between buildings while on the clock would no longer be allowed.

In light of those pre-August 7 events, surely it would have been self-defeating for Robinson to have argued lack of pre-August 3 notice to Florian that work rule 11, as interpreted by Boyle, applied to driving on South Kilbourn Street between buildings while on the clock. Indeed, Respondent-Union's officers legitimately had their own credibility to preserve when dealing with Respondent-Employer. Had Robinson denied Boyle's notice of his position concerning work rule 11, or denied that Respondent-Union had informed unit employees of that position, after having secured an implementation-delay to do exactly that, then likely nothing ever said by Robinson in the future would have been trusted by Respondent-Employer. In short, lying in an effort to salvage Florian's self-inflicted situation could have impaired, in not totally undermined, future overall relations between Respondents. That is hardly a result consonant with the purposes of the Act.

The fact that Robinson did not make a lack-of-notice argument, and that Florian conceded that Robinson had done "a good job" on August 7, is further evidence that, in fact, Florian had been put on specific notice prior to August 3 that he should not be driving on South Kilbourn Street between buildings after having punched in and before having punched out. Apparently appreciating that vulnerability of his situation on August 7, Florian advanced two other assertions.

First, he testified that, on August 7, Robinson had requested that Boyle bring one of the foremen into the meeting, to explain that "we were allowed to drive back and forth with no problem whatsoever," and, moreover, had mentioned specifically bringing in Focht and Mahoney as persons who could explain that to Boyle, "if he [Boyle] wasn't aware" that such a practice was allowed. Of course, Boyle was aware that he had prohibited continuance of such a practice. No foreman was in a position

to countermand that prohibition by the plant manager. Thus, bringing in someone such as Focht or Mahoney would hardly serve to salvage Florian's disregard of work rule 11, as notified that Boyle would be applying it.

Beyond that, no other person present during the August 7 meeting corroborated Florian's testimony about such a request having been made by Robinson. Robinson, seemingly sympathetic to Florian's position, never testified that he had requested on August 7 that Focht, Mahoney or any other person be brought into the sit-down meeting being conducted that day.

Second, Florian testified that, during that sit-down meeting, "Mr. Robinson didn't do anything wrong," but rather, "John Robinson done what he had to do to a certain point." What "point"? Well, claimed Florian, "I think if [Robinson] would have had full cooperation of the chair person maybe they could have got this resolved," because Robinson "probably could have done a better job if he had the opportunity to. If you have a committee in a company itself, if you work together and sit down and present your case as a whole, not the way the 7th meeting went on in August, where nobody wants to handle it, just let this guy handle it." But the guy—Robinson—was the one who ordinarily handled sit-down meetings for first or day-shift employees, such as Florian. True, Damron and, for about 15 minutes, Escobedo sat in during the August 7 sit-down meeting. Yet, as pointed out above, when able to attend such meetings, both of them ordinarily did so. So far as the record shows, their mere attendance in no way hobbled Robinson's ability to represent Florian, as he would have represented any other firstshift employee. So far as the evidence shows, Damron and Escobedo merely sat in as witnesses to what was occurring during a meeting conducted by the appropriate grievance committeeman.

Still, Florian argued that had Damron cooperated with Robinson, "maybe they could get this resolved." Yet, Robinson never claimed that his presentation had been impaired in any way by some sort of supposed lack of full support by Damron. Asked what he believed Damron or Escobedo could have done on August 7, that they had not done, Florian answered, "I couldn't tell you that." "I don't know what they could have come up with, said or done," he later answered. Asked what arguments Damron could have made that Robinson had not made, Florian conceded, "Again, I don't know. That wasn't my job." But, it was his situation that had been the subject of the meeting. Surely, he was able to understand what arguments could have been advanced on his own behalf. "Not off hand right now," he responded, when asked if he could think of any argument, not made on his behalf by Robinson, that Damron or any other union officer could have been made. Actually, given the points made in immediately preceding paragraphs, that appears to be an accurate portrayal of the situation.

Not to be lost sight of here is the fact that, at root, involved is interpretation and application of a private employer's work rule. Respondent-Employer is not a public entity. Its work rules are neither criminal prohibitions nor prohibitions which somehow infringe upon rights under the First Amendment to the United States Constitution, where clear notice of prohibitions is essential. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000). In fact, Boyle and Moore did notify

Respondent-Union that work rule 11 would extend to driving between buildings while on the clock. In turn, Respondent-Union and, in addition, Moore warned Florian to cease doing that. Against that background, Florian acted at his own peril in disregarding those warnings.

The August 7 sit-down meeting adjourned with Robinson saying that Boyle had 5 days to respond to what had been said during that meeting. Florian testified that, after leaving that meeting, he had spoken to Escobedo “outside the office area,” and had asked the latter, “why didn’t you get up at the meeting and tell Mr. Boyle that you also drive in your car back and forth and I’m the guy that relieves you.” According to Florian, Escobedo retorted, “F U. I’m not going to lose my job because of your fat ass and . . . just walked away from me at that point.” Escobedo denied specifically that he had ever been asked by Florian why he (Escobedo) did not admit having driven his car between buildings and, further, denied specifically having ever told Florian “f—k you, I’m not going to lose my job because of your fat ass.” In addition to that denial, there are other problems with Florian’s testimony about Escobedo’s purported remarks.

First, Florian’s testimony extended over 3 days of hearing. Thus, cross-examination continued on days after the one during which direct examination had been conducted. Even so, there seems no reason to conclude that by the second or third day Florian likely would have forgotten his testimony during direct examination about events in which he supposedly had been a participant. Yet when asked if he remembered testifying on the previous day about someone having called him a “fat ass,” Florian equivocated. “I believe so,” he initially testified. Then he testified, “You’d have to ask me the question again, sir. I think I testified to a lot of stuff for hours yesterday.” Asked about a member of Respondent-Union’s committee having referred to him (Florian) as a “fat ass,” Florian continued to equivocate: “You got to give me something real specific.” Asked, then, whether it was fair to say he had no recollection of having been called a “fat ass” by a fellow union member, Florian answered, “If you give me a little time, I’ll think of maybe your question and then I can answer it for you.” Now, as an objective matter, it seems unlikely that anyone would abruptly forget having been called that by a coworker, particularly when that coworker was an agent of a union representing a person called a fat ass. Even more so does it seem unlikely that anyone would abruptly forget having been called that, when such a remark supposedly had been made in the course of an event involving suspension of the target of that remark. What seems to have occurred, as on all too many occasions during the hearing, an account was made up during direct examination, but the witness was unable to remember during cross-examination exactly the story that he had earlier tailored to adversely portray an agent of the other side.

Much later during cross-examination Florian was given another bite at the “fat ass” apple, accompanied at that point by reference to his pretrial affidavit. That affidavit account of Escobedo’s remarks states: “F— You, I am not going to lose my job because of you.” Florian claimed, in essence, that the affidavit-account aided his recollection concerning what “I testified yesterday to.” He admitted that “[t]he word fat ass

was eliminated from” the affidavit, but claimed that he once more “remembered that word [sic] too.” Then Florian proceeded to reiterate that Escobedo had said, “F U I am not going to lose my job because of your fat ass.” By then, however, his ongoing waffling on the point accomplished nothing more than to leave the impression that Florian was doing no more than attempting to portray Escobedo in the most unfavorable light possible, with the overall objective of shoring up a case against Respondent-Union, rather than testifying candidly about what had occurred after the August 7 sit-down meeting.

That conclusion is supported, secondly, by Escobedo’s above-described testimony about his attendance at Florian’s sit-down meeting. Escobedo testified, “I was working at the time so they couldn’t get any one to relieve me so I went in there about 15 minutes before I seen the truck drive up and I had to go back to work.” “No,” he answered, he had not stayed for the entire meeting. Obviously, had Escobedo left the meeting after approximately 15 minutes, then he could not have been present to say anything to Florian following that meeting. In fact, no one disputed Escobedo’s testimony that he had been forced to leave the August 7 meeting early, to attend to duties from which he had been unable to obtain relief.

That leads to consideration of a third point. Florian testified during direct examination that he and Escobedo had not been alone during that asserted post-meeting exchange. “I believe Mr. Robinson was there,” testified Florian. He added hastily, “I don’t know if he heard it or not but I believe he was there, [w]hen we walked out of the office.” Florian never bothered to explain exactly how Robinson could not have heard an exchange between Florian and Escobedo, when they all supposedly had walked out of the office together. Now, Robinson was called as the General Counsel’s witness after Florian had given that testimony during direct examination—after Florian had testified about what Escobedo had said, he “believe[d],” in Robinson’s presence. But, Robinson never corroborated any aspect of such a postmeeting Florian-Escobedo exchange: never testified that he had heard Escobedo make the remarks attributed to him by Florian; never testified that he had seen, albeit not heard, Escobedo and Florian engage in a post-sit-down meeting conversation; never testified that Escobedo had even been present by conclusion of the August 7 sit-down meeting.

Moving on, by memorandum dated August 10, the substance of which is quoted below, Boyle responded to Robinson by giving notice that Florian was discharged. Boyle testified that he—and he alone—had made the decision to terminate Florian. There is no basis for questioning that testimony by Boyle.

As quoted above, both Boyle and Florian testified that the former had mentioned Florian’s past work record during the sit-down meeting. In fact, Boyle acknowledged having reviewed Florian’s personnel file before the sit-down meeting. As to that file, Drufke conceded that “Chester had a very thick personnel file,” and, in fact, a number of warning reports from that file were presented during cross-examination of Florian. The latest is dated “2-17-98,” for having failed to “follow procedures for pulling the oldest stock first,” while earlier ones—some signed by Florian and others showing “Refused to sign”—list violations of various work rules: work rules 20 and 21 on September 8, 1997; work rule 17 on October 2 and, again, on December 2,

1996; work rule 16 on November 21, 1994. The total number of those written warnings does not add up to 35, the number that Florian claimed Boyle had recited during the August 7 sit-down meeting, as quoted above. On the other hand, they certainly show that Florian had violated work rules in the past. And there is no evidence that any other employee had received as many written warnings as had Florian over the course of the same time period prior to August 7.

Even so, from Boyle's testimony, those written warnings had *not* been a reason for Boyle's decision to discharge Florian, though Boyle acknowledged having taken them into account during postdischarge settlement discussions, as Florian's grievance progressed to arbitration. Asked to explain each and every reason for his discharge decision regarding Florian, Boyle answered: "Each and every reason would be one simple fact that he left Company premises. It was a violation of work rule 11. Period. It's black and white. There aren't any exceptions."

At first blush, that might appear to have been a quite trivial offense—driving on a public street between buildings for a few minutes on one occasion—for discharging a relatively long-term employee. In fact, when evaluating allegations of unlawful motivation, one indicium to which the Board had accorded weight, in assessing actual motivation, is comparative severity of employee-offense and employer-discipline. See, e.g., *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *American Thread Co. v. NLRB*, 631 F.2d 316, 321–322 (4th Cir. 1980); and, more generally, *Pikeville United Methodist Hos. v. United Steelworkers*, 109 F.3d 1146, 1155 (6th Cir. 1997). Yet, that particular indicium is by no means determinative of employer-motivation. Account need be taken, as well, of the entire situation. See, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 252 (2000).

As set forth in subsection E above, Drufer had brought Boyle to Chicago to correct "quality and productivity problems" at the facility there. Boyle had a history of demonstrated success in correcting such problems. One element of his "philosophy" for doing so had been strict enforcement of work rules, aimed at achieving the overall objective of creating "[s]tructure, organization, discipline" at troubled facilities whose operations Boyle was attempting to turn around. As described in subsection F above, during his meeting with Respondent-Union's officers Boyle had mentioned that there would be strict enforcement of work rules at the Chicago facility. And he also said that he regarded driving between buildings while on the clock to be a violation of work rule 11. Before implementing new rules and interpretations, Boyle had allowed Respondent-Union time to communicate his message to unit employees. Surely, Boyle had no reason to believe that Respondent-Union would not do that.

Then, on August 10 Boyle confronted a situation where an employee had done precisely what Boyle had said would violate work rule 11. He had said that he would apply Respondent-Employer's work rules strictly. He did so. That the offense might appear objectively minor, in the overall scheme of things, is not the point. Boyle felt that strict enforcement of work rules was an integral component of turning around Chicago operations. Thus, he applied the rule strictly to Florian and followed a course which, so far as the evidence shows,

Boyle would have followed with any employee who had done what Florian had been caught doing on August 3, regardless of any internal union activities by the adversely affected employee. In such circumstances, there is no basis for application of the disproportionate offense-discipline indicium, as a basis for inferring motivation unlawful under the Act.

That indicium is not the only unlawful-motivation indicium which might appear to come into play here, at least at first blush. Boyle's August 10 memorandum states in substance, "The above subject, Chester Florian, has violated Work Rule No. 10 and No. 11; therefore he is terminated." Yet, as quoted above, Boyle testified that driving off company premises while on the clock had been the lone reason for his decision to discharge Florian. Work rule 10—falsification of "work records"—has no relationship to leaving company premises. In short, inclusion of work rule 10 seems to have been a falsely added reason for discharging Florian.

Another indicium of unlawful motivation is advancing reasons which, in fact, were not actual discharge reasons. See, e.g., *Detroit Paneling Systems*, supra, and, more generally, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 148 (2000). Again, however, that is not a determinative indicium. For, "the defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it []." *Maple Grove Health Care Center*, 330 NLRB 775, 777 (2000), and cases cited therein. As it turns out, Boyle had a plausible, if tenuous, reason for adding violation of work rule 10 to Florian's termination memorandum.

As pointed out in subsection G above, it is unrefuted that Boyle had thrice directed Florian to "punch out and go home for the day" on August 3, but Florian had declined to do so, asserting that it was "not 4:00 o'clock yet." Obviously, Boyle resented that response. Although he had not pursued the subject that day, as set forth above it is uncontroverted that Boyle had raised that very subject during the August 7 sit-down meeting. Clearly, he had not simply forgotten by August 7 what had occurred four days earlier. Thus, in essence, he indulged his ongoing pique about what had occurred by adding work rule 10 as a termination reason, even though he conceded when testifying that it had not actually been a reason for his decision to fire Florian. In that regard, two points should be mentioned in connection with that addition of work rule 10 to Florian's termination notice.

First, as with Moore's suspension motivation, there is no credible evidence showing either that Respondent-Union, particularly Damron, had caused or attempted to cause Boyle to decide to discharge Florian on August 10. Furthermore, there is no credible evidence that Boyle had made his discharge decision because of any statutorily-protected activity by Florian. Rather, Boyle had warned that work rules would be enforced and that, in his opinion, work rule 11 prohibited driving on South Kilbourn Street between buildings while on the clock. On August 3 Florian was caught by Moore doing precisely what Boyle had said was prohibited by work rule 11. On the following day, it is uncontested, Florian had declined to punch out, despite having been directed by Boyle to do so. None of those activities are ones which are protected by Section 7 of the Act. So, the added work rule 10 reason, in the termination

memorandum, is of no true consequence in evaluating Respondent-Employer's motivation under the Act.

Second, facially it appears odd that Boyle had chosen to list work rule 10 as the rule violated when Florian had declined to punch out as directed by Boyle on August 3. After all, that conduct sounds less in violation of a rule against falsifying work records and more in insubordination. Insubordination is prohibited specifically by Respondent-Employer's work rule 28. But, Boyle confronted a problem where he to rely upon that particular work rule for terminating Florian.

Work rule 28 was one of the then-newly added two work rules about which Respondent-Union had protested in late June, after it had appeared among the revised work rules of "June 25, 1998" which were posted. Damron's protest had been based upon Respondent-Employer's failure to afford Respondent-Union prior notice and an opportunity to bargain about adding those rules, before they had been announced and implemented. The fact that Boyle and Moore thereafter met with Respondent-Union's officers could be found, in a subsequent arbitration proceeding, insufficient to erase the absence of prior consultation. Indeed, if any reliability is to be accorded to the testimony by White set forth in subsection E above, Damron had planned to "settle [those added rules] through the grievance procedure" should "somebody get[ ] hurt by" application of one or both of them to an employee. Thus, were he to have listed work rule 28 in the termination memorandum, Boyle faced a possible argument having little to do with Florian's recalcitrance, as Boyle view it, on August 3. Better, in that setting, to characterize Florian's conduct as violation of an already-established work rule.

It should not be overlooked that, as of August 10, Boyle confronted only disputes resolution procedures, under the 1995-1999 collective-bargaining contract, concerning Florian's suspension and discharge. No unfair labor practice charge was filed by Florian until August 14. Nor, so far as the credible evidence discloses, could Boyle have foreseen any reason as of August 10 to consider that Florian might file unfair labor practice charges. He denied that he had known of Florian's past and projected internal union activities. To the extent that his addition of work rule 10 can be regarded as padding Respondent-Employer's position for firing Florian, therefore, that padding cannot be regarded as some sort of effort to escape a conclusion of unlawful motivation under the Act. At best, instead, it can only be characterized as an effort to buttress Respondent-Employer's position in private disputes resolution procedures, hardly a violation of the Act.

As to that padding, it also should not escape notice that, as pointed out above, Drufke had not been "real comfortable" with the situation regarding Florian. Not because of any possible unlawful motivation on the part of Boyle, but rather Drufke's lack of comfort had arisen from his concern about the adequacy of notice to Florian regarding driving between buildings while on the clock. Drufke acknowledged having been told by Boyle that the latter "had a meeting with the Union," and that there was a "posting up that warned employees not to do that." Nevertheless, as with his unwillingness to accept Director of Human Resources Christopher's report about what he had overheard Focht saying to OFCCP investigators, as described in

subsection D above, Drufke seemed unwilling to accept Boyle's recitation of events leading to Florian's suspension. Thus, his remarks that "Boyle was wrong for doing that," and that "this one's going to cost us a lot of money," assuming those remarks were made, as Focht claimed. In the face of his superior's concern about Respondent-Employer's position in arbitration, it is not so surprising that Boyle would pad the reasons recited in the termination memorandum.

One additional point should not pass without notice, since it also appears to have influenced Boyle's reluctance to give Florian a break in evaluating whether to rescind his discharge. During rebuttal, Drufke testified that Boyle had mentioned a "problem which, the charge with the truck drivers," saying that he (Boyle) was "in the process of getting a written statement" from a driver about Florian extracting money from that driver. No such statement was ever produced, neither for Drufke nor during the hearing. Still, Drufke's rebuttal testimony should not simply pass without notice.

When Boyle appeared as a witness, he never was asked during direct examination about possessing any knowledge concerning rumors of Florian seeking money from commercial truckdrivers. Had nothing more happened, the record would be left with a void regarding what Boyle may or may not have known about, at least, the rumor that Florian had been doing that. During cross-examination, however, an effort was made to open an aspect of Boyle's knowledge of such asserted conduct by Florian. That effort was objected to, correctly, as beyond the scope of direct examination of Boyle. After that objection was sustained, an offer of proof was made: that a "truck driver told [Boyle] those things about Mr. Florian" in the presence of Escobedo. Though withdrawn, that offer of proof effectively obliterates any possible inference that Boyle had not known about accusations that Florian had been charging commercial drivers to load and unload them faster and, possibly as well, for skids ordinarily provided by Respondent-Employer free of charge to drivers, when available. If anything, the withdrawn offer of proof effectively concedes that, in fact, Boyle had some knowledge that Florian might be doing such things.

The withdrawn offer of proof is not the sole basis for concluding that Boyle possessed that knowledge. As set forth above, Drufke acknowledged that Boyle had mentioned a "charge with the truck drivers." Moreover, Escobedo described an incident involving a Gorman Trucking driver whom Escobedo had seen speaking with Boyle, though Escobedo had not been able to overhear what they had been saying. Finally, Robinson testified that, during the processing of Florian's grievance, Boyle had said that "he more or less had a witness that [Florian] was talking [sic] kick backs from the truck drivers." Apparently, Boyle was unable to obtain any driver's written statement to that effect. Even so, obviously Boyle had become aware of the possibility of such conduct by Florian. It did not form a basis for terminating Florian on August 10. Yet, as with the warnings in Florian's personnel file, it became a consideration for Boyle when weighing whether or not to rescind Florian's suspension and termination, when confronted by Respondent-Union's grievance concerning those disciplinary actions.

A copy of Florian's termination memorandum was supplied to Damron. That was ordinary procedure, testified Robinson. As Steelworkers' then-Staff Representative Langele testified, "Rich Damron informed me" of the memorandum, during a conversation about "setting up a third step meeting for a different discharge case," and, "I told him to, well, take it to procedure. If it gets up to my step, let me know." As pointed out in subsection A above, Steelworkers' representatives ordinarily take over grievances once they progress to the third step of the contractual disputes resolution procedure.

On August 10 Robinson called Florian, asking the latter to come to the plant on August 13 to sign a grievance which Robinson was preparing. That grievance was signed by Florian and filed by Robinson on August 13. It protests two matters. First, that Respondent-Employer "had A Policy, that Employees next door, drove there [sic] cars next door before Work and after Work, So Chester Wasn't Leave [sic] the premises, he was return [sic] From next door." Second, the grievance states that "Work Rule No. 10 Should have being [sic] discuss [sic] in our First Meeting on Aug 7, 98. And should have being [sic] on Letter Date [sic] Aug 4, 98." As a remedy the grievance requests, "Job Back, Back Pay for all Lost Days [&] hours loss [sic]." So far as the evidence discloses, Florian never objected to anything written by Robinson, nor sought to have anything added to the grievance, when signing it on August 13. Nor, when testifying, did Florian claim that anything had been omitted from that grievance. Beyond that, there is no independent basis for concluding that the grievance somehow was deficient to the point of demonstrating a failure by Respondent-Union to fairly represent Florian.

There is one significant point in connection with what next occurred regarding Florian's grievance. Under the disputes resolution procedure set forth in article XIII of the 1995-1999 collective-bargaining contract, there seemingly should have been, at least, a step 2 meeting with then-Regional Manager Druflke. So far as the record shows, that never occurred and no explanation is supplied by the evidence for that step's seeming omission. Apparently, by some point everyone understood that Florian's grievance was going to proceed directly to step 3. Thus, Florian answered affirmatively when asked if he had known that Steelworkers would be involved at the next level, after he had signed his grievance, and that Respondent-Union would not be handling that next step meeting. "Let's hope so, yes," answered Florian, when asked the latter. Given Florian's attitude toward Damron and Escobedo, and the primary theory upon which the failure to fairly represent allegation is based, it would seem that there can be no basis for concluding that the Act was somehow violated because Steelworkers took over processing Florian's grievance after August 13.

Nevertheless, Focht seemed to be attempting to create some sort of failure of that duty on and after August 13. According to him, during a shop-floor conversation, which Focht placed as having occurred after Florian's grievance had been filed, Robinson "just started out that he really thought it was unfair" what had happened to Florian. Focht agreed and, according to Focht, Robinson "told me that Chester had filed the grievance he had to kind of do this on his own. That Rich and Manny and the Committee wants nothing to do with this one," or "he's kind of

out on a limb because he has to control this one by himself because the other Union employees told him they washed their hands with Chester. If he wanted to grieve this and follow up with it all the way, he'd have to do it on his own." Robinson never corroborated that testimony by Focht—never testified to having participated in any such conversation and never testified to having made those asserted remarks to Focht. Beyond that, as set forth above, Robinson could hardly be regarded as having "to control this one by himself" after the grievance had been filed; Steelworkers' representatives were going to be handling the grievance's processing. There seems no reason for Robinson to have made any such remark to Focht.

In sum, there is no credible evidence that Respondent-Union had caused, or even attempted to cause, Respondent-Employer to discharge Florian. Nor is there any credible evidence that Boyle had discharged Florian for any reason proscribed by the Act. The credible evidence shows that Florian, like other union employees, had been told that driving on South Kilbourn Street between buildings while on the clock was no longer allowed. Florian did so and was twice caught by Moore doing so. Thus, he was suspended, then discharged, for disregarding specific notice to cease driving between buildings while on the clock. Furthermore, regardless of what Damron thought of Florian, Robinson processed the suspension in the normal course of affairs and, also, prepared a proper grievance after Respondent-Employer made the decision to fire Florian. There is no credible evidence that, in taking those actions, Respondent-Union had somehow violated the duty of fair representation which it owed Florian, as his statutory bargaining agent.

#### *I. Suspension and Discharge of White*

Shipping clerk James White had been employed off and on by Lithostrip and Respondent-Employer for approximately 33 years. Fifteen or 16 of those years had been at the Chicago facility, though White had only worked there steadily for approximately 6 years prior to August of 1998. During 1967 White had been one of the Chicago employees who voted in an election which culminated in representation by Respondent-Union's predecessor-union. Thereafter, White had served as a union safety man during the latter 1970s.

After that, so far as the record shows, White never engaged in any internal union activities. That is, he testified that he had never been even a candidate for union or unit office. Nor had he ever announced any intention to run against any incumbent officer. Beyond that, there is no evidence that White had even voiced support for Florian, Phillips, and Crylen in their failed efforts to run for unit offices during early 1997. Nor is there any evidence that White had voiced any kind of opinion about, or support for, any intention by Florian to run for unit chairperson during 2000. In fact, there is no evidence that White had any significant relationship with Florian prior to the latter's suspension and discharge.

As set forth near the beginning of subsection H above, White had been working in the annex on August 4 and had been told by Florian that the latter was being suspended for having driven between buildings on August 3. Following that conversation, testified both White and shipping clerk Ralph Nelson, White had telephoned Nelson and warned that Nelson should not drive

between buildings after clocking in and before clocking out, because Florian had been “fired” for doing so. Accordingly, there can be no question that, as of August 4, White had understood clearly that Respondent-Employer did intend to discipline employees for driving on South Kilbourn Street between buildings while on the clock. Yet, that is precisely what White did 2 days later: on Thursday, August 6 he drove from the annex to the main building to punch or clock out.

No supervisor observed White doing that on August 6. But, annex loader George Hollins testified that he had seen White making that drive between buildings. According to Hollins, he had earlier warned White not to continue doing that, because Boyle “is enforcing the rules,” but White had simply “waved his hand” and said, “Oh, they ain’t going to do shit.” White never was called as a rebuttal witness. So that testimony by George Hollins is left uncontroverted. When he then saw White driving from the annex to the main building on August 6, Hollins testified, he reported what he had seen to Moore. Initially Moore testified that he had learned of that White had driven between buildings “from a rumor in the plant.” Pressed for greater specificity, Moore testified, “I believe it was Ricky Hollin [sic], Ricky Hollin I believe his name was. I’m not real sure.” Wrong brother, but essentially Moore corroborated the testimony given by George Hollins.

As described in subsection A above, Respondent-Employer has four security cameras surveilling perimeter areas of its Chicago plant. At least for a time Respondent-Employer retains tapes made by those cameras. Moore reviewed tapes to ascertain whether or not they revealed White driving between buildings. They showed that White had done so on August 6. Moore acknowledged that he had not examined those tapes to ascertain whether any other employee had done so. Not surprisingly, given that only White had been reported as having driven between buildings while on the clock.

On Thursday, August 13 White was summoned to a meeting with Moore. Present throughout that meeting was Production Foreman Dedina. There is really very little dispute of consequence regarding what had been said during the meeting. When Moore asked if White had driven between buildings “last Thursday,” testified White, “I had to stop and think because, and I says, yeah, I did.” According to White, Moore said, “Well, then we have a problem. And he explained to me work rule 11, leaving the premises and how could I be that stupid to do that 3 days after Chester was just suspended.” White testified that he replied, “I just did it because it’s been a habit for all these years. I didn’t give it any thought. I didn’t try to embarrass anybody or make a statement.” On its face, that explanation raises doubt concerning the reliability of White’s statements.

After all, it is undisputed that White had been warned by George Hollins that he (White) had best stop driving between buildings, but had simply waved off Hollins. White admitted that he had been told of Florian’s suspension, by Florian. Seemingly, Florian’s suspension was not some easily forgettable minor event in White’s employment experience with Respondent-Employer. White called Nelson to warn Nelson not to do what had caused Florian to be suspended. Against that immediate background, it is difficult to believe any explanation

by White that he had done so on August 6, simply because he had not “give[n] it any thought.”

Beyond that, White never explained why he had chosen to tell Moore that he “didn’t try to embarrass anybody or make a statement.” Those are odd remarks—ones not likely to be made by an employee being suspended. The fact that White made those remarks is some indication that, in fact, he had made his August 6 drive to the main building as some sort of test of Respondent-Employer’s intentions, perhaps to ascertain whether it would suspend any employee other than Florian for doing that, given Florian’s suspicions, fed by Focht’s false statements, that his suspension had resulted from a conspiracy between Respondents to get rid of him.

In any event, White testified that when Moore said “well, we have to suspend you,” he (White) had “asked for a union official to be brought in,” and Damron, “the only union official on duty,” was summoned to the meeting. After he arrived, testified White, “I explained to him, Mr. Damron, that I was being suspended for driving around the building. And I, again, told him that I, you know, Rich I didn’t do it because, you know, for any, make a statement or be embarrassed or, I just did it.” In other words, not only did White admit what he had done on August 6 to Moore, but he admitted it to Damron in front of Moore. Those admissions should not be overlooked, given that Respondent-Union allegedly failed later to fairly represent White.

Moore’s testimony about the meeting differed only somewhat from that of White. Moore testified that he had asked White whether he had been “given permission for anyone to be in his vehicle and he had told me no,” after which Moore “asked him if he knew why he was in here and he told me yes for violating work rule 11.” According to Moore, White added, “I screwed up. I shouldn’t have done it.” Moore denied that he had used the word “stupid,” but acknowledge have said to White, “Just how could you do the same thing Chester did.”

Now, given White’s above-described lack of any internal union activity prior to August 13, as well as the lack of evidence that he had engaged in any union activities whatsoever that might have come to the attention of Respondent-Employer, the only possible argument, to support an allegation that White had been suspended for a reason unlawful under the Act, is that Respondent-Employer suspended White to conceal an unlawful motive for having suspended and discharged Florian. As concluded in subsection H above, however, a preponderance of the credible evidence does not support unlawful motivation allegations with regard to Florian’s suspension and discharge. Nor does it establish that Respondent-Union had caused Respondent-Employer to suspend and discharge Florian. Rather, a preponderance of the credible evidence shows that Florian would have been suspended and discharged, regardless of his past and projected union activity and regardless of how Respondent-Union’s officers felt about those disciplinary actions. In light of those conclusions regarding Florian’s situation, there is no room for a conclusion that Respondent-Employer had suspended White in an effort to conceal an unlawful motivation concerning Florian. The latter predicate finding for such a theory does not exist.

That leaves for consideration the companion allegation that Respondent-Union failed to adequately represent White, though for the most part that allegation is based upon Respondent-Union's supposedly successful conspiracy with Respondent-Employer to get rid of Florian, an assertion for which there is no credible evidence. As quoted above, White testified that Damron had been summoned to attend the latter phase of the August 13 suspension meeting. Damron agreed: as he had been checking his "mail box in the office," he testified, "Moore come [sic] in, got me and said that Jim White was in the conference room and that he wanted me to come in there." As quoted above, White testified that, once Damron had arrived in the room, he (White) admitted having driven from the annex to the main building on August 6. Damron's testimony supports that of White: "Jim White started doing all the talking. He says, I, I done it. I told him [Moore] I done it. It was wrong. I done it, I told him I done it."

After the meeting ended, testified White, he and Damron left the room and Damron "told me that he would file the first step grievance right away. He would let me know what's going on," or, "he would file the grievance and he would advise me of when the meeting would be set up," concerning that grievance. Damron never denied having made those statements to White. Even so, there is a basis for doubting that Damron would have said such a thing to White as early as August 13.

As set forth in subsection A above, article XIII, Section 3 of the 1995-1999 collective-bargaining contract provides for suspension, while Respondent-Union investigates, prior to imposing final disciplinary action upon a unit employee. Operation of that provision was illustrated in the case of Florian: he was suspended on August 4, a sit-down meeting was conducted on August 7 and, only afterward, was Florian discharged. Moreover, only after that discharge did Robinson prepare a grievance. As it turns out, no sit-down meeting was conducted for White, possibly because his August 13 admissions to Moore and Damron left Respondent-Union with little room to contest discipline against him for having driven between buildings while on the clock, given the prior suspension of Florian.

Still, there is no basis for inferring, must less concluding, that as of August 13 Respondent-Employer had intended upon discharge as a penalty for White's infraction. So, as of that date, there was really no basis for Damron to file a grievance. As had been the case with Robinson's grievance for Florian, a grievance for White, in the ordinary course of affairs, would not be filed until after Respondent-Employer had given notice of its final disciplinary decision regarding White. That said, there seems no reason for Damron to be saying on August 13 that he would be filing a first-step grievance at that point. Beyond that, there seems no basis for Damron to have assertedly said that he would file a grievance. Doing so was the responsibility of the appropriate-shift grievance committeeman, as Robinson had done for Florian. That is but an added reason for doubting that Damron had promised to file a grievance for White, as White claimed that Damron had promised. Conversely, as discussed in subsection L below, White had another reason to claim that Damron had promised to file a grievance for White as early as August 13.

From General Counsel's and Charging Parties' viewpoint, special significance attaches to an event that occurred on the day after White's suspension. On that day, all agree, Boyle and Moore participated in a meeting with White at the Illinois Bar and Grill, near Respondent-Employer's Chicago facility.

White testified that he had left his home that day and had gone to Duffy's, a bar, where he shot darts and consumed one beer. After doing that for approximately a half-hour, he testified, his wife telephoned the bar and, when he came to the phone, said that Boyle had called their home and wanted her to "get a hold of me to have me call back to the plant." "Had to be 4:30, quarter to five," testified White, when he called the plant and, after connecting with Boyle, "he asked me to meet him to discuss this situation," to which White responded, "sure because I want my job back." According to White, Boyle "asked me if I would meet him up at the Illinois Bar and Grill about 5:30," and White agreed to be there. Boyle and Moore advanced a quite different description regarding how that meeting came to be convened.

"I had a message on my desk to call Jim White," Boyle testified, and "[a]bout five minutes until 5:00 I finally returned his call. I got his wife. I left a message with her to call me back." "About 20 minutes later, probably a quarter after 5:00 Mr. White called me," testified Boyle, and "I asked Mr. White if he wanted to meet with me. He said he did. And I said fine. I'm getting ready to leave for [sic] work. I'm going to stop and get something to eat at the Illinois Bar and Grill. You can stop by there if you want to and talk to me." White agreed to do so, Boyle testified.

Boyle did not intend to meet alone with White. Moore testified that, as he was working "at the exit end of the line[,] Mr. Boyle got in touch with me and told me that Mr. White had called him and wanted to have a meeting with him at the Illinois Bar and Grill to talk about his job or replacing [sic] him somewhere to that affect [sic]," and that Boyle "wanted me to go there to be a witness on this meeting." Thus, both officials proceeded to the Illinois Bar and Grill, there meeting with White.

White testified that when he arrived there at "5:30," Boyle and Moore "were there" already. According to White, he was told to, "Sit down and have a beer." "I told [Boyle], I, you know, I'm sorry for screwing up his job or his case against Chester," testified White, but "Boyle says, you didn't screw up nothing. We're going to get Chester. It's just that you made it a little more complicated and you [sic] have to get you along with him and we're going to do this. But we don't want to get rid of the older employees that have been there with good work records and everything, so we have a problem, he says." According to White, "I told him, you know, I want to keep my job and get back."

To that, White testified, Boyle said, "well, what we can do is, we're going to go through Chester's case and we're going to have to go through with your case. But in about four to six weeks we'll have an opening out in Portage," and "we'll put you back to work out there," or, "go ahead and file for unemployment. He says put down the reason lack of work. And there would be no problem with that. He says, take four to six weeks off and we'll have you back to work" at Portage, or, "go

file unemployment, to take, it'll take four to 6 weeks. We'll have you back to work out in Portage." According to White, Boyle also "told me he couldn't, that he wasn't going to bring me back to the Chicago facility because that would, then he'd have to bring Chester back and he's not going to do that."

With respect to any grievance, White testified that Boyle said "that it was going to run its course and that I would be fired have and run [sic] and rehired out in Portage," or, "go through the process of filing a grievance. And let the grievance walk through and it'll, we'll work it all out there and then that I'm not coming back. And that in four to six weeks that he'll hire me out in Portage," but "I would keep, that all my benefits would stay the same because of my pension stuff because I'd be hired right back in the Sequa Precoat system."

According to White, Boyle also said, "we'll go through the first step and he says, why don't we just waive the second step and get right to the third?" or, "let it go through its course and waive the second step. At the first staff [sic] meeting, we'll let that go park [sic], and then we'll waive the second step of the meeting [sic], and then we'll go right on to the third step." White further testified that, near the end of the meeting, Moore chimed in by saying, "just take the four to six weeks vacation, spend some time with your wife, collect unemployment and we'll have you back to work soon."

Now, before going any further, it should not be overlooked that none of White's above-quoted testimony, about what assertedly had been said by Boyle and Moore and the Illinois Bar and Grill, suffices to show that either Florian or White had been suspended—nor, in Florian's then-existing situation, discharged—for any reason proscribed by the Act. In fact, White was an "older employee[ ]" of Respondent-Employer. Moreover, while that employment was not completely unblemished by prior discipline, there is no evidence showing that White's disciplinary record had been so tarnished with past written warnings as had been that of Florian—that White had "a very thick personnel file," to use Drufke's description, as was the fact concerning Florian. Further, in contrast to Florian, White had never disregarded a direction by Boyle, as had Florian on August 3, nor is there evidence of even rumors that White had exacted any money from commercial truckdrivers, as was rumored about Florian. Thus, in contrast to Florian, Boyle had no particular reason to be disturbed by any aspect of White's employment, other than the latter's August 6 violation of work rule 11, viewing the matter from Boyle's perspective.

Beyond that, White conceded that Boyle "[n]ever spoke to me about Union office" on August 14. White also testified that Boyle had never said "that he was going to get Chester for any Union activity. But he was going to get Chester. He did say those words in my presence. Nothing to do with the Union." White further conceded that, during the August 14 conversation, Boyle had never said that his reason for taking action against White or Florian had been because of anything that Damron had said. In fact, White agreed, Boyle had never said that he was in any way making any decision based on any effort by anybody to run for union office. Finally, White admitted that neither Boyle nor Moore had said anything in any way indicating that his and Florian's situations had been based upon anything given, said, urged or presented to Respondent-

Employer by Respondent-Union or by Damron. In short, White's testimony shows no more than that, on August 14, Boyle had treated two differently situated employees, who had committed the same infraction, differently based upon legitimate considerations arising from their comparative employment histories.

As pointed out above, Boyle testified that it had been White who had initiated the telephone contract which led to the Illinois Bar and Grill meeting. There, testified Boyle, "White started the conversation by wanting to know what he had to do to come back to work for Precoat Metals, Chicago. I told him that was not possible. That he had to go through the grievance procedure." According to Boyle, White said "he had some information that I needed to know," but Boyle rebuffed that offer, saying "I didn't care about what type of information he had." White asked "if I could do anything for him in Chicago," or whether he [c]ould . . . get a job at Portidge [sic]," testified Boyle, but "I said no. You've got to go through the grievance procedure in Chicago." As to mention of Florian during this conversation, Boyle agreed with White's above-described testimony that it had been White who first mentioned Florian. But, Boyle testified, "I told him I didn't want to talk about it. It wasn't an issue."

Moore testified that, "Mr. White basically started talking about getting his job back in Chicago or if he couldn't get his job back in Chicago if he could get a job in Portage," but "Mr. Boyle basically told him that he couldn't do anything to that affect [sic] until he exercised all his grievance procedures and so forth." Moore did not remember anything having been said about Florian, but did remember White having said "something about" things that were going on in the Chicago facility: "He said that there were things that he knew about in Chicago plant that could help Mr. Boyle," but that White "didn't explain at all" what he meant by that. Moore denied specifically having told White to take a 4 to 6 week vacation, spend some time with his wife, collect unemployment and having White back to work soon.

Boyle denied having said that White did not screw up anything, we are going to get Chester, it's just that you made it a little more complicated. He also denied having told White all we can do is go through with Florian's case and your (White's) case, then have an opening in Portage in about 4 to 6 weeks. Boyle denied having said we have a problem because we don't want to get rid of older employees who have been here with good work records. Further, Boyle denied specifically having told White that he (Boyle) would get White a job in Portage and, in addition, denied having said that he could not bring White back to the Chicago facility because he (Boyle) would have to bring Florian back. He denied, as well, having said that he was going to get Florian. Finally, Boyle denied having said either that White should skip the second step of the grievance process, or that White should go through the union steps and in 4 to 6 weeks Boyle would hire White in Portage.

To a degree Moore corroborated those denials by Boyle, though some questions put to him did not allow for Moore to do so unequivocally, given some of credibility discussion in subsection A above. Thus, in effect, Moore testified that he did not recall Boyle saying that if he brought back White he would

have to bring Florian back and that was not going to happen. Moore testified that he did not recall Boyle saying that Respondent-Employer would get Florian anyway and he did not care how long the case took. Moore testified that he did not recall Boyle having said that White should let his discharge go and in 4 to 6 weeks Respondent-Employer would have a position in Portage that White could have. Moore testified that he did not recall Boyle having said that White should file for unemployment and, in doing so, say that he had been let go for lack of work. In the final analysis, lack of perfected denials by Moore does not detract from the credibility of denials which were perfected from Boyle. Nor does the lack of perfected denials from Moore lend any plausibility to White's testimony about the Illinois Bar and Grill meeting.

To be sure, that meeting did occur and Boyle never explained why had had been so willing to meet with an employee suspended only the preceding day. Yet, it is implausible to accept that Boyle would have initiated such a meeting. True, White was an "older" employee. However, there is nothing in the record even suggesting that White had been so highly regarded or valued an employee that Boyle would likely make overtures to effectively reverse the suspension imposed on White. So far as the evidence reveals, Boyle had little, if any, knowledge about White as of August 14. There is simply no basis for believing that Boyle would have gone out of his way to have White rehired eventually in Portage, in the process possibly compromising Respondent-Employer's position in disputes resolution proceedings concerning Florian.

The unreality of White's testimony about that meeting is only reinforced by evaluation of Boyle and his situation as of August 14. While he was testifying Boyle impressed me as a no-nonsense individual, as well as a strict disciplinarian. In fact, the latter was his reputation when he arrived at the Chicago facility during mid-1998. If nothing else, his background shows that he regarded strict work-rules enforcement to be an integral component of correcting poorly performing facilities. Yet, White's testimony about the August 14 meeting effectively portrayed Boyle as having been freely, almost cavalierly, willing to make exception to all of that for an employee whom, so far as the record discloses, Boyle then barely knew, if at all. That simply seems implausible, as an objective matter.

Beyond that, as will be seen, as August progressed, it became apparent that Respondents would be skipping the second step of the contractual grievance procedure—meeting with the regional manager—and proceeding directly to the third step of the grievance procedure, both for both Florian and White. As pointed out in footnote 1 above, White did not file his charges until September 4. By that time the second grievance step had, in fact, been skipped and third-step grievance meetings had been conducted for both Florian and White. Given the benefit of that hindsight, by the time of filing his charge, it became a relatively easy matter to attribute a step-skipping statement to Boyle during White's descriptions advanced in support of his charge. Yet, skipping a grievance step was not so plausible an option for Boyle as of August 14. After all, that could not be accomplished unless Respondent-Union and Steelworkers agreed to doing so. Nothing the record even indicates that either would have been willing to do that as of that time.

In a memorandum dated August 18, Respondent-Employer terminated White. In addition to that date, two aspects of the termination memorandum for Florian, the one for White is signed by Moore, not by Boyle. Secondly, the text of the memorandum for White's termination is almost identically-worded to the one prepared for Florian: "The above subject, Jim White, has violated Work Rule No. 10 and No. 11; therefore he is terminated—8/13/98." Yet, unlike Florian, White had never disregarded a supervisor's direction to punch or clock out. Nor is there any evidence whatsoever showing that White had violated work rule 10 in any other manner. Moore never explained why that work rule had been included in White's termination memorandum.

As it turned out Moore, or someone under his direction, had been no more than the scrivener of White's termination memorandum. Boyle testified that he had made the decision to fire White, but had been working in Portage on August 18. So he had telephoned Moore and directed him to prepare a termination memorandum for White. Moore did so and, then, issued the memorandum without, so far as the evidence shows, having first shown it, or even read it, to Boyle. Now, such a scenario leave somewhat of an impression of undue haste in preparing a termination memorandum for White, at least as a first impression.

It should be remembered that the theory underlying the allegation of unlawful motivation for White's suspension and discharge is that he had been terminated to conceal an unlawful reason for having suspended and, then, discharged Florian. As concluded in subsections G and H above, there is no credible evidence which establishes motivation unlawful under the Act for either the decision to suspend or the decision to discharge Florian. Moreover, so far as the record discloses, neither at the time of Florian's suspension, nor at the time of his discharge, was there any basis for Respondent-Employer to anticipate that Florian might file an unfair labor practice charge concerning those disciplinary measures. Rather, so far as the evidence shows, Respondent-Employer could only fairly anticipate that those disciplinary measures would become subjects of contractual disputes resolution procedures.

Florian filed his unfair labor practice charges against Respondents on August 14, as stated in footnote 1, *supra*. Of course, that was a day after White had been suspended for engaging in the same act of misconduct as led to Florian's suspension and termination. So, to that extent, there might have been some basis for arguing that Florian's charge had motivated the decision to fire White: so that Respondent-Employer would be able to demonstrate consistency of treatment in the case of another employee who had committed the same rules infraction as had Florian. Such a motive would show that, even though Respondent-Employer had not suspended or discharged Florian for unlawful reasons, it had done so when it decided to fire White, so that it could protect itself against Florian's charge. Whatever merit such an argument might have in other circumstances, however, it falls flat here upon examination of the service sheet and postal return receipts for Florian's August 14 charges.

Those charges were served upon Respondents by certified mail. Accompanying each was a form letter signed by the Re-

gional Director for Region 13. Both of those letters bear the date "August 18, 1998," the same date as that of White's termination memorandum. Moreover, the jurat on both letters states that each was "served . . . on this day" of "19th day of August, 1998," the day after that of White's termination memorandum. Finally the postal receipts for those charges and the accompanying Regional Director's letter each bear a handwritten date of "8/21/98." Clearly, the termination memorandum for White had been prepared and issued well before either of Respondents had actually received Florian's charges. And there is no evidence that earlier notice of those charges had been given to either of Respondents by some other means prior to August 21. In consequence, there is no room for an argument that notification of Florian's charge had somehow influenced Boyle's decision to terminate White for having driven on South Kilbourn Street between buildings while on the clock.

To the contrary, there was a perfectly logical contractual reason for Boyle to have called from Portage on August 18 to have Moore prepare White's termination memorandum. Article XIII of the 1995-1998 collective-bargaining contract requires that, following the preliminary investigative suspension, "written notice of the company's final decision will be given to the employee and union no later than the end of the sixth (6th) day" after the suspension was imposed. White had been suspended on August 13. The 6th day thereafter would have been August 19. Before being issued, the termination memorandum had to be drafted and typed. Thus, to avoid any delay beyond the 6th day after White's suspension, it would hardly have been illogical for Boyle to have telephoned from Portage and told Moore to have a termination memorandum prepared for White. Doing so allowed seemingly sufficient time for drafting and typing the memorandum, as well as for its dissemination as required by the collective-bargaining contract.

No effort was made by any party to ascertain precisely what instructions Boyle had spoken to Moore on August 18. So far as the record shows, consequently, Boyle had done no more than direct Moore to prepare a termination memorandum for White and, in turn, Moore, or whomever received his direction, had simply copied the most recently-issued termination memorandum—the one issued to Florian 8 days earlier. Of course, there is an element of speculation in such a description, given the paucity of evidence regarding what had been said by Boyle to Moore. In the final analysis, nonetheless, it is not the preparation of White's termination memorandum that is the crucial consideration in assessing Respondent-Employer's motivation for having decided to fire White.

As to that motive, Boyle denied specifically that he or anyone at his direction ever discharged White to make a stronger case in connection with Florian's suspension and discharge. Each and every reason for his decision to terminate White, testified Boyle, had been "violation of Company work rule 11." Of course, that is exactly what White had admittedly done. In the abstract, of course, discharging White for that reason could have been an effort to conceal an actually unlawful motive for earlier suspending and discharging Florian for having done the same thing as White later did. As already concluded, however, a preponderance of the credible evidence fails to establish unlawful motivation for Florian's suspension and termination.

Instead, it establishes that Florian was suspended and terminated for engaging in an action which violated a work rule, as interpreted by the relatively newly-arrived plant manager, and which was no longer going to be tolerated in Chicago.

On August 6 White engaged in the same conduct as had Florian on August 3. Respondent-Employer's belated discovery of what White had done led it to the same consequence as had occurred when Florian had been caught: White was suspended and, then, discharged. Rather than showing concealment of earlier unlawful motivation, a preponderance of credible evidence shows no more than lawful consistency of discipline imposed for identical misconduct. That result is not changed by recitation of an inapplicable work rule in White's termination memorandum. Its inclusion there, at most, shows a lack of proper attention to what was done on August 18. In any event, a "defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it," *Maple Grove Health Care Center*, supra.

Turning to the alleged failure of Respondent-Union to properly represent White, that allegation is based largely on the theory that Damron had been attempting to persuade Respondent-Employer to get rid of Florian and, having accomplished that objective on August 10, it could no more fairly represent White, suspended and discharged for the same misconduct as Florian, than it was able to fairly represent Florian. Of course, as concluded in preceding subsections, there is no credible evidence that Damron had been attempting to cause Respondent-Employer to fire Florian and, further, no evidence that Respondent-Employer had acted on August 3, 4 and 10 in response to anything Damron might have said. Accordingly, the failure to fairly represent allegation regarding White falls under the basic theory advanced to support it: Respondent-Union had not caused Florian's suspension and discharge, it had not been failing to fairly represent Florian as of August 13 and 18, and, therefore, there is no basis for concluding that it had not fairly represented White in an effort to conceal its own supposed role in causing Florian's suspension and termination.

As set forth above, White portrayed Damron as intending on August 13 to rush out and file a grievance concerning White's suspension, even though such an action would be wholly premature as of that date. Moreover, as shown by what had occurred in connection with the grievance filed on behalf of Florian, described in subsection H above, it is not the unit chairperson who files grievances for unit employees of Respondent-Employer in Chicago. That is the responsibility of the appropriate-shift grievance committeeman. In White's case, that would have been Morales.

In fact, Morales was told that he would be handling White's situation. As discussed in subsection B above, Morales, as well as Escobedo, had no experience as grievance committeeman until elected to that position during early 1997. Though both had occupied their position for over a year by August of 1998, there is no evidence showing that, by that time, either one had handled a discharge or potential discharge situation. After prevailing in being elected, the two of them had agreed to work together handling grievances that each was primarily responsible for processing. "Me and Eddie were new at this and we had talked before that if we ever had a grievance, we would both

stick together and, you know, work through it together,” testified Escobedo.

The first significant point emerging in connection with White’s suspension is that, in contrast to Robinson’s handling of Florian’s suspension, there is no evidence that Morales had requested a sit-down meeting before any final decision was made to fire White. Failure to do so was never explained. Still, it cannot be fairly concluded that failure to request a sit-down meeting somehow prejudiced White and constituted a failure to fairly represent him. As mentioned above, in contrast to Florian’s situation as of August 7, there was little to be gained from pleading in a sit-down meeting that White should not be disciplined. He had already admitted to Boyle that he (White) had driven on South Kilbourn Street from the annex to the main building to punch or clock out. He had already admitted to Boyle that doing so violated work rule 11. He had already admitted to Boyle that what he had done was wrong. Against that background, there seems little basis for Morales to plead that Respondent-Employer should not take further disciplinary action against White, particularly in light of Florian’s quite recent suspension and discharge for the very rule infraction which White had already admitted to Boyle having committed. It was hardly illogical, nor certainly unlawful, for Respondent-Union to sit back at that point, keep its powder dry and wait to see what Respondent-Employer intended to do following White’s August 13 suspension.

The first step of the contractual grievance procedure is a meeting between the employee, “either alone or accompanied by the union representative as the employee may desire,” and that employee’s supervisor. In the case of White’s termination it had been Plant Manager Boyle who made the discharge decision. Unlike what Robinson had done immediately after Florian’s discharge, Morales did not immediately file a grievance. Instead, he testified that he “scheduled [a] meeting with the company” for 9:00 a.m. on August 24. Then, testified Morales, he telephoned White’s home, but White “wasn’t there,” and Morales was only able to speak with White’s wife. “I asked her if she could have Jim White call me as soon as possible,” testified Morales. “He didn’t call me back” that day, he further testified.

No question that Morales had made that telephone call to White’s home. White acknowledged that “my wife did” receive a telephone call from Morales. And White also acknowledged that he had not returned the call, as Morales had requested. “Because I didn’t know where to return his call to,” claimed White. However, he never claimed that he had at least tried to call Morales at Respondent-Employer’s Chicago facility. Nor did White claim that he had made any effort whatsoever to make such a call to obtain Morales’s home telephone number from Respondent-Employer. Nor did White testify to having even tried to call a coworker—particularly to Robinson, Escobedo or Damron—to obtain a home telephone number for Morales.

Having not received a return call from White, Morales testified that “I called him back” the following day, “I believe it was.” During that conversation, Morales testified that he advised White of the date and time of the first-step meeting with Respondent-Employer, but that White “said he couldn’t make it

there at that time. That if he could come in a little later.” According to Morales, they agreed to start the meeting at 9:30 a.m. on August 24 and Morales so advised Respondent-Employer.

White made no mention of having received a call from Morales during which he (White) was notified specifically of the date and time for the meeting with Respondent-Employer and, moreover, during which there had been agreement to postpone its start time until 9:30 a.m., at White’s request. Thus, White never denied Morales’s testimony that he had called White and that those discussions had occurred during that telephone conversation. Instead, as will be seen in the second succeeding paragraph, White claimed that it had been Damron from whom he had received notification of the date and time of the first-step grievance meeting.

There was corroboration for the testimony by Morales about a second call to White’s home, one during which the date and time of that meeting were discussed by Morales. Escobedo testified that he had been “sitting there” in the room from which Morales had called White. Obviously, Escobedo had not been able to hear the words spoken by White during that telephone conversation. However, Escobedo testified that he had heard Morales saying “the meeting was scheduled for 9:00 o’clock,” and, then, “Okay, . . . we’ll make it at 9:30.”

White testified that “Damron called my house” on a Saturday which he eventually placed as having been August 22. According to White, Damron said that the meeting was scheduled for 9:00 a.m. on Monday, August 24. “I asked [sic] Mr. Damron then if, that I couldn’t make it at 9:00 o’clock. It would be about 9:30, 9:15, 9:30,” testified White. Furthermore, according to White, he asked Damron “would he please set up a meeting with Mr. Boyle maybe five minutes before the meeting because I’d like to turn down the offer that was proposed to me,” or, “I was turning down the offer that Mr. Boyle made,” or, “I want to talk to him and turn down the offer that Mr. Boyle made me.” Now, despite the significance which he appeared to attach to the purported offer made to him at the Illinois Bar and Grill, White never claimed that he had related what had assertedly been said there to any official of Respondent-Union. Apparently, everyone is supposed to simply assume that Boyle or Moore told Damron about that purported offer. For when he had mentioned an offer to Damron during their phone conversation, White claimed that Damron “said he knew about the offer,” and, moreover, “would set up the meeting for me.” “He says, I’ll set the meeting up for you,” testified White.

Damron agreed that he and White had participated in a telephone conversation during which mention had been made of White wanting to meeting with Boyle. Damron did not testify about how that conversation came to be conducted. Obviously, it was a conversation which had taken place in addition to the above-described one between White and Morales. According to Damron, “he asked me would I set up a meeting for him with Mr. Boyle. And I told him I’m not accustom[ed] of [sic] doing that. I don’t do that.” Even so, testified Damron, White persisted: “And he asked me would I please ask Boyle to would he set up a meeting and if so call him or something like that and which I did,” or, at least, “tried to.” Damron made no mention of having known about some sort of earlier offer by Boyle and

Moore to White, as of the time of his telephone conversation with White. To the contrary, as to that August 24 prefirst step grievance meeting, testified Damron, "I don't know what it was for."

As discussed in this and in preceding subsections, Damron did not always advance testimony that seems reliable. However, all of the testimony in the immediately preceding paragraph was elicited from Damron during cross-examination. Accordingly, there is no basis for inferring that Damron had been prepared to testify about that telephone conversation with White. Given that seeming lack of preparation to testify about it, Damron's testimony about the telephone conversation carries some inherent credibility, that might not be the fact had it been elicited from him during direct examination by friendly counsel. Given the general lack of credibility demonstrated by White as he testified, there is a greater basis for crediting Damron's account of this telephone conversation with White, than for crediting White's above-described testimony regarding his telephone conversation with Damron.

It might be argued that White's account gains some inherent force from Damron's acknowledgment that he agreed to White's request for a meeting with Boyle. Yet, as quoted above, White had a contractual right to meet at the first grievance step with Respondent-Employer without the presence of a representative of Respondent-Union. White had a similar statutory "right at any time to present grievances to [his] employer and to have such grievances adjusted, without the intervention of the bargaining representative," under the first proviso to Section 9(a) of the Act. So, inference adverse to Respondent-Union cannot be drawn from Damron's eventual willingness to try to arrange White's requested meeting with Boyle, even though Damron had not been aware of what White wanted to discuss at that meeting.

Apparently Damron neglected to tell either Morales or Escobedo that White would be meeting with Boyle before the first-step grievance meeting. Those two grievance committeemen each testified to having been shocked to discover, when they arrived for the 9:30 meeting on August 24, that White was already present in the conference room with Boyle and Moore. Nevertheless, Damron's failure to communicate to Morales that such a meeting would be occurring, before the first-step meeting, cannot be characterized as some sort of failure to fairly represent White. Even had Damron told Morales or Escobedo, White still had contractual and statutory rights to meet with Respondent-Employer.

Only White testified about what had been said during his prefirst step grievance meeting with Boyle and Moore. According to White, he told those two officials that he was rejecting their Illinois Bar and Grill offer of eventual Portage reemployment: "I have an old car. It's 110 miles round trip. Winter's coming up. I would probably end up getting fired because my car broke down. And there's no buses out to Indiana from Chicago. That I would have to turn the job down." Neither Boyle nor Moore denied that White had made those statements to them prior to the August 24 grievance meeting.

Obviously had White said those things to them on August 24, that would seemingly reinforce his testimony that, at the Illinois Bar and Grill, Boyle had offered White eventual reem-

ployment at Respondent-Employer's Portage facility. Yet, as concluded above, even had such an offer been made to White on August 14, it would not show—or, even, tend to show—unlawful motivation for either Florian's suspension and discharge, nor for White's suspension. All such an offer would have shown is that Boyle had been willing to give a second chance to a long-term employee with a relatively clean employment record, while being unwilling to extend a second chance to an employee who had "a very thick personnel file," who had a reputation for extracting money from commercial truckdrivers to do his job and for skids ordinarily provided without charge, who had disregarded a work rule prohibition only recently announced by Boyle, and who had declined to follow Boyle's direction on August 3.

Beyond that, as also concluded above, there is no credible evidence that any reemployment offer had been made to White at the Illinois Bar and Grill. Why, then, would he have arranged to meet with Boyle and Moore? Possibly to plead the same arguments that he had advanced to them on August 13: that he had not been "try[ing] to embarrass anybody or make a statement." Possibly to repeat his own offer to reveal "information" concerning "things that he knew about in the Chicago plant." No one will know with certainty, given the state of the record. What can be said is that the fact that White chose to meet privately with Boyle and Moore on August 24, of itself, does not necessarily establish, nor support an inference, that on August 14 Boyle and Moore had made an offer of eventual reemployment at the Portage facility. In the context of the totality of the circumstances, that prefirst step grievance meeting conversation is too vague and ambiguous an incident to allow for any inference to be drawn from its occurrence, much less to admit of any firm conclusion based upon its occurrence.

The general unreliability of White's testimony is but further revealed by examination of his testimony about what had occurred during the first step grievance meeting. During direct examination he testified that Morales had "said, we believe this punishment is too severe for this. Jim [White] what do you have to say?" According to White, "at this point, again, I just stated what I said before, that I drove around. It was just an accident. I didn't do it for, to embarrass, to make a statement or anything." White further testified, "At this point Mr. Boyle says that, well, we got five days to answer this. Why don't we waive the second step meeting here and we'll go right into the third step," to which White "agreed because, again, I would hasten, you know, hasten the thing. Why go through another five days waiting around? And it was agreed and the meeting ended." No one else—not Morales, not Escobedo, not Boyle, not Moore—testified about what had been said during the meeting. No aspect of White's testimony, about what had been said during it, was refuted. Yet, when the entirety of White's testimony about that meeting is examined, problems arise regarding its reliability.

First, during cross-examination, White initially repeated that "Mr. Morales said we believe this punishment is too severe, Jim, what do you have to say? That's all Mr. Morales said." "That's it," reiterated White; "He didn't say much at all of anything and then he just turned it right over to me." Asked whether Morales had also told Boyle that White had a good

work record, that this should not apply to White, and that Respondent-Employer should not take that type of action against White, White answered unequivocally, "No, he said that he just believed that the punishment was too severe." But, as cross-examination progressed, White began to retreat from his earlier "all Mr. Morales said," "That's it," and "that he just believed that the punishment was too severe" assertions.

Asked again if Morales had said that White had a good work record and this should be resolved some other way, White answered in a manner that began to contradict his earlier testimony: "He might have said that, if he did, I don't remember it." Retreat turned into rout when White then was shown a portion of his prehearing affidavit. It states: "Morales told Boyle that I had a good work record and that maybe this could be handled another way." "Okay," allowed White, he had said that during investigation of his charges against Respondents. Asked if Morales had actually said that during the first step grievance meeting, White conceded, grudgingly, "Yes, all right. That's pretty close to it or what I said." Still, White persisted in attempting to protect his above-quoted initial testimony, by adding that Morales "didn't say much at all of anything," but never bothered to explain what Morales had omitted that could have been argued on White's behalf, given the situation. In sum, by the time that his testimony had been completed, White had given internally contradictory testimony about what Morales had said during the August 24 first-step grievance meeting.

Second, the fact is that, by August 24, Morales had been left with a very limited area within which to argue on behalf of White. Morales could hardly argue persuasively that, by August 6, White had lacked notice that driving on South Kilbourn Street while on the clock violated a work rule; White knew that Florian had been suspended for having been caught doing exactly that on August 3. Morales could hardly argue persuasively that White had not driven on August 6 from the annex to the main building while on the clock; White had already admitted to Respondent-Employer having done so. All that was left to Morales, as an objective matter, were arguments based on White's work history and, in addition, disproportion between offense and punishment. As White ultimately conceded, albeit grudgingly, Morales had advanced both arguments to Boyle.

Even so, throughout his descriptions of the meeting, White made occasional disparaging references to Morales having "just turned it right over to me." For example, asked if it could not be said that Morales had represented him fairly by the arguments which White ultimately conceded that Morales had made, White retorted: "It doesn't sound like it very much to me. Then he turns to me and he wants me to do the rest of the talking, no." Well, given what he had done and admitted having done on August 6, White certainly had been in the best position to advance whatever arguments could be made on his own behalf, in addition to those advanced by Morales. As concluded in the immediately preceding paragraphs, Morales had already made whatever arguments seemingly could have been made plausibly on behalf of an employee in White's position. If there might be any others, Morales was doing no more than offering White an opportunity to advance them. There is no evidence that White took advantage of that opportunity on August 24. Indeed, as with Florian's inability to describe any

further arguments that Robinson, Damron or any other official of Respondent-Union could have advanced during the August 7 sit-down meeting, White never testified about any added arguments that could have been made on his behalf on August 24.

Third, as set forth above, White testified that Boyle had suggested, during the first-step grievance meeting, "waiv[ing] the second step [grievance] meeting," and going directly "into the third step." Of course, by so testifying White reinforced his own testimony that Boyle had earlier proposed such a course, during the Illinois Bar and Grill meeting. Yet, there is considerable basis for doubting, as an objective matter, that Boyle would have made such a proposal to Morales on August 24. As a threshold consideration, Boyle had supposedly made such a proposal, to skip the second grievance step, in the overall context of a settlement proposed to White at the Illinois Bar and Grill. By the time of the first-step grievance meeting, according to White's account, White had rejected that settlement. So far as the evidence shows, Boyle had no particular reason, independent of a supposed overall proposal made at the Illinois Bar and Grill, to suggest skipping a step in the contractually-specified grievance procedure. There is no evidence that Boyle had anything to gain by making such a proposal.

Moreover, neither Morales nor Escobedo were in a position to make such an agreement. Nor, in truth, was Boyle. The second grievance step involved a meeting with Drufer, Boyle's superior. There is no evidence that Drufer had authorized Boyle to make such a proposal, nor that Drufer had been willing as of August 24 to be excluded from the contractually-specified grievance procedure. On the other side, Steelworkers' representative would be injected into grievances processed beyond the second contractually-specified step. As will be seen, eventually that step was skipped for both Florian and White. Yet, as of August 24, there is no evidence that Steelworkers had agreed to accept grievances on behalf of either Florian or White without a second step meeting having been conducted. And there is no evidence that a grievance committeeman had authority to cavalierly commit Steelworkers to such a course. Nor is there evidence that Boyle believed that a grievance committeeman possessed such authority. All that said, there is no objective basis for concluding that Boyle likely would have proposed to Morales skipping a subsequent grievance step.

Finally, there is no objective basis for concluding that the second step of the contractual grievance procedure would have been even a logical subject for discussion as early as August 24. "Yes, sir," answered White when asked if the first step meeting had ended with Boyle saying that he would give Respondent-Union his answer, to the arguments made during that meeting, within 5 days. Such a statement by Boyle is consistent with the contractual requirement that the supervisor involved in the first-step grievance meeting "shall give his answer in writing to the employee within five (5) calendar days after such discussion."

Now, there probably was not much doubt in Boyle's mind on August 24 that he would be rejecting Morales's arguments. Nonetheless, Boyle's specification of 5 days for giving his answer is an indication that he, too, was keeping his powder dry: did not intend to divulge as of August 24 what position he would take when he answered Respondent-Union's first-step

arguments on behalf of White. That being the situation as of August 24, it hardly makes a lick of sense for Boyle to have proposed that a subsequent grievance step be skipped. Such a suggestion would effectively divulge the very decision which Boyle was saying would be revealed within 5 days. In the overall context of the situation, the proposal which White attributed to Boyle simply makes no objective sense. White's testimony about it seems to have been nothing more than his effort to shore up his testimony about the supposed Illinois Bar and Grill offer by Boyle.

It had been apparently at some point after Boyle issued his August 10 termination notice for Florian, but before White's termination notice issued on August 18 or, perhaps, before the August 24 first-step grievance meeting concerning the latter termination, that a peculiar little exchange occurred between Damron and Maintenance Manager Allan Esrig. Esrig testified that "[i]t might have been a couple weeks" after Florian's discharge, he had said to Damron, "what do you think about this Chester situation," to which Damron responded, "There's only one left." That was all that had been said, testified Esrig.

Damron denied specifically having told Esrig only one was left. Of course, as must be apparent from what has been said in preceding subsections, Damron was not always the most reliable of witnesses. But, even accepting that the exchange described by Esrig had occurred, it hardly supports a conclusion of hostility by Damron toward Florian and White, much less some sort of admission of unwillingness to fairly represent either one of those employees. The remarks attributed to Damron are too vague and ambiguous to infer either of those conclusions.

In the first place, the remarks attributed to Damron can legitimately be construed as no more than recognition of fact. Two employees had engaged separately in identical conduct which violated a work rule prohibition. One had been discharged for doing so. A disciplinary decision was still pending for the other employee. So, as of one possible time of the Esrig-Damron exchange there was, indeed, "only one left" for final disciplinary resolution by Respondent-Employer. Even if the Esrig-Damron exchange had, in fact, occurred after notification by Boyle of White's termination, there still remained for resolution whatever position Boyle might take as a result of the first-step grievance meeting. Of course, Respondent-Employer already had taken final action against Florian, in the process rejecting Robinson's arguments advanced during the sit-down meeting. So, even if the Esrig-Damron exchange had occurred after White's termination notification, but before the first-step grievance meeting, there still had been "only one left."

In the second place, if he had said that, Damron may have been waiving off further discussion of the subject with Esrig. After all, the maintenance manager was not involved in the contractual disputes resolution procedure for operations support employees who worked in the annex. So far as the record shows, Esrig had no particular reason for becoming involved, by discussing Florian or White with Damron. And Damron had no reason—and, perhaps, no business—for discussing Florian's and White's situations with Esrig. By his answer Damron effectively blew off further discussion with Esrig of those subjects.

To be sure, neither of those explanations can be said to have been the actual meaning of Damron's asserted four-word response to Esrig's question about Florian. Yet, either one is as plausible an explanation as is an expression of hostility or of unwillingness to represent. Accordingly, the exchange described by Esrig is simply too ambiguous to accord it any weight in evaluating the complaint's allegations concerning Respondent-Union.

#### *J. Focht Appointed Business Manager*

Another event which occurred during the summer involved Focht. Discussed near the end of subsection D above was removal of his production manager's duties, though not his title, during May. Thereafter, Focht testified, he had been left in a status of "limbo," not knowing what duties he was supposed to be performing: "So from May until August, that's how long I was in limbo." That status has independent significance under the Act. For, as a result of the May memorandum, Focht had ceased to be a supervisor within the meaning of Section 2(11) of the Act.

True, according to Drufke's May 26 memorandum, Focht continued, at least for a while, after May to hold the title of "Production Manager." But, supervisory status under the Act is not conferred by mere possession nor retention of a job title. See, e.g., *Fleming Cos.*, 330 NLRB 277 fn. 1 (1999); *NLRB v. Joe B. Foods, Inc.*, 953 F.2d 287 (7th Cir. 1992). Nor is it conferred by the fact that witnesses and, even, counsel may refer to a particular individual as a supervisor. See, e.g., *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1156 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970); and *Gracelands, Inc.*, 293 NLRB 373 fn. 3 (1989). "The proper consideration is whether the functions, duties, and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in Section 2(11) of the Act." (Citations omitted.) *Browne of Houston*, 280 NLRB 1222, 1225 (1986). Accord: *Carlisle Engineered Products*, 330 NLRB 1359, 1360 (2000).

With respect to that consideration, Focht testified, "No, I didn't" by July have any employees under his supervision. To be sure, as shown in preceding subsections, as well as above in this one, Focht was hardly a reliable witness, as a general proposition. However, that answer, and like ones appearing elsewhere in the record of his testimony, was elicited during cross-examination. And cross-examining counsel appeared satisfied—in agreement with—the answers given by Focht in that regard. In consequence, having been relieved of production manager's responsibilities by the end of May, Focht no longer possessed any of the supervisory powers enumerated in Section 2(11) of the Act and, therefore, became a statutory—though not a unit—employee within the meaning of Section 2(3) of the Act.

As also set forth in subsection D above, in the wake of OFCCP's investigation and predetermination notice, Vice-President of Manufacturing Kramer had been holding off on taking any further action concerning removal of Focht from Respondent-Employer's Chicago facility, on advice of Director of Human Resources John Christopher to await the final findings of OFCCP. Those issued on August 7, 3 days after Florian had been suspended and one day after White had made his drive on

South Kilbourn Street from the annex to the main building to punch out for the day.

In a covering letter dated August 7, OFCCP's district director gave notice that review had been completed of Respondent-Employer's Chicago operations and that a conclusion had been reached that Respondent-Employer was not in compliance. A conciliation agreement was enclosed with that letter. Among the corrective actions specified in that agreement were backpay for four women who had applied for employment with Respondent-Employer at the Chicago facility. Three of them were applicants—Maurita Gill, Charlene Johnson, and Sheila Schmidt—whom Focht had unlawfully refused to consider for employment there. Almost \$50,000 in backpay was sought for those three women.

Receipt of that letter and conciliation agreement seemingly left Kramer free to take final action concerning Focht—to offer him a transfer to another of Respondent-Employer's facilities or, should he reject transfer, to fire him. That is the course which Kramer testified that he had intended to take, but had been holding off taking until a final determination was made by OFCCP. Yet, admittedly Kramer did not pursue those alternative courses in the wake of OFCCP's August 7 correspondence. Instead, Focht was allowed to continue working for Respondent-Employer, at the Chicago facility for significant periods, after August 7.

Kramer testified that, upon seeing OFCCP's August 7 documentation, "I was going to go ahead with my plants [sic] for Mr. Focht," by "offer[ing] him a chance for a fresh start in employment at the Jackson [Mississippi] facility." But, John Christopher had left employment with Respondent-Employer by that time and, as of August, had not been replaced by anyone as director of human resources. As a result, Kramer claimed that he had no one to prepare a last chance agreement, a document described in subsection M below, that he had wanted to present to Focht in connection with an offer of transfer to Jackson. On its face, that is a quite implausible explanation.

Kramer acknowledged that he was "the head of the manufacturing segment" of a multimillion dollar operation. Even though John Christopher had not been replaced, surely Kramer had, at least, counsel available to prepare the documentation which Kramer felt that he needed in order to offer a transfer to Focht. That is, had he been so intent on immediately removing Focht following receipt of OFCCP's final determination, as he now claims that he had been, surely Kramer could have located someone to prepare the necessary documentation. In fact, someone other than John Christopher did prepare Respondent-Employer's September 11 reply to the charge in Case 13-CA-37256, before John Christopher decided to return to employment with Respondent-Employer on October 12. Seemingly, the same source could have prepared a last chance agreement to be issued to Focht. That is not the only consideration which objectively raises doubt about Kramer's testimony concerning a purported ongoing intention during August to transfer or discharge Focht.

Focht testified that his situation had been "a little aggravating," given that "you're coming to work and you really don't know what you're supposed to be doing," and "where you're at, what are you supposed to be doing." "And I went on like two

months trying to find out, hey, what is my title? What am I supposed to be doing?" he testified, but "I was never told." When he asked Boyle the reason for his (Focht's) loss of production manager responsibilities, testified Focht, Boyle "just answered me he thought it was something to do with this EEOC suit with these three women."

Focht testified that he asked Drufke about the situation on three occasions during the summer, but he received no explanation. However, testified Focht, Drufke ultimately "called me in," saying "I finally got something drafted up for you, as far as what you're going to be doing and what your title is," and "that he would be making me business manager." It is undisputed that Respondent-Employer never had a title nor a position of business manager for anyone. Focht testified that he was shown by Drufke a "*Business Manager*" job description for the "*Northern Region*." Not only did Drufke show that job description to Focht, but Focht testified that Drufke "also handed a copy to Roger Kramer when he came in."

The business manager job description is undated. Focht testified that he did not recall the exact date on which it had first been shown by Drufke to him and Kramer. However, in his prehearing affidavit Focht placed that event as having occurred around August 14, and eventually Focht testified with some certainty that it had occurred on that date. From Focht's overall testimony concerning his transfer to the position of business manager, it seems clear that it had occurred at some point during mid-August. By then, however, Respondent-Employer should have received OFCCP's final determination of August 7. Consequently, left unexplained is why, had he truly been intent on offering Focht a transfer, or discharging Focht, Kramer had allowed Drufke to appoint Focht as business manager. Kramer never explained that, though he never disputed Focht's above-quoted testimony that Drufke had "handed a copy" of the business manager's job description to Kramer.

As pointed out, Focht was not generally a reliable witness. Yet, Kramer appeared as Respondent-Employer's witness, after Focht had testified, and Drufke was cross-examined by Respondent-Employer, when called as a rebuttal witness. Accordingly, both men were available to Respondent-Employer to testify about presentation of the business manager's job description to Focht and, further, to dispute any untrue portion of Focht's description of that incident. Neither one contested any aspect of Focht's account.

Significantly, all of Focht's above-described testimony about his appointment as business manager was elicited during cross-examination. As with Focht's testimony about ceasing earlier to exercise supervisory powers, cross-examining counsel appeared satisfied with the answers which Focht provided about his appointment as business manager. Given the totality of the situation, there simply is no basis nor reason not to credit the testimony that, after OFCCP's August 7 letter, Respondent-Employer had created a new position for Focht, had appointed him to that position, and Kramer was fully aware that those events had occurred. Kramer never explained why he had allowed Drufke to go through that process, had Kramer still actually intended to offer Focht a transfer to the Jackson facility and to fire Focht, if the latter rejected that transfer-offer.

What Respondent-Employer seems to have been intending to accomplish, by eliciting the above-described testimony from Focht, was to provide a basis for concluding that, by virtue of his appointment as business manager, Focht had been removed from the Act's protection as a statutory employee when Focht began aiding Florian in connection with the latter's suspension and discharge. If so, that purpose was not accomplished. As to any supervisory contention, during cross-examination Focht denied that he had been a supervisor while business manager. He did testify that, while business manager, he had "worked together" with another individual. "[E]verything I asked, he would do," testified Focht. Counsel seemed satisfied with those answers. But, those answers do not establish that Focht had possessed authority to exercise independent judgment in directing work by that other individual. "Asking" hardly rises to a level of "directing." Nor is there any evidence that, while business manager, Focht had possessed authority to exercise independent judgment in connection with any of the other powers enumerated in Section 2(11) of the Act. Consequently, there has been no showing that Focht had again become a statutory supervisor as a result of his appointment as business manager.

Nor is the evidence sufficient to allow of a conclusion that the business manager's position is one which can be categorized as managerial under the Act: as a position whose occupant "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." (Footnote omitted.) *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980). The job description for Respondent-Employer's business manager position describes the occupant's duties as,

Lead person in cost containment efforts. Participates in efforts at reducing inventories, applied cost of purchased supplies, implementing Midas group recommendations and improving Production goals such as yield, material cost %, productivity gains and Quality. Works with Engineering in the design and installation of Capital equipment including start-up.

According to the job description, the business manager reports to the regional manager, though he/she must also be able to "work well and cooperate with other individuals such as the Regional Controller, Plant Manager, Corporate Purchasing, Engineering, or other individuals depending on the current project being addressed."

Only Focht gave testimony about what duties had had actually performed during his relatively brief tenure as business manager. None of that testimony, most elicited during cross-examination, was disputed by any of Respondent-Employer's witnesses. Nor was any of it disputed during cross-examination of rebuttal witness Drufer.

Focht testified that, after having become business manager, "I was working just strictly for Ray Drufer and he had me working on rejects." "Yes," Focht answered, when asked if he had been told by Drufer that the business manager would report only to Drufer, not to Boyle. Focht testified that he worked at the Portage facility "a couple days a week," where he was "pulling a lot of rejects out of the Portage plant," and, then, "was bringing them to the Chicago plant to put them on a re-warning [sic] station to see how much material we could salvage

and, you know, make into good material." According to Focht, he both pulled the rejects at Portage and performed the rework at the Chicago facility. Though not supervising anyone else while he worked as business manager, Focht agreed that he had regarded himself, while occupying that position, as a company representative. Of course, like agreement could probably be obtained from most employees, particularly those who come into contact with customers. Such self-characterization hardly can serve as a basis for concluding that an employee is truly a managerial employee under the Act.

There is no evidence that, while he had been business manager, Focht had taken or recommended any "discretionary actions that effectively control[led] or implement[ed] employer policy." *Id.* Nor is there evidence that he had "determine[d] . . . the product to be produced, the terms upon which it [would] be offered, and the customers who [would] be served." *Id.* at 686. It cannot be said, on the basis of this record, that managerial status is demonstrated by responsibility for "cost containment efforts," achieved by performing such functions as reducing inventories and cost of supplies, implementing recommendations made by others, and improving yield, percentage of material costs, and productivity and quality for the overall objective of improving production goals. No evidence has been adduced which would show that any of those functions had involved anything more than a "highly skilled" employee's provision of "technical advice and services," *Bakersfield Californian*, 316 NLRB 1211, 1215 (1995), to accomplish goals set by others in Respondent-Employer's chain of supervision.

There is no evidence that, aside from technical expertise exercised within an overall framework established elsewhere, Focht had been able to exercise any discretion in formulating, controlling or implementing company policy. There is no evidence that Respondent-Employer had contemplated that its business manager would be able to commit company credit or otherwise affect its finances, nor that Focht had done so while serving as business manager. There is no evidence that Respondent-Employer contemplated that its business manager would do more than "[w]ork [ ] with Engineering in the design and installation of Capital equipment," without exercising any more than technical skills. Indeed, the business manager's job description characterizes its occupant as no more than a "Lead person." There is no evidence whatsoever that any divided loyalties would arise from concluding that Respondent-Employer's business manager, in general, and Focht, in particular, had been a statutory employee, no different from Respondent-Employer's other statutory employees, unit and nonunit. Therefore, the totality of the evidence does not support a conclusion that the business manager, nor Focht, had been a managerial employee under the Act.

The very fact that Focht had been appointed business manager during mid-August is one which creates an inherent conflict for Kramer's assertion that he had fully intended by then to transfer Focht to Respondent-Employer's Jackson facility, or to fire Focht if he refused to accept such a transfer, but had been unable to accomplish that because of the absence of a director of human resources. To be sure, were the latter true, something had to be done with Focht during that post-August 7 period. Yet, Focht had been serving as "Production Manager" since

May. No reason is revealed by the record as to why he could not have been allowed to continue serving in that position until Respondent-Employer selected a director of human resources to replace John Christopher.

Instead, Respondent-Employer went to the trouble of creating an entirely new job position to which Focht was then appointed. It was a position that contemplated duties not in Jackson, Mississippi, but rather contemplated continued duties in the Chicago facility, as well as in the one at Portage. The very facts that it created that position, prepared a job description for its occupant's duties, and selected Focht to be that occupant, collectively, tend to show that, following OFCCP's August 7 documentation, Respondent-Employer had made a different final determination concerning Focht than the one which Kramer tried to portray when testifying: that Respondent-Employer had decided to retain Focht in the Northern Region, but assign him the duties of a newly-created position—duties which would allow the Chicago facility to continue benefiting from Focht's technical expertise, while at the same time keeping him away from exercising any supervisory powers over employees, thereby avoiding further trouble such as that created by him when selecting applicants for hire.

As it turned out, Focht did create problems for Boyle and his Chicago subordinates during August, as Focht performed his business manager duties. Those problems led to preparation and submission to Drufke of a set of memoranda on September 9, as mentioned further in subsection M below. However, so far as the evidence discloses, neither those memoranda, nor mention of them, ever reached Kramer. By his own account, it had been Kramer who made the decision to offer the last chance agreement to Focht, described in subsection M below. At no point did Kramer claim that he had seen the September 9 memoranda, nor did he claim that he had been aware of them. In fact, Kramer never even claimed that he had conferred with Drufke, the ultimate recipient of all those memoranda, when making the decision to offer a Jackson transfer to Focht, by means of the last chance agreement, and to fire Focht if he declined to accept that transfer. Therefore, the September 9 memoranda turn out to be collateral matters, not material to Kramer's discharge decision.

#### *K. Rolfe's Summer Situation*

As set forth near the beginning of subsection D above, operations support employee Kenneth Rolfe, after completing his probationary period, had been one of the employees laid off during March. Though not unlawfully motivated, the layoff had angered Rolfe and led him to warn that he intended to "sue them for" it. As pointed out in that same subsection, Rolfe sought workers compensation for carpal tunnel syndrome and, given his condition, was relegated to light-duty status during May by his doctor. At that time Rolfe had been told by then-Acting Production Manager Mahoney that there was no light-duty work available at Respondent-Employer's Chicago facility. There is no evidence that any became available thereafter at Chicago, nor at any of Respondent-Employer's other facilities.

Rolfe testified that, beginning during June, he would bring doctors' bills to Personnel Benefits Coordinator or Personnel

Administrator Abbott, for payment by Respondent-Employer. So far as the record shows, Respondent-Employer did pay those bills. On those occasions, testified Rolfe, he would ask Abbott if work was going to pick up and if Respondent-Employer would be recalling people to work, but Abbott said only that "pretty soon they would be calling people back." Then, by notice dated August 7, Boyle announced that, "Three employees on lay-off are being called back and will start, temporarily on days, Monday, August 10th." Boyle testified that, "I was planning on starting a fourth crew." Apparently the three August 10 recalls were to be the first phase in that overall plan. Thus the "temporarily on days" statement in his August 7 notice.

Three operations support employees reported for work on August 10: "Bud" McFadden, "Stan" Smalara and Stephen or Steven Thomas Wright. All had been hired before Rolfe began working for Respondent-Employer. But, as pointed out in subsection D above, article IX of the 1995-1999 collective-bargaining contract allowed Respondent-Employer to extend contractually-specified 60-day probationary periods, upon proper notice of intention to do so. When that happens, an employee upon completing his/her extended probationary period, receives the original employment date as the seniority date. Thus, an employee's seniority is not adversely affected by extension of probation, once the probationary period is completed. As also mentioned in subsection D above, through apparent inadvertence, Respondent-Employer neglected to give proper notice of extended probationary period for Rolfe. As a result, he completed his probationary period before being laid off during March.

In contrast, McFadden, Smalara and Wright had each received timely notice of extension of probation. By working overtime, Smalara succeeded in completing his probationary period by the time that he had been laid off during March. However, as of that date both McFadden and Wright were still probationary employees, though Wright needed only one day to complete his probation when he was laid off. Thus, in the ordinary course of affairs, neither should have been recalled from layoff until recall opportunity had been offered to laid-off employees who had completed their probationary periods by the time of their layoffs. But, no offer of recall had been extended to Rolfe during early August.

During direct examination Rolfe testified that "Mr. Florian called me," and said that he (Florian) had learned from Wright that the latter and two other employees were being recalled and "were reporting to work the next day." During cross-examination, Rolfe added that he also had been given a like message by Phillips. Neither Florian nor Phillips corroborated that testimony by Rolfe. Yet, clearly Rolfe did become aware of the August 10 recalls.

Rolfe testified that, during August, he had taken some doctors' bills to Abbott. In the course of their ensuing conversation, he further testified, he had asked her "what was going on and I'd heard they called three people back. And when they found out I was number two, they sent two other people back home." As described below, two of the August 10 recalls had been sent home. But, not because of any reason having to do with Rolfe and, certainly, not because "they found out [Rolfe]

was number two.” Still, according to Rolfe, Abbott never challenged his purported assertion, but replied, “Sometimes you don’t need everybody and we’re only going to take one of them.” After “talk[ing] a little bit” more, testified Rolfe, “I said, come on, Mary. What’s going on?” and Abbott “said well, if you get me a note, a letter from your doctor stating that your hands were okay, I might be able to do something for you,” and, “She also asked me if I dropped my lawsuit.” In addition to that asserted conversation, Rolfe added one more event.

He testified that “on a Tuesday . . . I believe this was in August,” he had seen a help-wanted advertisement in a Sunday South Town Newspaper:

OPERATION  
SUPPORT

Coil Coater. Midway Airport area. Opening for an individual to work as an entry level material handler. One year experience helpful on overhead cranes and forklift trucks. Good salary plus shift premium and fringe benefits. Call between 10–2 ONLY 219–763–1540. EOE M/F/D/V

Rolfe testified that he called that telephone number and spoke with “Sharon Test up in Indiana. She said she and Mary Abbott were going to be interviewing people on Thursday. They were looking for qualified lift truck drivers and crane operators.” According to Rolfe, Test said that the interviews were going to be conducted “at Precoat Metals at the plant [sic] at 48th and Kilbourn on Thursday.” “She asked me for my name and phone number,” Rolfe testified, but “I gave her a phoney [sic] name and phoney [sic] phone number.”

Before the first shift began on August 10 the three recalled employees—McFadden, Smalara and Wright—showed up at Respondent-Employer’s Chicago facility. Before any one of them punched in, Wright testified, Damron approached and McFadden “asked Rich if I didn’t finish my probationary period, do I have to start all over again? And Rich stopped in his tracks and was like, of, what? You didn’t finish your probationary period?” Damron “said, you guys hold it here and he went in the office,” testified Wright. Damron testified that, when he had seen the three employees “by the time clock” on August 10, he had “walked up and asked them what they were doing there.” After ascertaining that they had been “called back,” testified Damron, “I told them don’t do anything, just to stay right here and don’t do nothing and I went in to see Mary Abbott.”

According to Damron, he went into the office where he asked Abbott whether the three employees had been recalled. “And she said, yeah,” testified Damron, “And I said, well, was [sic] they called by seniority?” Damron testified that Abbott replied that she was unable to answer that question because, “[t]here was a new lady that . . . done this right here,” or, “she didn’t do the call it was the new lady.” “I said, well you got to start with the most senior person and work down. And I don’t want to see anything else except you go by the seniority roster,”

Damron further testified. The upshot of what had been said was that McFadden and Wright, the still-probationary employees, were sent home, without having ever punched or clocked in, while Smalara, who had completed his probationary period, was allowed to punch in and was put to work. As pointed out above, Smalara’s hire date preceded that of Rolfe. So, there would have been no basis upon which Respondent-Union could have challenged his recall, compared to the failure to recall Rolfe. Moreover, apparently Boyle abandoned his “fourth crew” plan. For, Respondent-Employer thereafter never recalled any other employee. Furthermore, there is no evidence that Respondent-Employer hired any applicants.

It is quite clear that Rolfe is contending that he should have been recalled on August 10 and, moreover, that Respondent-Employer had been acting nefariously in not recalling him on that date. But, his position is not a sustainable one. Boyle testified that August recalls had been aimed at “starting a fourth crew.” There is no evidence that the work available had been other than full-duty. That is, neither General Counsel nor Charging Parties have presented any evidence that any of the work available during August at Respondent-Employer’s Chicago plant had been light-duty. Yet, that was the only work that Rolfe had been qualified at that time to perform, in light of his doctor’s restriction. Consequently, Rolfe was not qualified to perform the work which the three laid-off employees had been recalled to perform on and after August 10.

A like conclusion applies to the above-quoted Sunday newspaper advertisement. Nothing in it provides for light-duty work. And certain other points about it should not be overlooked. Notice, first, that at no place in the advertisement does Respondent-Employer’s name appear. Secondly, examination of the advertisement page introduced during the hearing (General Counsel’s Exhibit No. 12) discloses that it is an irregularly cut-out portion of one newspaper page. So carefully had it been cut that it omits the date of the newspaper of which that particular page was a part. Indeed, its careful cutting gives rise to some suspicion that a little fast-and-loose activity was occurring in connection with its introduction. After all, newspapers retain copies of their past issues and no one contended that it had been impossible to obtain a full page on which that advertisement appears. In any event, it cannot be said, from the face of the exhibit, that the advertisement had been placed on behalf of Respondent-Employer nor that it had appeared in an August newspaper. Rolfe’s testimony is the lone basis for connecting that advertisement to Respondent-Employer during that month.

In addition to testifying that he had seen the advertisement on either a Tuesday or Sunday in August, Rolfe claimed that he had telephoned the number listed and had spoken with “Sharon Test.” There is no evidence that Respondent-Employer employed someone named Sharon Test during August, nor during any other period. Nor, for that matter, is there evidence, other than Rolfe’s testimony, that the telephone number recited in the advertisement was one assigned to Respondent-Employer. Finally, Rolfe was supposedly told that interviews would be conducted at Respondent-Employer’s Chicago plant on the following Thursday. Yet, for no reason explained by him, there is no evidence that Rolfe went there on that Thursday, if for no other reason, to ascertain that, in fact, interviews were being

conducted. In fact, there is no evidence whatsoever that interviews had been conducted at Respondent-Employer's Chicago plant on Thursday, August 13, nor on any other day during August.

That leaves the above-quoted words attributed to Abbott by Rolfe, on the August day when he testified that he had spoken to her. His account of her "lawsuit" remark is inexplicable on its face. From the record the best that can be said is that it might have referred to his workers compensation claim arising from his carpal tunnel syndrome which seemingly had led Rolfe's doctor to impose the light-duty work-restriction described in subsection D above. Such a conclusion gains force from Rolfe's testimony that Abbott had also said that day that "if you get me a note, a letter from your doctor stating that your hands were okay, I might be able to do something for you." Well, of course. Respondent-Employer had attempted to recall three laid-off employees for what has not been shown to have been other than full-duty work. Rolfe was restricted to light duty by his doctor. Obviously, if his doctor lifted that restriction, Respondent-Employer would have been able to recall him for full-duty assignment.

To be sure, Abbott never appeared as a witness for Respondent-Employer and, as a consequence, never denied having made the above-quoted purported August remarks to Rolfe nor, if she had done so, never explained what they had meant. Yet, there is no allegation that Respondent-Employer had violated the Act by having failed to recall Rolfe on and after August 10. The only allegation pertaining to failure to recall Rolfe is one made against Respondent-Union, assertedly for having "refused to file a grievance concerning recall rights," based assertedly upon "Rolfe's affiliation with discharged employee Florian."

It cannot be said that the General Counsel had lacked opportunity to include an allegation against Respondent-Employer on Rolfe's behalf in connection with the failure to recall Rolfe on and after August 10. Included among the formal documents is an unfair labor practice charge in Case 13-CA-37292, filed by Rolfe against Respondent-Employer—and alleging specifically "fail[ure] and refus[al] to return [Rolfe] from laid off status because of his union and/or protected concerted activities"—on the same day as he filed his charge in Case 13-CB-15860 against Respondent-Union. But the General Counsel has not proceeded to complaint based upon Rolfe's charge against Respondent-Employer. That being the fact, it is impossible to conclude that Abbott's supposed statements to Rolfe, the newspaper advertisement of whatever date and source, and the failure of Respondent-Employer to recall a light-duty status employee for full-duty work, collectively, somehow show improper motivation by Respondent-Employer. Moreover, the absence of an allegation against it in connection with failure to recall Rolfe on and after August 10 supplies a basis for Respondent-Employer's failure to call her to deny or explain any statements which she might have made to Rolfe during August. After all, there is no reason to call a witness to create an issue when none is alleged to exist.

Turning to the allegation against Respondent-Union, several theories are advanced to support an alleged failure to represent Rolfe on and after August 10. Primarily, as quoted above, the argument is that Respondent-Union had been retaliating against

Rolfe because of its perception of his supposed "affiliation" with Florian. However, no credible evidence of such a perception exists as of, even, August 31. As described in subsection D above, Rolfe testified that he had mentioned to Escobedo in November 1997 having consulted with Florian. Yet, even if true, such a statement in that context hardly rises to the level of "affiliation with . . . Florian." Thereafter, viewing the matter from the perspective of Respondent-Union, there was no indication that Rolfe had been doing anything that could be regarded as "affiliat[ing] with . . . Florian." For example, Florian supposedly had notified Rolfe about the August 10 recalls. But, there is no evidence that Respondent-Union had ever become aware of such notification. Still, Rolfe made an effort to supply evidence of such perception by the end of August, as discussed below.

At this point, the simple fact is that there is no credible evidence that, as of August 10 nor for the next couple of weeks, Respondent-Union would have known or suspected that Rolfe had any connection with Florian. Beyond that, if anything, Damron's intervention with Abbott on August 10 created an opening for Rolfe to be recalled, had Rolfe been then qualified for full-duty assignments. Damron may not have understood the specific recall situation that day, and he acknowledged that he had given no thought to Rolfe on August 10, but his recall-seniority conversation with Abbott led Respondent-Employer to send home the two probationary employees, thereby clearing the way for recall of other laid-off employees, ones who, such as Rolfe, had completed their probationary periods.

Of course, after McFadden and Wright had been sent home on August 10, Rolfe was not recalled to work. Yet, the simple fact is that no one was recalled to replace those two probationary employees. Moreover, the unreliable evidence of a supposed newspaper advertisement for applicants to the contrary notwithstanding, there is no evidence that Respondent-Employer hired anyone after August 10 to fill the positions to which McFadden and Wright had been recalled.

During cross-examination some effort was made to fault Damron for Respondent-Employer's decision not recall anyone, specifically Rolfe, after McFadden and Wright had been turned away. But it would be ridiculous to fault Damron for such a decision by Respondent-Employer. Respondent-Union had no contractual or statutory authority to force Respondent-Employer to recall laid-off employees. Even if it had possessed such authority, there is no allegation of some sort of conspiracy between Respondents to deprive Rolfe of recall-employment. Certainly, Respondent-Union had no contractual or statutory authority to compel Respondent-Employer to recall a light-duty status laid-off employee for a full-duty opening. Still, Rolfe developed another theory.

To understand that theory, note must be taken of the 1995–1999 collective-bargaining contract's continuous service provision as it applies to recall of laid-off employees. article IX, Section 9, subsection (f) provides that continuous service is broken after "six months" of layoff for employees, such as Rolfe, "with less than ten (10) years length of service at time of layoff."

McFadden and Wright had been sent home on August 10 without having ever punched or clocked in that day. Based

upon that fact, Respondent-Union's and Steelworkers' officers concluded that there was no basis for arguing that either of those probationary employees had actually been recalled, within the meaning of the collective-bargaining contract's provisions. Rolfe saw the situation differently. But, rather than approach Respondent-Union initially with his opinion, he focused on Wright.

Wright gave the following testimony, none of which was ever contested. After August 10 and during September, Rolfe had "a couple" telephone conversations with Wright and, from the number shown on Wright's "caller ID," made additional efforts to telephone Wright. During the conversations, Rolfe attempted to persuade Wright to file a grievance for having been recalled on August 10 to Respondent-Employer's Chicago facility, but not having been allowed to punch in and go to work. By Wright's doing so, two objectives would be accomplished, in Rolfe's view. First, it would present an opportunity for Wright to possibly obtain a day's work, for August 10, and, since he was only one day short of completing his probationary period, Wright would no longer be a probationary employee. More importantly, if regarded as having been constructively employed on August 10, Wright's continuous service period would be restarted as of that date.

Second, in Rolfe's opinion, a successful grievance by Wright would provide a basis for Rolfe to claim that his own contractual recall right should be restarted, because he, rather than probationary employee Wright, should have been recalled on August 10. That is, Wright testified, "he told me well, if you could do that and you do that then that will give me six more months," and, "I can get mine, too, so we'll both have" restarted continuous service periods.

In addition, Rolfe suggested that Wright might want to "go see a lawyer," because "the more people suing the company, the better it looked." In that regard, it is uncontested, Rolfe told Wright, "The more people suing, the better it would look. He told me Chester is suing them, I've got a law case, John's suing them, he told me. And if you go in there, too, you might as well see if you've got a case too," but "if you can't afford an attorney, you can always go to the Labor Board." Wright testified that he felt that Respondent-Employer had done nothing wrong and, accordingly, that there was no basis for a grievance against it. Moreover, he testified, "I thought [Rolfe] was using me as a pawn on something that wasn't right to do," and "I felt like I was getting badgered, pulled into something, and I just didn't feel comfortable with it."

Now, three points need to be made about Rolfe's idea that he could benefit by a successful grievance filed by Wright. First, as already pointed out, Respondent-Union took the position that it could not be successfully contended that McFadden and Wright had been truly recalled, since neither one had punched in on August 10. Certainly, there is no provision in the 1995-1999 contract that would support a position that both had truly been recalled, given that neither one had punched or clocked in that day. One might argue about the absolute correctness of such a position. Yet, it is hardly an illogical one and can hardly support an inference that Respondent-Union had been attempting to somehow disadvantage Rolfe by having failed to file such grievances on behalf of McFadden and Wright. That be-

comes an even less plausible inference in view of a second point.

That point is that, under the 1995-1999 contract, Respondent-Union had no contractual basis for filing any type of grievance on behalf of probationary employees McFadden and Wright—the predicate step under Rolfe's theory that if Wright prevailed on a grievance, then Rolfe could prevail on his own grievance concerning recall of a probationary employee, rather than a laid-off employee, such as him, who had completed the probationary period. article IX, section 2 of that contract states, in pertinent part: "During the probationary period, the Company shall not be restricted by this Agreement in dealing with the employee," and, further, "Probationary employees are assigned or scheduled, laid off, disciplined, or dismissed, during such probationary period at the Company's sole discretion. The Company's actions with respect to such probationary employees shall not be subject to the grievance or arbitration provisions of this Agreement." In short, Respondent-Union had no contractual right to file grievances on behalf of either McFadden or Wright, because those two probationary employees had been told to report on August 10 but were sent home before either could punch or clock in.

Of course, the third point is that, even had Respondent-Union somehow overcome the above-quoted contractual language and somehow prevailed in disputes resolution concerning Wright, Rolfe would still not have been able to prevail in a grievance against Respondent-Employer, for not having been recalled before Wright. That is so because the jobs available that day have not been shown to have been other than full-duty ones. Rolfe was restricted as of August 10 to light-duty assignments. Thus, he was not qualified to perform the work then available. Accordingly, Respondent-Union would hardly have been in a position to argue that Rolfe should have been recalled, even had it been concluded that Wright and McFadden had been recalled within the meaning of the contract and that such recalls improperly bypassed laid-off employees who had completed their probationary periods.

In sum, there was no basis upon which Respondent-Union could have prevailed in disputes resolution concerning Respondent-Employer's failure to recall Rolfe on August 10. Given that penultimate conclusion, it cannot be concluded that Respondent-Union somehow failed to observe its statutory duty to fairly represent Rolfe on and after August 10 by not filing a grievance concerning Respondent-Employer's failure to recall him on that date. That ultimate conclusion leads back to later August events under the theory that Respondent-Union had failed to fairly represent Rolfe after August 10 because of his affiliation with Florian. At the outset, of course, it must be kept in focus that there really had been no basis for filing any grievance on behalf of Rolfe, given that he had been restricted to performing a type of work which was not then available at Respondent-Employer.

Whatever the actual situation had been on August 10, it seems clear that as the month of August progressed Rolfe and Florian became aligned. That is shown, first, by Focht's testimony that when he went to the Board's Regional Office to give an affidavit in support of Florian's charge, he had gone there in the company of Florian and Rolfe. It also is shown by Wright's

uncontroverted account of a conversation with Florian after Wright had refrained from returning Rolfe's telephone calls.

"Kenny [Rolfe] is a big guy," testified Wright. So, whenever he saw that it was Rolfe's telephone "number on my caller ID," Wright avoided any confrontation, over his own decision not to file the grievance which Rolfe wanted him to file, by simply not answering the phone and not returning Rolfe's calls. As time passed, however, Wright encountered Florian who said, "Kenny wants to talk to you about getting together, about last call [sic] rights and calling the union and file [sic] a grievance," and, Florian added, "'Kenny wants to rip your head off' because [Wright] didn't return his phone call one time I think it was," testified Wright. When Wright asked Florian if he had given Wright's home phone number to Rolfe, Florian "told me yeah, he did."

Still, there is no evidence that any of the foregoing incidents had ever been related to any officer of Respondent-Union prior to September 1. Nor is there any evidence which would supply a legitimate basis for inferring that Respondent-Union likely knew that Florian and Rolfe had begun working together after August 10. Neither Rolfe nor Wright testified that he had revealed to any officer of Respondent-Union that the former was attempting to persuade the latter to file a grievance concerning the aborted August 10 recall. Neither of them, nor Florian, testified that he had informed any officer of Respondent-Union about Florian giving Rolfe the home telephone number for Wright. Nor did either Wright or Florian testify that he had told any officer of Respondent-Union about Florian's effort to persuade Wright to talk with Rolfe. Finally, so far as the evidence shows, neither Florian, Rolfe nor Focht said anything to any officer of Respondent-Union about their trip to the Board's regional office on August 31. Nothing in the record supplies any basis for inferring that Respondent-Union's officers would somehow have suspected that any of those events had occurred.

Against that background of no evidence of either actual or suspected knowledge that Rolfe had begun working with Florian, nevertheless, Rolfe made an effort to supply evidence that Damron had somehow learned by the end of August that Rolfe and Florian were working together. He did so by giving testimony about a sequence of events which purportedly led to a conversation during which Damron supposedly alluded to the then-developing alignment between Florian and Rolfe—an allusion which is alleged to have violated Section 8(b)(1)(A) of the Act.

It is undisputed that, during August, Rolfe approached Robinson about Respondent-Employer's failure to have recalled Rolfe on August 10. During direct examination Rolfe testified that he had asked Robinson, "What was going on. They called the three people back. They state that they only need two of them. They had made provisions to bring these people from nights to days. And now because they find out that I'm number two, they're not going to call these people back." If Rolfe truly had made those remarks to Robinson, it should not escape notice that two of those remarks were simply false. Respondent-Employer did not "state that they only need two of them," but instead only Smalara was allowed to punch in and go to work on August 10. Secondly, McFadden and White were not sent home "because they find out that [Rolfe was] number two," but

rather because Damron challenged the contractual priority of recalling two probationary employees.

According to Rolfe, Robinson said that "it apparently looks like they're going to let your time run out and they're going to let your six months run out and not call you back." "And I said isn't there anything we can do?" testified Rolfe, but Robinson "said no. He said there's nothing I can do." "Yes," answered Rolfe, when asked if he had asked Robinson specifically about filing a grievance. "He said there was nothing he could do," claimed Rolfe. Asked, still during direct examination, whether he had told Robinson what Abbott had purportedly said earlier, Rolfe testified, "I said I need an operation on both hands and she's trying to bargain my job for my hands," but, according to Rolfe, Robinson responded only, "your only choice is to go with your lawsuit."

Unable to achieve satisfaction from Robinson, Rolfe testified that, "one or two days later," he had telephoned Damron. According to Rolfe, Damron said, "well, the company was within their rights to call back whoever they wanted. I said, you know, this is not right. He said, too bad you made friends with the wrong people." As an objective matter, such a purported remark by Damron should have ended all further conversation from Rolfe's standpoint. Seemingly, it showed that Damron had no intention of trying to help Rolfe because of Rolfe's "friends." That said, seemingly there was nothing more to be said between the two men. Yet, claimed Rolfe during direct examination, it did not. "We kind of chit-chatted just a little more. He said how about I set up a meeting between me [Rolfe] and Mr. Boyle. I thought about it, and I didn't want any part of it. I said, no thank you. And that was the end of our conversation." Apparently, Rolfe never appreciated the inherent inconsistency between a supposed statement that Rolfe had not been recalled because he "made friends with the wrong people," and an offer to try to help Rolfe through a meeting with the plant manager.

Rolfe was asked during direct examination whether anything had been said, during the "chit-chat" with Damron, about light-duty work. At that point, Rolfe acknowledged the following exchange which he had earlier omitted from his testimony about his telephone conversation with Damron:

He said are you able to come back to work and work a full job? I said, well, I was waiting for my operation for my hands, but the doctor did say I was fit to go back and work light duty. He said we have no such position here at work. And I said, well, that's kind of a lie. I know people that have worked light duty there. He said who are your company snitches.

Damron denied flatly that he had ever asked Rolfe who were his company snitches. Indeed, such a remark simply makes no sense.

To be sure, it is undisputed, even admitted, that in the past Respondent-Employer had made light-duty work available at its Chicago facility. So, to that extent, Rolfe's purported remarks to Damron—"people that have worked light duty there"—would have been accurate. But, Rolfe had been told during the late spring by then-Acting Production Manager Mahoney that no light-duty work then was available at the Chicago facility.

There is no evidence contradicting that statement by Mahoney. Moreover, there is no evidence whatsoever that any light-duty work had been performed by anyone at Respondent-Employer's Chicago facility during the summer. So, there was simply nothing for any supposed "company snitches" to have reported to Rolfe and, beyond that, no reason for Damron to have posed such a supposed question to Rolfe. All else aside, objective evidence leaves Damron's denial more reliable than Rolfe's above-quoted testimony about "company snitches."

In addition, Damron denied specifically having said that it was too bad that Rolfe had made friends with the wrong people. Again, that denial is more reliable than the testimony by Rolfe to which the denial was directed. As concluded above, there is no credible evidence that Damron knew, or had reason even to suspect, as of late August or September 1 that Rolfe "made friends" with Florian or with any other "wrong people." There is no allegation that Respondent-Employer had failed to recall Rolfe on August 10 because of knowledge, by either of Respondents, that Rolfe had become aligned with Florian or any other union dissident, such as Phillips or Crylen. Nor is there any basis for inferring that Damron would somehow have come to believe that Rolfe had not been recalled on August 10 for having "made friends with the wrong people." To the contrary, as already concluded, the evidence shows no more than that Respondent-Employer had recalled three employees on August 10 to perform full-duty work that, because of his doctor's restriction, Rolfe was not qualified to perform. As an objective matter, it simply makes no sense for Damron to have made the "wrong people" remark attributed to him by Damron.

The fact is, as pointed out above, that Damron's conduct on August 10—protesting to Abbott about Respondent-Employer's seeming disregard of seniority in making the recalls for August 10—was naturally helpful to a laid-off employee in Rolfe's situation. As a result of Damron's statements that day to Abbott, the two probationary employees were sent home, leaving two vacancies, had Respondent-Employer been disposed to recall other laid-off employees, such as Rolfe. Of course, Respondent-Employer never did recall—nor, so far as the record discloses, hire—anyone to fill the vacancies which McFadden and Wright would have occupied, had they been allowed to punch in and go to work, as was Smalara. But, Respondent-Employer is not alleged to have violated the Act by not filling those two seeming vacancies. And Respondent-Union could not compel Respondent-Employer to recall employees to replace McFadden and Wright. Even had it been able to do so, Respondent-Union could not have compelled Respondent-Employer to recall Rolfe. He was restricted to light-duty work and there is no evidence that Respondent-Employer needed, nor assigned, anybody to perform light-duty assignment.

Not only did Damron's August 10 protest to Abbott naturally aid other laid-off employees, such as Rolfe, but Rolfe admitted that Damron made an affirmative effort to aid Rolfe. Damron offered to try to arrange a meeting between Rolfe and Boyle. Consistent with Rolfe's admission regarding that offer, Damron testified that, during a conversation with Rolfe that may even have predated the August 10 recalls, Rolfe had said that he wanted to return to work at Respondent-Employer, but could only work light duty and had been told that Respondent-

Employer "had no light duty." Accordingly to Damron, Rolfe continued by saying, "they've had light duty before. They've changed the light duty requirements," to which Damron suggested that "you come on in and myself and the Committee we'll have a meeting with Jim Boyle to get to the bottom of it, find out what's going on," but Rolfe "didn't want to." Of course, as set forth above, Rolfe agreed that he had rejected Damron's offer of a meeting with Boyle.

Furthermore, Boyle testified that he had "told Mr. Damron to set up a meeting at one point with Mr. Rolfe and myself and the Union" to discuss Rolfe's situation. But, testified Boyle, "[p]robably within a week of my request" to Damron, Damron "told me that he had contacted Mr. Rolfe and Mr. Rolfe refused to meet with me." Now, the very fact that Boyle and Damron had discussed setting up a meeting between Boyle and Rolfe, and the further fact that Damron had communicated to Rolfe about meeting with Boyle, are facts which tend to refute any testimony about Rolfe assertedly having not been recalled because the latter "made friends with the wrong people." There is no basis for concluding other than that both Boyle and Damron had been attempting to help Rolfe. Only Rolfe's own suspicions—or, perhaps, desire to not return to work, under some sort of misguided belief that he could obtain backpay without having to work—undermined that attempt.

To be sure, no one can say with any certainty that a meeting between Boyle and Rolfe would have resulted in some sort of arrangement whereby Rolfe's situation could be accommodated by Respondent-Employer—that some sort of light-duty work could have been figured out for Rolfe. On the other hand, Rolfe's rejection of the offer of such a meeting effectively foreclosed any effort to work out such an accommodation. The fact that Damron had been instrumental in the effort to arrange such a meeting is strong evidence showing that Respondent-Union had been attempting to fairly represent Rolfe, rather than abandoning Rolfe because he supposedly had "made friends with the wrong people." Moreover, in the overall above-described sequence of events that Rolfe testified had led to his conversation with Damron, there are certain other factors which should be considered.

Rolfe never explained why he had chosen to contact Robinson, rather than the grievance committeeman who should ordinarily have handled grievances for Rolfe. Robinson pointed out that Rolfe "worked on another shift," and "I didn't even know him because he worked on the other shift." Conceivably, Florian or, maybe, Phillips had suggested that Rolfe speak with Robinson, since Florian and Phillips believed that Robinson was favorably disposed toward Florian's situation. That seemed to be the fact as Robinson was testifying. But, it also seemed that Robinson was not disposed to dissemble too greatly when testifying—that he might be disposed to shade his testimony somewhat in support of Florian's position and in opposition to that of Damron, but that he was not disposed to wander too far from the truth, in contrast to other witnesses for the General Counsel and Charging Parties. In the process, not only did Robinson not corroborate much of Rolfe's testimony, concerning their conversation which led Rolfe to speak with Damron, but Robinson contradicted Rolfe's account in one important respect.

As set forth above, Rolfe claimed specifically that he had asked Robinson to file a grievance on his (Rolfe's) behalf. Asked specifically during direct examination whether he had been requested by Rolfe to file a grievance regarding Rolfe's recall situation, Robinson answered unequivocally, "No." Nor did Robinson corroborate Rolfe's testimony about the latter's having said "now because they find out that I'm number two, they're not going to call these people back." Moreover, Robinson did not corroborate Rolfe's testimony about having said that Abbott was "trying to bargain my job for my hands." To the contrary, Robinson testified that Rolfe only "more or less talked to me about his arm and his insurance," and "somebody had told him they had skipped him or something" when recalling employees. That is the extent of Robinson's account about what Rolfe had said. As to his responses to Rolfe, Robinson corroborated none of the above-described ones attributed to him by Rolfe.

With respect to Rolfe's comments "about his arm and his insurance," testified Robinson, "I told him Rich Damron usually takes care of that, go talk to Rich." Concerning Rolfe's statement about having been told that he had been "skipped," Robinson testified, "I told him I wasn't in the meetings concerning the lay offs and the call back. I told him he had to go talk to Rich." When Robinson was further pressed, for whatever reason, about his remarks to Rolfe, Robinson reiterated, "I always referred Ken to Rich because Rich knew more about his case than I do. Like I said, I just met the man. The man had been working out there and I didn't even know him because he worked on the other shift." A seemingly inherently-reliable explanation. But one leaving little room for judgment-laden "apparently looks like they're going to let your time run out and they're going to let your six months run out and not call you back" responses attributed to Robinson by Rolfe.

Lest there be any doubt, Rolfe's testimony about his conversation with Robinson is not a collateral subject. Testimony about that conversation was elicited during direct examination of both witnesses. Obviously, it was being elicited in furtherance of the complaint's allegation concerning Rolfe. Even had it not truly accomplished such an objective, Rolfe and Robinson's conversation is an integral component in the overall sequence of events leading to a supposed unlawful statement by Damron to Rolfe. As it turns out, the testimony in support of that supposed unlawful statement is simply not credible, given the totality of the considerations reviewed above.

Beyond that, there is no basis for concluding that Respondent-Union had not been fairly representing Rolfe during August in connection with anything that Abbott may have said to him. There is no basis for concluding that Abbott had been "trying to bargain [his] job for his hands," and, accordingly, no basis for concluding that he had related such a remark to Robinson. Indeed, as noted above, Robinson did not corroborate Rolfe's testimony about having made such a statement to him (Robinson). The General Counsel was unwilling to proceed against Respondent-Employer's decision not to recall Rolfe on August 10. It had been Damron whose intervention led Respondent-Employer not to recall McFadden and Wright, thereby clearing the way for some other laid-off employees to be recalled, were Respondent-Employer disposed to do so. It

had been Damron who attempted to broker a meeting between Boyle and Rolfe, so that the latter could at least receive information about his recall-status. There was nothing for Respondent-Union to grieve about Respondent-Employer's failure to recall Rolfe. He was restricted to light-duty work; Respondent-Employer had no such work during the summer. Therefore, the credible evidence does not support an allegation that Respondent-Union had unlawfully failed to fairly represent Rolfe on and after August 10.

#### *L. September 1 Third-Step Grievance Meetings*

As discussed in subsection I above, White claimed that Boyle had proposed, during the Illinois Bar and Grill meeting, taking White's grievance directly to the third-step contractual grievance meeting and, furthermore, had made a like proposal, during White's first-step grievance meeting, to Morales and Escobedo. Some support for that testimony by White might facially appear to be derived from the fact that, indeed, White's grievance had been elevated directly to third-step grievance meetings conduct on September 1. Yet, so also was Florian's grievance elevated directly to the third grievance-step. Certainly, it could not be said that Boyle was somehow attempting to settle Florian's grievance through the same grievance-step-skipping as occurred with White. The fact is that by the time that White filed his charges against Respondents on September 4, those third-step meetings had already occurred. It was an easy matter at that point to attribute to Boyle proposals about skipping the second grievance-step, inasmuch as that had already occurred by September 4. The unreliability of White's accounts of such a proposal by Boyle is further shown by certain other considerations.

The contractual second grievance step involved a meeting between "[t]he Regional Manager"—Drufke, during August—and "the Committee"—unit chairman and grievance committeepersons—under article XIII, section 2, step 1 of the 1995–1999 collective-bargaining contract. Boyle was Drufke's subordinate. Inherently, there is a lack of plausibility to a scenario whereby a subordinate officer takes it upon himself to propose a course of action which excludes a superior officer. No question that Drufke was concerned about Respondent-Employer's ability to prevail on Florian's suspension and discharge during disputes resolution. However, that is hardly a basis for inferring that Drufke would have been willing to remove himself from the second step of the contractual grievance procedure. When he testified during rebuttal, Drufke never claimed that he had authorized Boyle to make any proposal that would remove Drufke from that procedure.

On the other side, there is no evidence that a grievance committeeperson possessed authority to agree that an ensuing step of the grievance procedure could be skipped, especially when doing so would lead to the step at which Steelworkers would become involved in handling grievances. Beyond that, there is no basis for concluding that a unit employee, such as White, possessed any authority to agree to any supposed employer-proposal to skip a contractual grievance step.

In addition to those organizational-structure considerations, the record reveals that it had been Steelworkers then-Staff Representative Langele who had taken the initiative to move

Florian's and White's grievances to the third contractual grievance-step. He testified that already scheduled for September 1 third-step meeting with Respondent-Employer had been a grievance concerning the discharge of employee Bruce Palmer.<sup>22</sup> Motivated by Florian's charge against Respondent-Union, Langele testified that he "contacted Rich and asked him to get that grievance up to my step" for processing on the same date as the one for Palmer. During their conversation, testified Langele, Damron mentioned that White also had been terminated. "I asked Rich to get both these hurried and brought up to my, my step so we could hear it [sic] on the 1<sup>st</sup> of September," testified Langele.

Damron agreed that Langele "told me to get all the meetings, to get, ask the Company to get all the meetings together, meaning three, three grievances." "I done like he told me, yeah," testified Damron. Respondent-Employer agreed to Langele's suggestion. Third-step grievance meetings were scheduled for Palmer, Florian and White on September 1. There is no basis for concluding that some sort of failure to fairly represent had occurred as a result of skipping the second contractual grievance steps for Florian and White. To the contrary, doing so removed their grievances from control by Respondent-Union, which allegedly had been failing to fairly represent them, and elevated them to control by Steelworkers, against which no allegation of unfair labor practices has been made.

As described in subsection H above, Robinson had prepared a grievance for Florian on August 13. But, as pointed out in subsection I above, Morales had not actually prepared a grievance for White by the time of the August 24 first-step meeting concerning White's suspension and termination. In fact, Morales did not do that until August 29, though its belated preparation never became an issue between Respondents, nor with Steelworkers, in connection with resolution concerning White's suspension and termination. As will be seen, however, it did become a subject of argument between Damron, White and possibly Morales on September 1. The grievance which Morales eventually did prepare protested "VIOLATION of woRk Rule No. 10 And No. 11 [sic]," and stated, "Settlement requested in Grievance To BRiNg MR. JIM White back to Work as SOON Possible [sic]." There is no contention that the substance of that grievance was somehow improper and a violation of Respondent-Union's duty of fair representation owed White.

Although Morales prepared White's grievance on Saturday, August 29, White did not sign it prior to the time of his third-step September 1 grievance meeting. It is undisputed that Morales had called White's home on August 29 and, as White then was at work for another employer, left a message with White's wife "to come down and sign the grievance." When he returned home from work and received the message from his wife, White testified that he did not "have Mr. Morales' home phone number," and so telephoned Respondent-Employer's facility. Morales had left work for the day, but White was able to speak with Escobedo.

White testified that when he asked if he should come down and sign the grievance, Escobedo replied "that Eddie Morales has all the paperwork and he doesn't have nothing to do with it," or, "Eddie has all the paperwork, that you have to sign it by him" Inexplicably, White never claimed that he had asked Escobedo for the home telephone number of Morales. Instead, White testified that he then asked Escobedo "can I sign the grievance first thing Monday morning?" or, "if I could come in and sign it September 1st, the day of the third-step grievance meeting," or, "if I could sign it Monday morning at the meeting?" According to White, Escobedo responded, "okay," or "that would be fine with him," or "fine by me." Escobedo never disputed that testimony by White. So when White arrived at Respondent-Employer on Monday, September 1 he had not yet signed his grievance and, as a result, his grievance had not actually been filed. Before describing the exchange between White and Damron about that fact, three other events must be reviewed.

First, ever seemingly intent on attempting to show ill treatment by Respondent-Union, Florian testified that he had learned of his September 1 third-step grievance meeting from an anonymous phone caller. According to Florian, the caller "said Chester? And I said, yes. You have a meeting September 1st at such and such a time, and click." Florian claimed that he did not recognize the caller's voice. But, nothing in the record suggests that Respondent-Union had anything to gain by anonymously calling Florian with cryptic notice of his third-step grievance meeting.

During cross-examination it was pointed out that Florian had testified that the caller had said only "a meeting," and Florian was interrogated about how he had known that the caller was referring to the third-step grievance meeting. A somewhat flustered-appearing Florian answered that he had effectively just assumed that it was his third-step grievance meeting to which the caller was referring: "For that kind of meeting, yes," he could show up, because "I took a chance because I was out on the streets." Then he testified, "A grievance meeting I was told to come to." But, apparently realizing that he was contradicting himself, Florian quickly backtracked by testifying, "Told me I had a meeting set up on September 1st." Ultimately he denied again that the anonymous caller had told him what kind of meeting and asserted that he "[t]ook it for granted" that it had been his third-step grievance meeting to which the caller had been referring.

Damron testified that he had been the person who had telephoned Florian and had given notice of the third-step meeting on Florian's grievance: "I called Chester up, identified myself and told him when the meeting was going to be." As already pointed out, Damron was not always a reliable witness. Yet, his account is inherently more plausible than is Florian's portrayal of an abruptly-placed telephone call from some anonymous person who, "like Hairbreadth Harry in a Drury Lane melodrama," *Schroeder Distributing Co.*, 171 NLRB 1515, 1526 (1968), gave notice of some sort of meeting and hung up. The fact is that the third-step grievance meeting had been arranged by, and would be conducted by, a representative of Steelworkers. There is no evidence that Steelworkers' officials had harbored any animosity toward Florian. Having taken the

<sup>22</sup> An undisputed fact which refutes any conclusion that Respondent-Employer had been unwilling to fire any employee other than Florian and White during the late spring and summer.

trouble to seek elevation of Florian's grievance, it seems most unlikely that Steelworkers would not want to be certain that Florian was present during the meeting. Damron had been instructed by Langele to arrange for that meeting on Florian's grievance. It seems unlikely that Damron would have left himself vulnerable to criticism by Steelworkers, especially in view of Florian's already-filed unfair labor practice charges, by not following through and ensuring that Florian was given proper notification of the third-step grievance meeting—by playing some sort of game with Florian when giving notice of that meeting.

The second event, to be reviewed before turning to consideration of what occurred on September 1, involves Rolfe. He testified that he "had some bills to bring down to" Abbott and that he learned from Florian, "a day, two days" before September 1, that "Mr. Langele was supposed to be there" on that date. There is no evidence that Respondent-Union ever learned that Florian had told that to Rolfe. So, Florian's notification to Rolfe does not supply any basis for inferring that Respondent-Union knew or suspected that an "affiliation" had developed between Florian and Rolfe. What Florian's notification to Rolfe does show is the reason for Rolfe's appearance at Respondent-Employer's Chicago facility on September 1, as described below. Having failed to achieve satisfaction from Robinson and Damron, as described at the end of subsection K above, Rolfe decided to approach Langele.

Third, as it turned out Langele did not appear at Respondent-Employer on September 1. "I though[t] I'd be able to handle" the grievance meeting that day, testified Langele, but he "had outpatient surgery that day." As a result, he was not able to appear for those meetings "with the way that the things were scheduled for my surgery," he testified. So, he further testified, he "asked Sub-director Pasnack [sic] to fill in for me at the last minute." Then-Sub-Director Pasnack agreed that Langele "had to go into the hospital and have some tests run. And that was the only date that this specialist had available for him to come down and have the tests." "So, kind of the last minute, Craig [Langele] called me and said that he had a [sic] discharge cases and he asked me to fill in for him, because we don't like to, you know, hold up the discharge cases," Pasnack testified. He went to Respondent-Employer's Chicago facility on September 1 for the grievance meetings.

It hardly can be argued with any persuasion that Florian's and White's representation had been somehow compromised by the "last minute" substitution of Pasnack for Langele. In fact, there is no unfair labor practice charge against Steelworkers. Yet, it became Steelworkers, not Respondent-Union, who controlled the processing of those two alleged discriminatees' grievances once the third-step of the contractual grievance procedure was reached. No one challenged the genuineness of the surgery-explanation for Langele's nonappearance. No evidence shows that Florian or White suffered some sort of prejudice by having Pasnack, rather than Langele, process their grievances on September 1. To the contrary, that occurred because of Steelworkers' desire not to "hold up the discharge cases," an objective also sought in Section 10(m) of the Act for the Board's processing of cases.

On September 1 Pasnack, accompanied by Damron, Morales, and Escobedo, conducted the third-step grievance meetings. Representing Respondent-Employer at those meetings were Boyle, Abbott, and Moore. As already pointed out, the primary, perhaps the only, theory advanced to support the unlawful failure to fairly represent Florian and White is that, because of Florian's past and projected efforts to run for unit chairperson, Respondent-Union, specifically Damron, caused Respondent-Employer, specifically Boyle, to discharge Florian. When White engaged on August 6 in the same conduct for which Florian had been suspended on August 4, that theory proceeds, it became necessary for Respondent-Employer to also suspend and, later, also discharge White for having done so, in order to disguise or conceal its alleged unlawful motivation for having suspended and, later, discharged Florian. Thus, the theory proceeds, Respondent-Union could hardly represent Florian fairly, given its role in causing Florian's suspension and termination, nor could it have fairly represented White in the circumstances.

As concluded in preceding subsections, credible evidence fails to support any aspect of that theory. There is no credible basis for concluding that Respondent-Union had caused Respondent-Employer to suspend and discharge Florian. Nor does it support a conclusion that Respondent-Employer suspended and discharged Florian for an motive unlawful under the Act. To the contrary, credible evidence supports the conclusion that Florian brought discharge upon himself by ignoring warnings that driving on South Kilbourn Street between buildings while on the clock was no longer going to be tolerated by newly-arrived Plant Manager Boyle. Florian was caught doing so on August 3; accordingly he was suspended and, then, discharged. Despite knowing about Florian's suspension, White drove between buildings while on the clock on August 6 and when Respondent-Employer discovered that fact, it suspended and, then, terminated White, as it had done to Florian. There is no credible evidence of an element of disguise or concealment in connection with White's suspension and termination. Rather, those disciplinary measures constituted no more than consistent application of work rules to employees and consistency of discipline imposed.

Beyond that, the circumstances of Florian's and White's suspensions and terminations admit of no inference, much less conclusion, that Respondent-Union had anything to do with those disciplinary decisions, directly or indirectly. Thus, nothing in those suspensions and terminations supports a conclusion that Respondent-Union had inherently been unable to fairly represent Florian and White. To the contrary, a preponderance of the credible evidence shows that Robinson and Morales had done their best to do so and, further, fails to support an inference or conclusion that Damron somehow had impaired the abilities of those two grievance committeemen to do so.

That leaves for consideration only the somewhat marginal possibility, given the credible evidence in this case, that Respondent-Union somehow failed to satisfy its statutory obligation of fair representation on some other basis. Of course, as discussed in subsection H above, Florian effectively admitted that Robinson had done all that he could to protest Respondent-Employer's grounds for suspending Florian and, concomitantly, for then discharging him. Similarly, as discussed in subsection

K above, Morales seems to have done all that he could, during the first-step grievance meeting, to challenge Respondent-Employer's decision to suspend and terminate White. Certainly, White has suggested no added arguments that Morales could have plausibly made in the circumstances. That leaves for consideration, though never alleged to have been unlawful, Steelworkers' processing of Florian's and White's grievances.

In that regard, it should not be overlooked that while Florian and White had suffered like penalties for committing like offenses, their situations as of September 1 were not the identical. Florian had received notice prior to August 3 from Escobedo and Moore that Boyle would no longer tolerate driving on South Kilbourn Street between buildings after punching in and before punching out. But, as of August 3, when Moore again caught Florian doing that, no employee had ever been actually disciplined for engaging in such no-longer-to-be-tolerated conduct. Indeed, from the evidence presented, Florian appears to have decided that Respondent-Employer was not truly serious about no longer tolerating such conduct and that continuing to drive between buildings was more convenient than walking back and forth.

That was not a belief which White could legitimately have indulged as of August 6, when he drove on South Kilbourn from the annex to the main building to punch out. Not only did he know by August 6 that Respondent-Employer no longer intended to continue tolerating such conduct, but White also knew that it would discipline employees caught doing so. White knew that because of what had happened to Florian. The very fact that White had known those facts as of August 6 rendered his situation quite different from that of Florian: White nor Respondent-Union were hardly in a position to argue that White, unlike Florian, was not truly aware that Respondent-Employer intended to discipline employees caught driving on South Kilbourn between buildings while on the clock.

A separate meeting was conducted on September 1 for each of the grievances. The parties met first to deal with Palmer's discharge. Then they met on White's suspension and discharge. Finally they met to deal with Florian's grievance. As discussed above, White had not actually signed his grievance by the time his September 1 meeting convened. In fact, he did not sign it until his third-step grievance meeting was already in progress. That is a nonissue, however. Respondent-Employer participated in the third-step grievance meeting regarding White's suspension and discharge. It never raised any objection concerning lack of receipt of a written grievance on behalf of White. Nonetheless, the foregoing two factors—difference between Florian's and White's situation and failure to have signed a grievance earlier—became subjects of heated discussion between White and Damron on September 1. In fact, their argument led to a physical altercation. That altercation, in turn, has led to the allegation that Damron unlawfully "inflicted injury upon White by grabbing and choking him about the neck because he repeatedly referred to discharged employee Florian" on September 1.

On its face that is a somewhat puzzling allegation. The September 1 meeting which White attended was confined to his own situation; Florian participated in a separate third-step grievance meeting that day confined to his own suspension and

termination. As pointed out above, White's situation differed from that of Florian. Section 7 of the Act does not inherently protect an employee's repeated references to another employee during the processing of that first employee's grievance.

Still, pleading-language aside, the point seems to be that Damron became angered at White's purported repeated mention of Florian's name, ostensibly because Damron knew that he had unlawfully caused Florian's suspension and discharge. The latter is no more than pipe dream, given the conclusions already reached that there is no credible evidence to support a conclusion that Respondent-Union had caused Florian's suspension and termination. It also may be that the allegation is based upon the theory that, hostile toward Florian, Damron simply had become angered at White's purported repetition of Florian's name and, as well, possibly concerned that White had become "affiliated" with Florian as August passed. As it turns out, even based upon White's own testimony during direct examination—when, presumably, the best case possible was being advanced on behalf of White, cf. *McKenzie Engineering Co.*, 326 NLRB 473, 483 (1998), *enfd.*, 182 F.3d 622 (8th Cir. 1999), regarding what had occurred between Damron and him on September 1—there is no basis for concluding that Respondent-Union had violated Section 8(b)(1)(A) as a result of what happened on September 1.

During direct examination White testified that, when he arrived for his grievance meeting, he had been told to wait in the reception area "until you're called for your hearing." "Ken Rolfe and Chester showed up right before I was going into the meeting," testified White. As will be seen, testimony about Florian's presence before White's third-step meeting was contradicted by Rolfe. In fact, the point at which Florian arrived at Respondent-Employer that day becomes significant in evaluating certain testimony given by both Florian and White, regarding what had occurred when White was leaving the Chicago facility following the altercation with Damron.

According to White, "The meeting started out by Ray [Pasnack] saying, well, I don't have a grievance in front of me or a grievance number and what's this, what is this about?" "Ray put it out there, it was just general, you know, what is this grievance about," testified White, "And nobody answered so I answered." White testified that he said to Pasnack, "this is just like Chester's case about driving around the building, leaving company premises." He further testified that Pasnack then "started to ask Mr. Boyle some questions like where's the time clock? Is there a time clock in the annex building? Is it customary for people to drive around? And just general questions." But, White expressed uncertainty about whether Boyle had answered Pasnack's questions and, if so, what exactly Boyle had said: "I'm sure he responded, no, there's no time clock there. The time clock's in the main building. I'm sure those were the answers. I really don't remember."

"I guess Mr. Pasnak [sic] wanted to get a little more familiar with what was going on, so he asked the company then if he could discuss this amongst ourselves," continued White, "So the company then got up and left the room." At that point, testified White, "Rich [Damron] started saying these things have to be signed in a timely matter [sic]. And I start saying, well, look at [sic]. I'm following your advise [sic]. You're

telling me when to come in and do this and I'm doing everything that you're telling me to do." In other words, Damron's initial complaint, as described by White, had been about the absence of a signed grievance, as opposed to having anything to do with any relationship between Florian and White. Indeed, while it had been White who had responded to Damron's complaint, it is not certain from White's account that it had been White to whom Damron had directed his complaint. After all, Morales also was in the room and, as with Robinson's preparation of Florian's grievance, Morales had been the grievance committeemen responsible for preparing and filing White's grievance. In any event, Damron's complaint about absence of a timely-signed grievance is not covered by the above-quoted allegation in the complaint.

After that exchange, White testified, Damron "says this is not like Chester's case. You keep saying it's like Chester's case." But, White's own above-quoted testimony shows that White did not "keep say" anything about Florian to that point during the meeting. According to White's testimony to that point, he had only once mentioned "this is just like Chester's case," and, accordingly, there was no objective basis for Damron to have made such a "keep saying" accusation. According to White, he responded to that accusation by telling Damron "that it is like Chester's case. We were both fired for the same reason," but Damron said "again that it's got nothing to do with Chester's case. That I mentioned Chester's name three times in the meeting. And I says, I only mentioned Chester's name twice in this meeting." Setting to the side the numbers purportedly given, the fact is that Damron's point, assuming it had been made, was a correct one.

As set forth above, while Florian and White had engaged in identical by-then prohibited conduct, they had done so separately and their situations as of September 1 were not the same. In fact, that was the very point which White had made to Moore: when he had driven between buildings on August 6, he had not been trying to "make a statement," an ambiguous remark, but one which appears aimed at informing Moore that White had not driven between buildings as some sort of effort to join forces with Florian and his conduct on August 3. Of course, a remark that White's case had been "like Chester's case," on its face, might be construed by Respondent-Employer as contradicting earlier denials by White that he had not been trying to "make a statement" by his August 6 trip on South Kilbourn Street. A listener might infer, at least, that White was saying on September 1 that his misconduct had been related to that of Florian. Worse from Florian's point of view, Respondent-Union was arguing that Florian could not have known that discipline would result from his August 3 trip between buildings. That was not an argument which could plausibly be advanced on behalf of White, who had known of Florian's suspension before White drove between buildings. To equate his case with that of Florian, White's comments might be construed by Respondent-Employer, or at least argued by it, as some sort of concession that, in fact, Florian had known that discipline would be imposed for driving on South Kilbourn Street between buildings while on the clock.

In any event, on its face, Damron's remark does not show that he had assertedly become upset simply because White had

mentioned Florian's name; rather, Damron had become purportedly upset because White was arguing that the situations of the two discharged employees were the same. It can hardly be concluded that statutorily-protected activity is restrained or coerced by an argument over whether one discharged employee's conduct is or is not "like" that of another discharged employee. To be sure, grievance-filing and -processing are activities protected by Section 7 of the Act. So, also, is arguing theories to employers during grievance-processing. Yet, the bargaining agent is not obliged under the Act to adopt and advance every argument which an employee chooses to make. In that regard, some latitude must be left under the Act for give and take between bargaining agent and employee about particular arguments which can plausibly, and will, be argued to the employer. From White's own testimony, that is the most that occurred here.

The situation on September 1 was no different than what had occurred during November of 1997 when, as described in subsection D above, Escobedo had spoken to Rolfe after the union meeting. There, as here, it had not been mere mention of Florian's name which had sparked the asserted response of Respondent-Union's officer. During November of 1997 it had been the mention of a particular contract interpretation, albeit one supposedly advanced by Florian, that had led to Escobedo's comment. Here, it had been an equation of discharge situations by White that had supposedly led to Damron's complaint that White's situation was not "like" that of Florian—had "nothing to do with Chester's case." No conclusion of unlawful statement can be based upon White's testimony about that supposed remark.

White testified that, as he and Damron argued over the comparative situations of Florian and White, "his voice is started raising [sic]. My voice started rising. We started back and forth." Then, according to White, "Eddie Morales finally handed me the grievance," which White signed. Still, testified White, "like I say, words start getting heated between Rich and I because he's saying that I'm the one that's screwing it up, that, because I'm not signing things. I'm following their, what they're telling me to do." Thus, the argument between White and Damron had ceased being about comparability or noncomparability of Florian's and White's cases, and had returned to the subject of timely signing of grievances. "At this point I says, look it," White testified, "You guys are going to screw us anyway. I'm getting out of here. I'm leaving. I'm leaving." So I got up, started to leave. Walking toward the door." Now, it should not escape notice that, despite whatever dispute had been occurring between Damron and White to that point, White's "I'm leaving" announcement was wholly disproportionate. Certainly, there was no reason, based upon White's own account of what had been said, to accuse anyone of "going to screw us anyway" and, moreover, no basis for White to have abandoned the grievance procedure.

The room in which all of the foregoing was occurring is a rectangular one with a single door situated near one end of one of the long walls. In that room is a large rectangular table. That table was so positioned on September 1 that one short end of it was essentially across from the room's door. It had been at that end of the table where Damron was sitting. From his

position at the opposite end of the table, to walk to the door White also had to walk in the direction of where Damron had been seated.

As he did so, testified White, “Rich got up out of his chair and says, you’re leaving? You’re leaving? That’s when he grabbed me around the shirt like this, scratching my neck up in here.” According to White, “That’s when I threw my hands up and I go, I looked at Ray Pasnak [sic] and I says, hey, what’s going on here? At this point, Eddie Morales comes around. Grabs Rich Damron, pushes him back and I leave.” At best, that testimony given by White during direct examination—presumably the best evidence in support of the complaint’s allegation, see, *McKenzie Engineering Co.*, supra—shows not that Damron’s conduct had resulted from mention of Florian’s name, but instead because White had announced that he intended to leave the meeting, effectively abandoning his own third-step grievance meeting. Consequently, White’s testimony leaves no room for concluding that any injury inflicted upon him had been “because [White] repeatedly referred to discharged employee Florian.” Conversely, there is no allegation that Respondent-Union had violated the Act by a physical altercation resulting from an announcement by White that he was leaving a grievance meeting.

The Act does not broadly deputize the Board as some sort of police court empowered to adjudicate internal disputes between labor organizations’ officers and members. Only recently the Board held that it could not become involved in internal affairs of labor organizations, so long as whatever happened had no affect on employment relationships, access to the Board or some other public policy interest encompassed by the Act. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). No one countenances acts of violence. Here, however, no official of Respondent-Employer had been present when the altercation occurred between Damron and White. That altercation has not been shown to have had any affect upon White’s employment situation. To the contrary, Steelworkers continued processing White’s grievance after September 1 and, eventually, struck a settlement whereby White was able to return to work with Respondent-Employer, with the amount of backpay, if any, to be left for resolution during arbitration. Obviously, the altercation had no affect upon White’s access to the Board; he filed charges against Respondents on September 4, as mentioned in footnote 1 supra. Therefore, there is no basis for concluding that the September 1 altercation violated Section 8(b)(1)(A) of the Act.

It should not be overlooked that White’s testimony about that altercation is not left uncontroverted. Damron acknowledged that he and White had gotten into an argument on September 1 over “the manner that the grievance was followed, the time limitations and all of it,” during which “we were passing words back and forth to each other.” “He got up, I thought he was going to leave,” testified Damron, but “he walked over to me, shaking his finger in my face. I got up and pushed him back and he said, I’m going.” Damron denied specifically that he had choked White, that he had grabbed White by the shirt, and that he had grabbed White by the neck and scratched White’s neck. “Pushed him away from me,” Damron testified had been all that he had done.

White is the larger of the two men involved in that altercation. Neither Morales nor Escobedo testified about it. But Pasnick did. He testified that White and Damron “got into an argument over who filed the grievance and who was responsible for seeing that the grievance was filed and was it Mr. White’s obligation to go and find Mr. Damron to sign the grievance and file the grievance,” or, instead, “was it Mr. Damron and the committee’s obligation to go find Mr. White to fill out the grievance.” Despite his own statements to them that the subject was effectively a nonissue, testified Pasnick, “these two were carrying on, both of them. And Mr. White gets up from the end of the table and he starts coming down to the other end of the table,” toward which White had to walk to exit the room, but also toward where Damron had been sitting at the table’s end.

“Mr. Damron gets up and they’re shouting at each other,” Pasnick testified, “And Mr. White waves his hand at Rich and Rich is standing a few feet away or two feet away from Mr. White and goes over and pushes . . . Mr. White. You know, puts his hands up on his chest and gives him a shove.” In other words, neither Damron nor Pasnick testified that Damron had done other than shove White. But, Florian made some effort to collaterally support White’s account of having been “grabbed . . . around the shirt” and of Damron having “scratch[ed]” White’s neck.

As pointed out above, White testified that Rolfe and Florian “showed up right before I was going into the meeting,” and when he left the room, White testified, “I went down the hallway out into the reception area,” where “I saw Ken and Chester out there.” “Chester says, what’s going on?” testified White, “And I said, Chester, they’re going to screw us, they’re going to get us no matter what. We ain’t got a chance. Look what they did to me. I says, I can’t talk to you. I’m out of here,” and , “they scratched me all up,” after which White left.

Florian did not corroborate White’s testimony about having arrived Respondent-Employer’s facility “right before [White] was going into the meeting,” but instead testified that he had arrived “approximately a half hour before [his own] scheduled meeting,” and, aside from the receptionist, mentioned only having seen Rolfe in the reception area. As he and Rolfe conversed, testified Florian, “the office door had opened up and Mr. White came out.” According to Florian, White’s “face was red and he had some marks on his neck,” which Florian described as “actual scratches running down his neck.” Florian testified that “I asked him, Jim, what’s the matter,” and White “told me, Chester, this is nothing but a farce, this meeting,” and, “you’ll never get your job back and told me he was just attacked by Rich Damron,” and “he had to leave and would call me at a later date.” “So he left the plant,” testified Florian.

Obviously Florian’s testimony tends to support that of White, to the extent that more than the “push” or “shove” described by Damron and Pasnick had occurred. The problem is that Rolfe apparently was not clued-in on what Florian and White would be testifying about the reception-room encounter. Rolfe agreed that he had seen White before the latter went in to his third-step grievance meeting. Rolfe also agreed that “[a]pproximately a half hour” after White had entered the meeting room, White “came storming out . . . and he said . . . look at

what that f--king Damron did to me. Look what he did to me. He grabbed me round the neck, choked me.” “And he kind of stormed out of the office,” testified Rolfe, saying “he was going to file a grievance with someone.” Rolfe further testified that he had seen “red marks around [White’s] neck.” Now, clearly that testimony tends to support that given by Florian and White.

Notice, however, that Rolfe’s account omits any mention of such colorful phrases as “they’re going to screw us, they’re going to get us no matter what. We ain’t got a chance,” as White claimed he had uttered to Florian and Rolfe, and, also, “Chester, this is nothing but a farce” and you’ll never get your job back,” as Florian testified that White had said. Most importantly, Rolfe’s above described account omits any mention of Florian having even been present when White had come back into the reception area.

An effort was made to correct that, through a question about who had been present when Rolfe saw White the second time, as the latter came back into the reception area. Rolfe answered: “I believe Chester was just coming into the plant when Jim White was going out.” Shortly afterward Rolfe was asked what he had done after having talked with White. “Well, Chester came in for a few minutes,” answered Rolfe. All else aside, those answers by Rolfe tend to contradict the testimony by White and Florian that Florian had been present when White reentered the reception area. They also tend to contradict White’s and Florian’s testimony about what supposedly had been said to Florian by White, as the latter reentered the reception area. True, at one point Rolfe testified that, as White was leaving and “Chester was just coming in,” White told Florian “he didn’t have time to talk to him, that he was out of here.” But Rolfe then testified, “And then Chester asked me what happened. I had told Chester what happened.” In short, Rolfe effectively contradicted Florian’s and White’s testimony that the latter had described to the former what supposedly had occurred in the meeting room. According to Rolfe, he had been the one to do that.

One other point concerning White’s third-step grievance meeting merits further attention, given the allegation about failure to fairly represent White. As set forth above, White’s testimony portrayed Pasnick as having seemed somewhat mystified about the substance of White’s grievance when the meeting started. But representation is sometimes a process of not revealing all of one’s cards—of not disclosing to the other side all knowledge possessed by the representative at any given time.

Pasnick testified that it was customary for the Steelworkers’ official to meet with a unit’s committee to “talk amongst ourselves and get the background information and fill me in on where we are in the grievance procedure and what issues there were.” He further testified that, on September 1, Respondent-Union’s committee—presumably Damron, Morales and Escobedo—had told Pasnick “that nobody had ever been discharged for this rule violation or any similar rule violation,” though Respondent-Employer “had given some employees a ten-day suspension . . . For a more serious . . . infraction of the rule,” such as “[l]eaving the company property to go out to lunch and not clocking out or notifying anyone.” Based upon what he was told, Pasnick formed the conclusion “that the punishment

didn’t fit the crime,” and only a lesser penalty was warranted. It is worth noting that Pasnick’s conclusion was essentially the same as the argument advanced by Robinson on Florian’s behalf during the August 7 sit-down meeting, as described in subsection H above—an argument which Florian agreed had embodied everything that could be argued on his behalf.

Of course, as pointed out above, that was not an argument available to Pasnick to advance on behalf of White—White had known about Florian’s suspension in seeming anticipation of discharge, for having driven on South Kilbourn between buildings to punch out, by the time that White also had done that on August 6. Even so, Pasnick obviously knew that White was claiming that he had “just done [that] inadvertently.” Pasnick testified that he had made that argument to Respondent-Employer’s officials on September 1: “It’s a question of habit. People had done it before, and the company, even though the company’s now trying to reenforce the rules, you know, that this is certainly not a grounds for discharge,” testified Pasnick, without contradiction. That said, there seems nothing more that could have been argued on White’s behalf, given his knowledge of Florian’s suspension by August 6 and his admissions to Respondent-Employer that he had driven that day from the annex to the main building to punch or clock out. In sum, regardless of what he chose to divulge or not divulge to Respondent-Employer’s officials at the beginning of White’s third-step grievance meeting, there is no basis for any conclusion that Pasnick had been unaware of, and had not made, the best possible arguments on White’s behalf during that meeting.

Florian’s meeting was the final one conducted on September 1. Before it convened, Pasnick met with Florian. As set forth above, Damron, Morales and Escobedo had been present for the third-step meetings. Ordinarily Robinson would have been present during Florian’s meeting, inasmuch as Robinson was the grievance committeeman on Florian’s shift and the committeeman who had prepared and filed Florian’s grievance. Robinson testified that he thought that he had been advised by Damron about the third-step meeting. But no one summoned Robinson to the meeting on September 1.

On the other hand, Robinson admittedly made no effort on September 1 to leave the line to attend Florian’s meeting. He testified that, during a telephone conversation “before the meeting,” he had “told Chester to come down a little early. I’ll get off the line. Maybe we can go over some things.” Yet, Robinson never claimed that he had tried to “get off the line” on September 1. Moreover, as pointed out above, Rolfe admitted that Florian had not arrived at Respondent-Employer’s Chicago facility until after White’s meeting had concluded. Florian never claimed that he had sought to speak with Robinson, once Florian had arrived at that facility. Meanwhile, testified Robinson, “I just was going to continue to do my job until the supervisor tell [sic] me I can leave and go to the meeting.”

As pointed out above, Robinson acknowledged that he had been told by Damron about the scheduled third-step meeting for Florian’s grievance. The fact that Damron had done so is some indication that Damron had not been attempting to exclude Robinson from that meeting. After all, telling Robinson about the meeting was hardly the best method for eliminating Robinson’s attendance at it. Damron testified that, in addition, he had

requested that Boyle make arrangements for Robinson to attend Florian's third-step grievance meeting, but had been told by Boyle that Robinson could not be relieved to attend. In fact, Robinson acknowledged that there had been occasions when Respondent-Employer had been unable to locate relief so that he could attend meetings.

In any event, Florian's own testimony shows that he never protested the absence of Robinson when he first met with Pasnick on September 1, even though he seemingly had been aware of which unit officers had been in attendance at the meetings. Instead, he testified that, when Pasnick had come outside the meeting room to discuss the situation, "I had told Mr. Paznak [sic] that if he was aware that I filed charges with the . . . Board, that there was a conspiracy between the company and the union to have me terminated," and, further, because Damron, Escobedo and Morales were "in this meeting, I says I don't feel I'm going to get fair representation," and wanted "a third party witness [to] come in" in view of what had happened to White during his third-step meeting. Note that Florian made no mention of Robinson. According to Florian, Pasnick denied Florian's request for a "third party witness," and, also said "he really didn't want to hear about any" conspiracies because "he was here for my grievance meeting." Three points must be made about Florian's account of that exchange with Pasnick.

First, as concluded above, there is no credible evidence of any "conspiracy between the company and the union to have [Florian] terminated." It is hardly surprising that Pasnick would not want "to hear about" a supposed one. Second, there is no evidence that Steelworkers ordinarily admit whatever third-party witnesses a grievant wants to have sit in during grievance meetings with employers. Finally, Florian never bothered to explain why he had sought "a third party witness," rather than Robinson, when Florian obviously knew which unit officers were present for the meeting. The absence of such an explanation tends to support certain testimony by Pasnick; asked if Florian had requested that Robinson be present, Pasnick answered, "No, I don't believe so."

Pasnick acknowledged that it was ordinary procedure to have present in grievance meetings the grievance committeeman who had been handling the grievance under consideration. But, testified Pasnick, "I was unaware" that Robinson had been that committeeman for Florian's grievance "at the time of the meeting." In the final analysis, it can hardly be argued persuasively that failure to have ensured Robinson's presence initially on September 1 somehow shows an unlawful failure to fairly represent Florian on that date. Robinson possessed no special facts about the circumstances of Florian's suspension and discharge. So far as the evidence discloses, Pasnick possessed the written materials in connection with both disciplinary actions, as well as an explanation from the committee, as well as Florian's pre-meeting statements, pertaining to the events of August 3, 4, 7, and 10. At best, therefore, Robinson's absence was a fault, but not an unlawful one under the Act. Indeed, Florian acknowledged that he had understood that Robinson would not have been acting as his representative during the third-step meeting. And, in any event, as described below, Robinson did eventually arrive as the meeting progressed. Interestingly, there is no

evidence that, after having arrived, Robinson made any particular contribution to the arguments on behalf of Florian.

With respect to what occurred during Florian's third-step grievance meeting, there are really two aspects to Florian's testimony about it: an exchange between Florian and Damron over Robinson's initial absence from that meeting and, secondly, the arguments advanced by Pasnick on Florian's behalf. As to the former, as described above Robinson testified that he had continued working that day, anticipating that he would be relieved so that he could attend Florian's meeting. Eventually that did occur, testified Robinson. The line foreman, Wally or George, came to him and said to report to the grievance meeting. By the time Robinson entered the room, he testified, the meeting was already in progress.

Florian testified that when he had entered the meeting room, "I noticed that John Robinson wasn't there." Noticing that, Florian further testified that he had "asked Mr. Paznak [sic] at that time . . . where John was at, that he'd been handling my case right along." According to Florian, Pasnick replied, "he's probably tied up someplace and he'll be here." It may have been that remark which led Respondent-Employer to summon Robinson to the meeting.

Florian testified that Pasnick told Boyle "that nobody had ever been fired for driving their car from one building to the other, for this work rule 11. He felt that this was too severe of a punishment at this time," and asked that Florian instead be given "a disciplinary suspension instead of termination." "At that point I stopped the meeting," testified Florian, "and asked Mr. Paznak [sic] if I can talk to him. He agreed. He asked the company to step out." Apparently before Respondent-Employer's officials had time to leave, Robinson arrived.

"I waved him in," Florian testified, and "Mr. Damron at that time jumped out of his chair and told me, who the hell do you think you are, bringing anybody into these meetings and started to kind of approach me. Mr. Paznak [sic] at that point stuck his arm out, stopped him and told him, I told you to control yourself and sit down, that he [Pasnick] will handle this meeting." That colorful description, however, has an inherent flaw: Robinson would ordinarily have attended Florian's third-step grievance meeting. Damron had earlier asked Boyle to allow Robinson to be present. So, as an objective matter, there would have been no seeming basis for Damron to have demanded to know "who the hell do you think you are, bringing anyone into these meetings" of Florian. Moreover, Florian's testimony about the "started to kind of approach me" becomes untenable in view of Robinson's testimony about what had occurred after he arrived for the meeting.

As already pointed out, Robinson appeared favorably disposed toward Florian's situation, and not particularly happy with Damron; on the other hand, for the most part Robinson did not seem disposed to allow those feelings to influence his basic candor while testifying. Contrary to Florian's above-quoted testimony that Damron began yelling after Florian "waived [Robinson] in," Robinson testified, "when I walked in I guess Damron and Chester was [sic] arguing." No question Robinson was testifying that an argument between Damron and Florian had already been in progress when he arrived in the room. "Yeah," answered Robinson to a specific question put to him

during direct examination, an argument had been going on between Florian and Damron when he (Robinson) had walked into the meeting. Thus, according to Robinson, that argument had not been provoked by Florian having “waived [Robinson] in,” as Florian attempted to portray.

The substance of that argument, moreover, was not about Florian “bringing anyone in these meetings,” according to Robinson. Rather, he testified, “Chester wanted his, he wanted the guy who was handling it in there,” and “Rich, I guess more or less said they couldn’t get me off the line, but they couldn’t get me off the line,” and, in any event, “he was the chairman and [Florian] don’t [sic] tell him how to run the meeting, more or less.” In short, contrary to Florian’s account, according to Robinson the argument was not over Florian somehow having brought “anybody into these meetings,” but was over Damron’s asserted failure to have Robinson present during the meeting. That was not the biggest contrast between the accounts of Florian and Robinson.

Robinson testified that Pasnick “was trying to get Chester and Rich calmed down,” by “talking to Rich and then he more or less talked to Chester so he could get the meeting going again. That’s more or less what happened.” Well, what about Damron’s supposed “jump[ing] out of his chair” and “start[ing] to kind of approach” Florian, presumably bent on some sort of violence, but having been stopped when Pasnick “stuck his arm out”? Never happened, according to Robinson.

During direct examination Robinson was asked whether Pasnick had physically restrained Damron by extending his arm to keep Damron behind him. Robinson answered, “Well, I think he stood up more or less. I don’t think he had to. If I recall, I don’t think he had to restrain him. No, he more or less talked to him.” Apparently having heard from Rolfe—not from White—about the earlier altercation during White’s meeting, Florian simply attempted to enhance his own case, through an effort to portray a somewhat similar incident when he had supposedly almost been attacked by Damron, who was stopped from doing so by Pasnick.

Turning more directly to the above-mentioned second aspect of Florian’s account of the meeting, Florian testified that, after Respondent-Employer’s officials had left the room, he told Pasnick, “I had done nothing wrong. I had asked him if he would please present my case with no suspension whatsoever and complete backpay.” Pressed further during cross-examination about what he had said to Pasnick, Florian added that he also “had asked him for some kind of a letter or whatever from the company stating that I had done nothing wrong.” “That’s true,” answered Florian, he had wanted a letter of apology from Respondent-Employer. To perhaps no one’s great surprise, Pasnick rejected those conditions. “At that time he [Pasnick] continued on the same way, asked Mr. Boyle to take into consideration to give me a suspension, disciplinary suspension and back pay,” testified Florian, the amount of which would be determined afterward. According to Florian, “That’s the way the meeting ended.”

Pasnick agreed that Florian had requested an apology letter, though Pasnick placed that request as having been made by Florian during their above-mentioned conversation before the grievance meeting: “Mr. Florian felt that he was being singled

out. That was, like a personal vendetta against him. That he wanted an apology from the company and, as well as, you know, reinstatement with full back pay.” Pasnick testified that he told Florian,

I thought that was a little unreasonable given the fact that he knew there was a rule and he knew that, I mean, you know, he violated the rule. Admittedly violated the rule. There was no question about that. To say to the company, we want you to apologize for any enforcement of the rule, I felt, was a little bit beyond the realm of reasonableness in trying to resolve the case

Given the considerations enumerated in preceding subsections, it is not possible to argue with Pasnick’s logic. Surely, in the totality of the circumstances, Pasnick’s position cannot be characterized as some sort of unlawful failure to fairly represent Florian.

A final point to be made about the September 1 meeting concerning Florian’s grievance involves the arguments advanced by Pasnick on behalf of Florian. Pasnick testified that “we made the argument that people had driven around in the past. And that this was a common practice out there.” Florian agreed that Pasnick had argued that nobody had ever been discharged or disciplined for doing what Florian had done on August 3: “Yes, that nobody has been either suspended or terminated for it.” “He had asked the company to bring me back,” Florian also agreed. Florian never disputed Pasnick’s testimony that, in response to Pasnick’s arguments, “the company’s comment to that was, yeah, we know, but that’s why we reinstated the rule and that’s why we reposted the rule and told the committee and told people out in the shop about the rule.” Indeed, one of those “people out in the shop” who had been told specifically was Florian—by Moore, as set forth in subsection G above, it is uncontested.

Pasnick did make one gain, it is uncontroverted, on behalf of Florian and White during the September 1 meetings. As described in subsections H and I above, the termination notices for both employees had listed violation of work rule 10 as one reason for termination. That was discussed on September 1, testified Pasnick, and “they finally admitted that there really wasn’t a basis for the violation of Rule 10,” Boyle’s pique at Florian, for not having punched out as directed on August 3, to the contrary notwithstanding. Consequently, the reason for the suspensions and discharges was reduced to violation of work rule 11. That may not seem like a terribly significant victory for Pasnick, at first thought. But Steelworkers continued to process Florian’s and White’s grievances until a settlement of both was ultimately reached. White accepted it; Florian did not. Nonetheless, those ultimate resolutions were inherently facilitated by a reduction in the number of work rules assertedly violated by Florian and White. Ability to eventually settle or prevail during arbitration is naturally furthered by discipline based upon one, rather than two, work rule violation.

Turning back to the events of September 1, as set forth above Rolfe testified that he had come to Respondent-Employer’s Chicago facility to bring some bills to Abbott and, also, to speak with Langele. He further testified that he had been wait-

ing in the reception area when White came out of his third-step grievance meeting and, as White was leaving, that Florian had arrived, as also set forth above. Pasnack testified that he had gone outside, apparently for a break, after White's meeting and there encountered Rolfe. According to Pasnack, Rolfe "approached me and said that he had a grievance. He wanted to talk to me about it. He wanted to have it out. That he was going to lose his seniority and that he wanted to speak to me. It was important he talk to me." Pasnack testified that, "I told him that he's not on the agenda for today. But, that when we're done with the three grievance cases that we have on the agenda, I'd be happy to sit down and talk with him about his problems." Rolfe then waited for Florian's meeting to end.

Rolfe made another seeming effort to fortify his and Florian's cases against Respondents, in this instance by giving testimony about a purported event which assertedly occurred following Florian's grievance meeting. He claimed that, upon leaving the meeting room, "Chester said they were through with him, let's go get a cup of coffee," and the two of them started walking from the reception area to the coffee area of the Chicago facility's main building. As they were walking there, testified Rolfe, Boyle and Damron "were standing right by, near the entrance to the coffee area,." According to Rolfe, "as we walked by Mr. Damron said there goes a fine pair of fat f--k Union brothers," after which he and Boyle "chuckled over" what Damron had said. When they went into the coffee area, Rolfe further testified, he asked if Florian had heard Damron's remark and Florian "said, yes, that's what they said," and "we talked about it a little bit. Rolfe never explained what had been said during that "little bit" of talk. More significantly, Florian did not corroborate any aspect of Rolfe's testimony about that supposed incident.

Damron denied ever having described Florian and Rolfe to Boyle as "far f--k Union brothers," and, further, denied having ever, including on September 1, stated to Boyle "there goes a fine pair of fat Union brothers when Florian and Rolfe walked by[.]" Boyle denied ever having heard Damron describe Florian and Rolfe "as a fine pair of fat f--k Union brothers." As pointed out above, Florian never corroborated Rolfe's testimony about Damron having made such a derogatory remark to Boyle, as Florian and Rolfe had walked to the coffee area on September 1. Indeed, Florian never claimed that such a remark had been made by Damron on any occasion as Florian and Rolfe were walking by.

There is no dispute about the fact that Rolfe did engage in a conversation with Pasnack on September 1, though Rolfe initially placed their conversation as having occurred on September 2. Asked what had been said, Rolfe testified during direct examination that he had wanted "to find out about things that I had coming," and "had also wanted to talk to him [Pasnack] about the three people that were recalled and two sent home." According to Rolfe, "I questioned Mr. Pasnak [sic] on the contract," but, "He said there's nothing I can do," even though Rolfe assertedly "pointed a few things in the contract to him." Rolfe testified that Pasnack had "said I wrote the contract, I'll interpret it. You have no case for grievance." Pressed by further examination, Rolfe essentially repeated the foregoing testimony: "I showed him two or three different paragraphs in the

contract. He said I don't interpret it that way." Rolfe further testified that, at that point during his conversation with Pasnack, he had been talking about, "My recall and parts in the contract I thought that concerned me."

Rolfe never did identify which specific "paragraphs in the contract" or "parts in the contract" he had assertedly pointed out to Pasnack. It is true that article VII of that 1995-1999 contract provides for report pay and, in addition, article VIII covers call-in. If those had been the paragraphs pointed out to Pasnack by Rolfe, the report pay article applies to "[a]n employee who reports for work at the start of his scheduled shift," and, further, specifies, "Employees who report and are directed to wait for a decision concerning operations will be paid for waiting." article VIII specifies that, "A 'call-in' occurs when an employee who has left work is notified to return to work outside of his shift," which, of course, was not applicable to two probationary employees newly recalled from layoff, as opposed to being recalled after having completed a shift. Furthermore, whatever support for Rolfe's position would ordinarily be provided by article VII is dissipated by article IX's bar against proceeding to contractual disputes resolution on behalf of probationary employees, as pointed out in subsection K above.

Rolfe continued his direct examination testimony about his conversation with Pasnack by introducing an entirely different asserted grievance subject. He testified that he had told Pasnack "that I was working 12 hours a day. That when I was laid off they did not give me 12 hours pay a day. They gave me pay for two holidays instead of, and eight hours, instead of 12 hours." As will be seen, he eventually would change that complaint. At this point, the important consideration is that, so far as the evidence discloses, Rolfe had never mentioned that asserted problem to any of Respondent-Union's officers. And Rolfe acknowledged, during direct examination, that Pasnack responded appropriately to the complaint: "He said indeed you do have 12 hours pay coming for each one of these days. File a grievance with Mr. Langele." Still, Rolfe was not satisfied. "I said there's nothing else you can do for me?" testified Rolfe, and Pasnack answered, "no, there's nothing else at all I can do," to which Rolfe retorted, "well, you leave me no choice. I'm going to the NLRB over this."

It should not escape notice that to that point during direct examination, Rolfe did not advance any testimony about having related to Pasnack any statements purportedly made by Abbott. That subject was suggested to Rolfe who then testified that he also had told Pasnack, "That Mary Abbott tried to bargain my job for my hands." But, at that point, Rolfe gave no testimony about what, if anything, Pasnack had responded.

During cross-examination, however, Rolfe was asked if it was not "a fact that Mr. Pasnak [sic] told you that if that was the company's position, you should discuss it with your worker's compensation lawyer because it was against the law?" "Yes, he could have said that," Rolfe allowed somewhat grudgingly. "Could have. Could have said that, yes," conceded Rolfe when asked if Pasnack "advised you to go, because if they were not calling you back to work because of your injury, that your worker's compensation lawyer can help, didn't he tell you that?" "Correct," admitted Rolfe, when asked whether

Pasnick had suggested “talk[ing] to your lawyer [about Abbott’s supposed remarks] because it was against Illinois law, isn’t it? Didn’t he?”

As pointed out in subsection D above, it seems undisputed that Steelworkers does not handle workers compensation claims for employees. Given that seemingly undisputed fact, and the further fact that by September Rolfe already had filed a workers compensation case, it seems difficult to argue persuasively that Pasnick somehow had failed to fairly represent Rolfe by telling him to bring whatever comments Abbott may have made to the attention of his workers compensation attorney. Nonetheless, some effort was made to show that Pasnick had failed to provide fair representation to Rolfe, by virtue of that response.

Pasnick was cross-examined about the fair employment practices provision in article IV of the 1995–1999 collective-bargaining contract:

The employer and the Union each agree that there shall be no discrimination by either party against or on behalf of any applicant or employee because of race, creed, religion, color, sex, age, national origin, disability or veteran status or any other category protected by federal, state or local laws. The Union or an employee may file grievance alleging a violation of this Article. In addition, the resolution of any claim of discrimination prohibited by law shall be through the grievance and arbitration procedures provided in this Agreement.

“Possibly yes,” acknowledged Pasnick, it would be a violation of state law if Respondent-Employer had not recalled Rolfe because of his workers compensation claim.

The problem with such a grievance, of course, is that, regardless of what Abbott may have said to Rolfe—and there seemed some basis for inferring that Pasnick did not altogether trust what he was being told by Rolfe—Rolfe admittedly had not been qualified for recall during 1998. His doctor had restricted him to light-duty assignment. There is no evidence that Respondent-Employer had other than full-duty work available before, at least, late 1998. Beyond that, Rolfe never divulged whether or not he had followed Pasnick’s suggestion—whether he had or had not brought Abbott’s purported comments to the attention of his workers compensation attorney. What is clear is that Rolfe never again approached Steelworkers about filing a grievance regarding Abbott’s purported comments. Apparently, he either chose to ignore Pasnick’s suggestion or, if he did follow it, his workers compensation attorney never suggested that Rolfe attempt to file a grievance concerning Abbott’s supposed remarks.

As to Rolfe’s recall argument, Pasnick seems to have understood what Rolfe was arguing. For, Pasnick testified, “Kenny’s theory went like this. That these people, the two junior people who reported should have received call-in pay. . . . And if they got four hours call-in pay, then he should get four hours call-in pay because he was senior to them and he wasn’t one of the two people brought in. Therefore, he had a loss and should be paid that four hours pay,” which would, in turn, restart his 6-month eligibility period for recall. Of course, article IX of the contract posed a threshold problem for grieving about call-in pay, as well as for any argument about report pay, for two concededly probationary employees.

Even if Steelworkers could have overcome that threshold contractual hurdle, moreover, it would have confronted the insurmountable barrier that Rolfe had not been qualified during August to perform the full-duty work, so far as the evidence shows, which McFadden and Wright had been recalled to perform. Beyond that, Pasnick testified that, as of September 1, he had only recently lost when advancing such a, in effect, falling-domino theory during arbitration: “Where one thing is contingent on two or three other things. And, essentially, the arbitrator kind of said, you can’t parlay these kind of grievances to achieve that end.” Pasnick acknowledged that different arbitrators can render contrary decisions. But, the statutory duty of fair representation does not require labor organizations to keep sorting through arbitrators until possibly one is reached who might agree with an already-rejected argument, particularly where rejection is based upon seemingly logical rationale.

Importantly, Rolfe admitted never even attempted to file a grievance over his nonrecall on August 10. He claimed that he had not done so because no one from Respondent-Union nor Steelworkers had expressed any sympathy with his argument. On the other hand, it is a good question whether, in fact, Rolfe had actually realized there was no basis for such a grievance and simply chose to pursue a course of joining forces with Florian and attempting to gain a backpay award through the Board, rather than attempting to file a grievance. In that respect, it should not be overlooked that the Board expects parties to make some efforts to pursue their statutory rights, and demonstrate that those rights will actually be denied by respondents, before concluding that violations of the Act have occurred. See, e.g., *Iron Workers Local 433 (Riverside Steel Construction)*, 169 NLRB 667 (1968).

In fact, Steelworkers did accept Rolfe’s grievance concerning the two supposed lost days’ pay, although his actual problem turned out to be one differing from his above-quoted description to Pasnick. On September 8 Rolfe filed a grievance seeking 16 hours pay for 2 “holiday days.” On the following day he filed a corrected grievance “for two (2) unused personal days based on a 12 hour work day.” Rolfe testified that he had gone to Steelworkers’ facility on Harlem Avenue where he talked to a “lady” and “gave her everything that Mr. Pasnick had said to do,” but that Langele later called and “said he was turning down my grievance down [sic] because it had no foundation.” That appears to have been a correct assessment of those grievances.

According to article XVI of the 1995–1998 collective-bargaining contract, “Two personal days” are “considered annual holidays.” Under Section 3(b) of that article, to qualify for a holiday, “The employee [must be] actively employed,” and, under Section 3(c), must have “worked all of his regularly scheduled hours on his last scheduled workday prior to and on his next scheduled workday immediately following the holiday.” Moreover, section 1 of article XVI provides that, “Preferred dates for the Personal Holidays must be selected by the individual employee at least fourteen (14) days in advance,” unless Respondent-Employer “waives such requirement.” There is no evidence that, before his March layoff, Rolfe had scheduled personal days. Obviously, he had not been working

thereafter and, accordingly, he had no “scheduled workday” to which a personal day could have been pegged.

The fact is, however, that apparently Steelworkers did succeed in obtaining some pay for Rolfe, as he eventually admitted. During cross-examination he agreed that on September 10, “I got in the mail” payment for 16 hours. Still he was not satisfied. He testified that he felt that he was entitled to “14 hours pay for each day,” and had complained to Mahoney about not receiving pay for that number of hours: “I said, come on, Dan, you know that isn’t right,” but Mahoney merely replied, “well, that’s what I was told to give you.” Langele explained that, at the time, Rolfe had been “arguing for an additional eight hours pay”—payment based upon 12-hour, not 14-hour, days: “They paid him for sixteen. He was looking for twenty-four.” At that point, testified Langele, “I withdrew it from the procedure because it didn’t have any merit to go any further.” There is no allegation that Steelworkers should have followed any other course.

In sum, the credible evidence does not support the allegation that Respondent-Union had unlawfully failed to fairly represent Rolfe “concerning recall rights.” He was restricted by his doctor to light-duty work. He was told that no light-duty work existed at Respondent-Employer. No evidence has been presented to refute what Rolfe was told. So far as the evidence shows, anyone summoned for recall was, or was going to be, assigned full-duty work. Damron prevented Respondent-Employer from recalling probationary employees on August 10, before recalling all laid-off employees who had completed their probationary periods. Steelworkers suggested to Rolfe a plausible course to pursue had Abbott, in fact, made the remarks which Rolfe claims that she made and, further, had Respondent-Employer truly not been recalling Rolfe because of his workers compensation claim, an assertion which is supported by not one scrap of evidence and, conversely, tends to be refuted by the fact that Rolfe had not been qualified to perform any of the work then available at Respondent-Employer’s Chicago facility.

Phillips made a final effort to fire a shot across Respondent-Union’s bow during early September. He testified that, on September 4, Morales “had pulled me to the side,” and had “said, listen, bro . . . I don’t know what you have against me but . . . I just want to let you know that they’re out to get you and that’s why they’re putting this new work rule about leaving your work station.” According to Phillips, when he asked “who’s they,” and asked did Morales mean “Rich and your buddy Manny,” Morales answered, “bro, I can tell you it’s not Manny. . . . It ain’t Manny, bro.”

Morales denied having told Phillips, “Listen Bro, I don’t know what you have against me, but I just want to let you know that they’re out to get you.” “No. I never spoke to Mr. Tom Phillips regarding,” testified Morales, putting a work rule in about leaving workstations. “Never,” denied Morales, had he ever told Phillips that he should maybe watch out or be careful because of the rules. “I didn’t tell him nothing about regarding Mr. Rich Damron,” either, Morales testified.

The testimony by Phillips about the purported September 4 conversation is reminiscent of the supposed warning by Robinson discussed in subsection E above. No greater reliability can

be accorded to the purported September 4 remarks by Morales. In his prehearing affidavit, Phillips stated, “I told Morales that Damron and Escobedo were dirty with all the crap they pulled with Chester”; even the General Counsel conceded that there had been no mention during direct examination by Phillips that he had told Morales that Damron and Escobedo were “dirty with all the crap they pulled.” Asked to explain that omission, Phillips gave an answer which appears to have been a reflection of his general attitude concerning how he testified: “there’s no particular reason. And, if [sic] fact, if I could put it in now I would say that. I feel that there is a lot of dirty crap going on there.” In short, he felt free to put into words whatever Phillips happened to feel. In the end, it appeared that Phillips simply had been unable to remember everything that he had claimed when he gave his affidavit, because when he gave that affidavit, he had “put” in whatever he felt, regardless of what had actually been said and done, and lost track of everything he earlier had said when tailoring his accounts to suit his own ends.

Beyond that, given the evidence already reviewed, there seems no basis for Morales to have believed that Respondent-Employer would have gone to the trouble of “putting” in a “new work rule” for no reason other than to “get” Phillips. Certainly there is no evidence that, as of September 4, Respondent-Employer had actually done so as a vehicle for catching Phillips “leaving [his] work station.” Even if it had done so, Robinson at least seemed to feel that Phillips had been excessively wandering from his workstation, as mentioned in subsection E above. Certainly had Respondent-Employer shared that perception, the Act does not bar an employer from imposing a rule to prohibit excessive wandering by an employee who should be working. Furthermore, there is no credible nor objective evidence that Respondent-Union, specifically Damron, would have been disposed to prevail upon Respondent-Employer to impose a new work rule for no reason other than to “get” Phillips. Nor is there credible or objective evidence showing that, had Damron done so, Respondent-Employer would have been disposed to comply with such a request. As discussed in the beginning of the immediately following subsection, Boyle appears to have been satisfied with the work performance of Phillips.

#### *M. Termination of Focht on November 3*

Described in subsection J above was Focht’s appointment during August to the newly-created position of business manager for Respondent-Employer’s northern region facilities at Chicago and Portage. In that position, Focht no longer reported to Boyle, but instead reported directly to Regional Manager Drukke who, in turn, reported directly to vice president of Manufacturing Kramer.

The General Counsel points to three post-August events involving Focht—putting him on paid leave on September 14, offering him a last chance agreement on October 28 and terminating him on November 4—as evidence that Respondent-Employer discharged Focht for giving testimony to the Board in the form of an affidavit. As discussed in subsection J above, Focht had gone with Florian and Rolfe to the Board’s Chicago Regional Office on August 31 and, there, had given an affidavit in support of Florian’s charges. While Drukke was then Focht’s

immediate supervisor, it had been Kramer who made the decisions which led to each of the three foregoing personnel actions involving Focht. Thus, while Focht was generally an unreliable witness, it is on Kramer's testimony that attention must focus in this subsection. For, when evaluating allegations of discrimination, whether under Section 8(a)(3) or under Section 8(a)(4) of the Act, "at issue is the actual motivation of the official or officials who made the decision to take an allegedly unlawful action." (Citation omitted.) *Clinton Electronics Corp.*, 332 NLRB 479, 496 (2000). As discussed below, Kramer's testimony regarding his motivation for those three personnel actions was no more reliable than that of Focht.

Before addressing that situation, however, testimony about two, as it turns out, periphery subjects needs to be discussed, if for no better reason than to dispose of them. First, by August Boyle had heard about the supposed lists—sometimes colorfully characterized as "hit lists"—which he had supposedly brought with him to the Chicago facility, as discussed in subsection E above. As mentioned below, eventually Boyle learned that there were rumors in the facility about such a list and that the names of Crylen and Phillips were on it. Anxious to allay any concerns by those two employees, Boyle acknowledged that he had spoken to each one about lists. "What I wanted to do," Boyle testified, "was I didn't want employees thinking that they were on some sort of list for termination."

According to Boyle, he telephoned Crylen and "asked him if he'd been informed that he was on a list for termination," and when Crylen replied that he had heard that, "I apologized on behalf of the Company and told him it wasn't true and that he'd basically be judge[d] on his work performance." Crylen's testimony about that conversation was not significantly different from that of Boyle. "He wanted to know, wanted me to know that there was no conspiracy going on," Crylen testified that Boyle had said.

Crylen, of course, had been one of the dissidents who had attempted to run for unit office during early 1997, as described in subsection B above. Another had been Phillips. Boyle testified that he had Phillips summoned to an office. "He wanted to know that if he had to have Union representation," testified Boyle, and Boyle asked, "did you do anything wrong?" to which Phillips replied in the negative and Boyle said, "I guess you don't need Union representation." Then, according to Boyle, "I asked Mr. Phillips if he'd been told that he was put on any sort of list. He told me that he had. I asked him who told him that. He told me Jack Focht. And then I again apologized on behalf of the Company and I told him there wasn't any truth to it. And he'd basically be judged on his own performance. He didn't do anything wrong, nothing would happen to him."

It should not be overlooked that Boyle's testimony about what he had said to Phillips is essentially consistent with his uncontradicted, and essentially corroborated, description of what he (Boyle) had said to Crylen. Yet, once more, Phillips used an acknowledged conversation as a launching pad to portray an agent of one of Respondents in an adverse light.

Phillips did agree that he had asked whether he needed union representation and that Boyle had responded that Phillips did not because he was "not in any kind of trouble." According to Phillips, Boyle then "said . . . I don't know what you've been

hearing out there," to which Phillips replied "this list thing," which led Boyle to say, "I don't know why you would think you're in any kind of trouble, why I would have anything against you because, you know, you're here. You come to work. You do your job and that's, that's good enough for me." During cross-examination Phillips added that Boyle had "said that it's not his list"—"that he had heard about a list and that it's not his list" and "that he wasn't out to get anyone in particular, someone like you, who comes to work and does their job, I believe was something around what he said." Of course, that account pretty much corroborates the above-quoted testimony by Boyle and, moreover, is essentially consistent with what Crylen and Boyle testified had been said during their telephone conversation. But, Phillips claimed that more had been said during his conversation with Boyle.

Phillips testified that Boyle had "said, the only then, that, the only list that he knew about was Jack's list. And he went on to say that Jack wanted me fired and that Jack had wanted Chester fired. And he said that he [sic] was Jack's list and that he had a copy." Initially Phillips testified that "I remarked, you know, I've kind of been surprised by him saying it was Jack's list." Immediately after that, Phillips testified that he had said, "I didn't believe it," But, he immediately retracted the foregoing testimony about his purported response, by testifying, "I didn't believe, I actually, I didn't say anything. I kind of sat back." Phillips then claimed that Boyle "told me, he said, by the way, he says, I don't [know] if you've heard that Jack's gone, Jack's out of here. He's fired." After that, according to Phillips, the conversation turned to Florian, though Boyle continued to make some further remarks about Focht.

"I told him, I said, well, I think that, you know, you guys lost a lot of respect from the guys out there as far as the management wise when you guys fired Chester. I think Chester got a raw deal," Phillips testified, to which Boyle "said, since I've worked for Sequa I've never seen somebody with a work record like Chester's. He said, you know, for this guy to be working here for this long there had to be some kind of favoritism going on between him and Jack Focht." Then, testified Phillips, Boyle "said, you know what? He says, I got nothing against the guy. He said, if he was here now, I'd kiss his big fat ass because he just did me the biggest favor and not even known it." Phillips testified that he asked "what the favor was," to which Boyle "remarked that it was Chester who in a round about way got him Jack Focht," because Boyle "was wondering who it was on his team that, that was working against him. And he now knows it was Jack Focht," adding "that Jack Focht and Chester Florian don't know where the game's being played. That they screwed up."

The foregoing account did not conclude Phillips's testimony about supposed remarks by Boyle about Focht. According to Phillips, after saying that Focht and Florian did not know where the game was being played, Boyle "explained that him and Jack go back a long way. It was kind of a blood feud, in his words, it was a blood feud between him and Jack. That he worked with Jack when Jack was down in St. Louis and that Jack had worked with his father before." After that, Phillips testified, Boyle "said that when he came up to Chicago, that Boyle felt that when he gave Jack a job he put him over the rewinder and

took him off the production line,” and, “I gave him a good job, all he had to do was go over there, do his job and keep his mouth shut. And he couldn’t do that.” But Boyle was not yet through, according to Phillips.

“I brought up Ken Rolfe at first,” testified Phillips, by saying “since we’re all being honest with each other,” that “he lost a damn good worker when he didn’t call back Kenny Rolfe,” because “at one time Kenny Rolfe during his work day got cut real bad, received 22 stitches in his arm. When he got cut, he left, went, got 22 stitches in his arm, came out and finished out his shift.” To that, according to Phillips, “Jim Boyle stated that Ken Rolfe had basically shot himself in the foot,” because “it was real stupid for him to come after the company for his hands, for his injured hands,” adding “that Ken Rolfe had been harassing the personnel director by calling up and asking him [sic] when he could return to work. And he said he was continuously calling up and asked when he could return to work.” Later Phillips added “that Kenny Rolfe probably would have been recalled except he keeps calling up the Personnel Director and harassing her about when he can return to work.”

Boyle denied at least most of those remarks attributed to him by Phillips. He testified that Phillips had said during the conversation that “he wanted to know about three friends of his,” and named “Chester Florian and Kenny Rolfe and Dave Duanes,” the latter of whom had “some type of attendance problem,” perhaps arising from “a serious automobile accident.” Boyle further testified, “I told him I couldn’t talk about the cases of Kenny Rolfe or Chester Florian,” and, “I don’t really know for certain what’s going on with Mr. Duanes.” As an objective matter, if nothing else, Boyle’s testimony about what had been said during this conversation seems more reliable than the account advanced by Phillips.

Phillips admitted that, “I never really had any contact with Mr. Boyle. We never spoke,” prior to the above-described conversation, but, “the only time we really ever spoke was that time in the meeting that he had with you [sic].” No question that Phillips was testifying that he had only minimal or passing contact with Boyle prior to then: “Looking back into my memory, anything of any significance, aside from just talking to him about the way the line was running or something for that day, no, we did not talk that much. Him and I, if we walked by and said hello to each other, it would be a rare thing.” In other words, by his above-quoted testimony, Phillips would have it believed that, during a conversation with a virtually unknown employee, Boyle had completely let down his hair and bared his soul by making a series of comments about three employees, at least one of whom had unfair labor practice charges pending against Respondent-Employer regarding the very discharge which Boyle supposedly was discussing with that virtually unknown employee.

Especially given Boyle’s no-nonsense appearance when testifying, that scenario by Phillips seems as unreal as was White’s assertions about remarks purportedly made by Boyle at the Illinois Bar and Grill, discussed in subsection I above. Such a course would have been inherently reckless, given the circumstance surrounding Boyle’s conversation with Phillips. All else aside, Boyle did not appear to be a reckless individual—one possessing all the self-preservation instincts of a lemming.

As described during the course of discussion in some preceding subsections, Phillips demonstrated that his testimony was not reliable—that he had axes of his own to grind and, conversely, that he had been aligned since at least early 1997 with Florian. In turn, Florian and Focht had been closely aligned since at least as early as then, with Focht having favored Florian’s effort to oust Damron as unit chairman, discussed in subsection C above. Of course, as acknowledged in the complaint, Rolfe had come into “affiliation with Florian,” as August progressed. In the end, Phillips’s testimony about Boyle’s supposed statements, during the meeting about a list, appeared to be no more than another effort by Phillips to aid Florian, Focht and Rolfe—as White had tried to aid Florian, as well as himself, by his testimony concerning the Illinois Bar and Grill meeting—and, as well, to disadvantage Respondent-Employer, by fabricating an account which portrayed Boyle in a most disadvantageous light.

Beyond that, very little of the remarks attributed to Boyle by Phillips truly aid the complaint’s allegations. Allegedly Respondent-Union had caused Respondent-Employer to suspend and discharge Florian. But, had Boyle come to the Chicago facility with an already-prepared list of employees to be gotten rid of, and had Florian been on that list, then it hardly can be said that Florian’s suspension and discharge had been the result of some sort of causation by Respondent-Union. In fact, coming to Chicago with an already-prepared list would have been an event tending to refute any motivation unlawful under the Act for Florian’s suspension and discharge. Similarly, had Boyle truly not recalled Rolfe because the latter was “harassing” Abbott, that hardly shows improper motivation.

True, some evidence of unlawful motivation might tend to be shown by Boyle’s remarks about Focht, as portrayed by Phillips. The problem with relying on the testimony given by Phillips about those remarks is, as pointed out above, that it had been Kramer, not Boyle, who had made the decisions regarding Focht. As discussed below, there is no evidence whatsoever that Boyle had been consulted or had any input regarding those decisions by Kramer. Indeed, once Focht had become business manager, he no longer was under Boyle’s supervision; he was supervised directly by Drufke. Given those circumstances, it hardly seems plausible to believe that Boyle would have been blabbing to a virtually unknown employee about having gotten rid of Focht.

The second, as it turns out, periphery subject concerns Focht’s unsatisfactory performance as business manager. That performance turned out to have been quite shabby. Perhaps motivated by his admitted dissatisfaction at being removed as Chicago production manager, Focht engaged in a series of acts that bred ongoing complaints about him by Chicago supervisors and other personnel. There can be no question about those complaints having been made. Various witnesses described what Focht had done; their testimony was never contradicted, though witnesses were called during rebuttal.

In fact, rebuttal witness Drufke, clearly sympathetic toward Focht—indeed, who hired Focht at the employer for whom Drufke went to work after having left employment with Respondent-Employer—acknowledged that he had received complaints from Chicago personnel about Focht’s performance

while business manager. Drufke identified some of those complainants as Boyle, Robert Buntin and Elizabeth “Lisa” Karpel, each of whom did testify to unsatisfactory conduct by Focht. Drufke agreed that “there was [sic] a lot of complaints” about Focht.

Litigated at some length was a series of memoranda, one by Boyle, all of which are dated September 9 and all of which Boyle testified that he had submitted to Drufke. Drufke denied having received or, even, seen them during the remainder of his employment with Respondent-Employer. The candor of his denial is diminished somewhat by Drufke’s admission of the numerous verbal complaints about Focht which he had received. After all, people had been willing to complain verbally to Drufke about Focht. Accordingly, there seems no basis for concluding that any of them would have been unwilling to reduce those verbal complaints to writing. In the final analysis, however, all of the evidence about Focht’s unsatisfactory performance as business manager, and complaints about that performance, amounts to no more than a collateral subject.

Vice-President of Manufacturing Kramer testified that he had made all of the decisions which led to the three above-listed actions concerning Focht, albeit for two in consultation with Director of Human Resource John Christopher following the latter’s return to employment with Respondent-Employer on October 12. Kramer never claimed that he had made any of those decisions as a result of consultation with Boyle or Drufke. More importantly, neither Kramer nor John Christopher claimed that any decision concerning Focht had been based upon the latter’s job performance as business manager, nor upon any reports of unsatisfactory performance or misperformance by Focht. Instead, the below-described offer of a last chance agreement to Focht and his ensuing discharge were portrayed by Kramer and John Christopher as no more than an outgrowth of Kramer’s spring decision to transfer Focht from Chicago or fire him, as described in subsection D above, because of the discriminatory hiring revealed by OFCCP’s audit.

For his part, Drufke never testified that he had ever relayed to Kramer or John Christopher any of the complaints made to him (Drufke) about Focht. Beyond that, had Kramer been aware that Focht was performing so shabbily as business manager, it seems unlikely that he would have offered Focht a transfer to Respondent-Employer’s Jackson facility. Like Boyle, Kramer impressed me as a no-nonsense person. It is difficult to believe that he would have employed Focht anywhere, had he actually known the problems caused by Focht. Given his sympathy for Focht, there is some basis for inferring that Drufke may have simply desk-drawerred the September 9 memoranda.

Therefore, the complaints about Focht’s misperformance-performance, while real, have not been shown by Respondent-Employer, specifically Kramer and John Christopher, to have been actual considerations when offering Focht a last chance agreement, nor when earlier putting Focht on paid leave. Absent such evidence, the complaints about Focht can be regarded as nothing more than what is categorized as “after-acquired evidence of wrongdoing,” *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 356 (1995), and such evidence cannot be regarded as a moving cause for discipline imposed and alleged

to have been unlawfully motivated. See, *Handicabs, Inc.*, 318 NLRB 890, 894 (1995), and cases cited therein, and *Multi-Ad Services*, 331 NLRB 1226, 1239–1240 (2000), and cases cited therein. So far as the Respondent-Employer’s evidence shows, Focht’s performance as business manager had not been a factor in Kramer’s decisions regarding Focht.

On August 31 Focht accompanied Florian and Rolfe to the Board’s Chicago Regional Office where Focht gave an affidavit in support of Florian’s unfair labor practice charges. Then, on September 11 he had a meeting with Drufke and Boyle. All three gave testimony about what had been said during that meeting. As already pointed out, Focht’s testimony was not reliable and, accordingly, little is to be gained from recounting what he testified had been said during that meeting. Moreover, Drufke’s and, particularly, Boyle’s testimony contain admissions from which it can be concluded that Respondent-Employer learned during the meeting that Focht had begun working with Florian’s attorney and, specifically, had become involved with the Board in the course of working with that attorney.

Boyle testified that the meeting with Focht had been convened because of the September 9 memoranda complaining about Focht’s conduct: “I told Mr. Drufke I thought he needed to talk to Jack,” regarding “the problems and complaints. And Mr. Drufke told me he agreed. But he felt like it should be both of us to talk to Jack instead of just him.” As will be seen, that testimony by Boyle was contradicted by Drufke.

The meeting started, testified Boyle, with Drufke mentioning that there had been complaints about Focht, after which Boyle raised a complaint received that morning from customer Ferro Union. As that discussion progressed, according to Boyle, Focht became belligerent and said he would refuse even a direct order given to him. At that point, testified Boyle, “I was sitting down. I stood up. I walked over. I looked out the window,” and Focht said, “I’m going to tell you something else, Boyle. I’m not happy with the way you’re running the plant, so I went to the NLRB.” “I said fine, Jack. That’s not what we’re here to talk about,” Boyle testified, but “Mr. Focht then proceeded to tell us that he didn’t agree with our decisions in the Chester Florian case.” According to Boyle, “I believe then Mr. Drufke asked Mr. Focht if Mr. Focht was working with Mr. Florian’s personal attorney,” and Focht “said yes.”

Boyle testified that Drufke then said that he wanted “to get this meeting back on track,” and added, “Jack, it’s obvious it’s not working out with you in Chicago. You need to go to Portidge [sic] on Monday,” but “Jack said no.” Of course, that particular account is somewhat inherently suspect, given that, as business manager, Focht then was working both at the Chicago and Portage facilities. In any event, testified Boyle, “Drufke said, Jack, you need to go back, think about it over the weekend, and we’ll talk on Monday.” “That was it,” Boyle testified.

Drufke contradicted virtually every aspect of Boyle’s above-described testimony about the September 11 meeting. Consistent with his above-mentioned denial about having received them, Drufke denied that the meeting had been called to discuss the September 9 memoranda. He also denied expressly that Ferro Union had even been mentioned during the meeting.

Rather, Drufke testified that the September 11 meeting with Focht had been convened because “a very agitated” Boyle had come and had “asked if I heard that Jack Focht was working the Chester’s attorneys, working with the Union concerning the suspension and termination of Chester.” According to Drufke, in Boyle’s presence, “I called Jack” and asked, “Jack, I understand that you’re working with Chester’s attorneys. Is this true?” but Focht did not “reply with either a yes or a no.” So, testified Drufke, “Jim then, very agitated, jumped up, he was sitting, and he confronted Jack,” asking “something like ‘come on, Jack. I know this is happening.’ Jack looked at Jim and he said, yes, it’s true.” After asking Focht “why are you doing that? Why didn’t you talk to me if you thought this was a bad case?” and not receiving “a good answer,” Drufke testified, “I then responded that I had to call St. Louis, the gentleman I reported to worked in St. Louis,” and the meeting ended. So, in contrast to Boyle, Drufke acknowledged that the meeting had been convened not to discuss as work deficiencies by Focht, but because Boyle had become aware that “Jack Focht was working with Chester’s attorneys,” and, of course, one course being pursued by September 11 was the unfair labor practice charge filed by Florian against Respondent-Employer. The connection between Florian’s counsel and that charge can hardly have escaped notice by Boyle and Drufke.

As pointed out above, Boyle admitted that Focht had said, during the September 11 meeting, that he “went to the NLRB.” Drufke equivocated when asked if there had been any mention of the NLRB during the meeting. “No, I don’t believe there was,” he answered initially. “I’m trying to recount a conversation that happened 2 years ago. One of the reasons I don’t think there was because if we would have been talking about a safety problem rather than this case with Chester . . . I certainly wouldn’t have called someone on the carpet and in essence we were calling Jack on the carpet,” claimed Drufke. In the end, however, Drufke expressed uncertainty about recalling whether or not the NLRB had been mentioned: “No, I don’t. No, I don’t recall. He might have, he might not have.”

It may be that Drufke truly did not recall whether or not Focht had mentioned going to the Board. On the other hand, it may be that Drufke chose to fudge about that having been said, as an effort to distance himself from subsequent conduct by Kramer which has become the subject of an unfair labor practice allegation. Whatever Drufke’s actual motive, Boyle’s above-described admission removes from doubt that Respondent-Employer had known about Focht’s contacts with the Board by the conclusion of the September 11 meeting. Beyond that, even had Drufke not taken notice at the time of that admitted statement by Focht, Drufke did admit that Focht had admitted that he had been working with “Chester’s attorneys,” and it hardly takes a genius to make the connection between doing so and the unfair labor practice charge that by then had been filed against Respondent-Employer by Florian.

Drufke appeared equally guarded when asked about his call to Kramer following the meeting with Focht. “I told Roger what transpired and Roger told me he would be in Chicago . . . the next work day,” was all that Drufke testified had occurred. Kramer testified that he had received a telephone call from Drufke on Friday, September 11, during which Drufke “told me

that he had information that Jack was working with someone’s lawyer.” According to Kramer, “I don’t think I had a trip planned” to the Chicago facility before that call from Drufke. But, he testified that he had told Drufke, “Well, I’ll be up Monday. I want to talk to” Focht.

As to the possibility that Drufke had mentioned during that telephone conversation that Focht had said he had gone to the Board, Kramer side-stepped a direct answer to a question about that, in a fashion similar to Drufke’s above-described answer about Focht having said anything about having gone to the Board. “I don’t remember him [Drufke] specifically mention[ing] NLRB,” Kramer testified initially, “I’m not sure he ever told me that.” Shortly afterward, Kramer denied that Drufke had mentioned an NLRB statement by Focht. Of course, Boyle never testified that Focht had said that he had given a statement to the regional office; merely that he “went to the NLRB.” Given that admission about what Focht had said, and given Drufke’s admission that he had “told Roger what transpired” during the meeting with Focht, it seems unbelievable that Drufke would not have told Kramer, during their September 11 telephone conversation, that Focht said he “went to the NLRB.” In any event, Kramer conceded that, on September 14, he “heard it from Jack,” that Focht had gone to the Board’s regional office.

Kramer testified that he and Drufke met with Focht on Monday, September 14. “First thing I noticed is that [Focht] was very upset, on the verge of tears,” claimed Kramer, and, as a result, he asked, “Jack I understand that you’re working with somebody’s lawyer on something. What’s going on here?” According to Kramer, Focht replied to the effect that “he was working with someone’s lawyer in conjunction with the National Labor Relations Board.” Use of that adjective, “someone’s,” did not escape notice. During cross-examination, Kramer conceded that Focht “may have said” that the “someone’s lawyer” had been an attorney for “Florian,” but added hastily, “I’m not sure.”

Kramer testified that Focht had continued by saying that he was upset about “our treatment of Mr. Florian” and, also, his own “demotion” from plant manager which had left him feeling “humiliated” and “hardly” able to “stand being in the plant.” Obviously, the fact that Focht admittedly had complained to Kramer about Respondent-Employer’s “treatment of Mr. Florian,” should have left little doubt about the “someone’s lawyer” with whom Focht had begun working, even had Focht actually not said that the “someone” was Florian. Kramer testified that, in response to Focht’s expression of “humiliat[ion],” he had asked Drufke, “Didn’t you tell him the reason for that?” demotion, and Drufke had answered, “Yes, I did, but maybe I didn’t make it clear.”

Then, testified Kramer, he said to Focht, “Well Jack, you know, I think the best course of action at this time would be, you know, if you feel that way would be for you to go on paid leave of absence,” and, “While you’re on this paid leave of absence I want you to do some soul searching and determine what you think how you can best serve the company in the future.” To that, Kramer testified, Focht “did not object or give me any indication that that was something that he objected to.” On the other hand, Kramer never claimed that he had offered

Focht an opportunity to voice his opinion about being put on paid leave of absence.

During cross-examination Kramer agreed that Focht also had mentioned a list of employees whom Respondent-Employer purportedly wanted to terminate. Boyle testified that, on September 14, he had been told by Kramer “that he’d had some type of meeting with Jack Focht,” during which “basically Jack had said that I had some sort of list of employees that I wanted to terminate.” “I told Mr. Kramer that was ridiculous,” testified Boyle. That report by Kramer generated Boyle’s above described conversations with Crylen and Phillips, in the first of the two periphery points.

Boyle also testified that he had told Kramer that he (Boyle) had no problem with Focht, “[o]utside of the complaints with the managers and the insubordination.” Any argument that such a general and ambiguous remark might evidence that Kramer had known about the complaints described in the second periphery point, covered above, is quickly refuted by the fact that Kramer did not corroborate that testimony by Boyle. That is, Kramer never testified that, on September 14, he had been made aware by Boyle of “complaints with the managers and the insubordination” by Focht. Even had Boyle actually mentioned those matters to Kramer, in the general fashion described by Boyle, Boyle’s remarks obviously had not registered with Kramer. Not only did the latter not mention them as having been said that day by Boyle, but Kramer never claimed that he had made any further effort to ascertain what Boyle may have been talking about.

As set forth above, the situation as of September 14 had been left with a supposedly distraught Focht having been placed on paid leave, during which he purportedly was to think over how he could best serve Respondent-Employer in the future. Yet, there are some bases for inferring that concern about Focht’s distress, and need to think about his future, never truly had been Kramer’s actual reason for having placed Focht on leave of absence that day.

In the first place—as Drufke and, particularly, Kramer’s above-described testimony show—the entire purpose for Kramer’s trip to Chicago, and for having conducted the meeting there, had been to ascertain whether Focht had become aligned with “someone’s lawyer” and, if so, the reason why Focht had done so. Boyle admitted that, by the time that Kramer came to Chicago, Focht had already told Drufke that he (Focht) had gone to the Board. Drufke admitted that he had “told Roger what transpired” during the meeting when, Boyle admitted, Focht had made that remark. By September 11, Florian’s unfair labor practice charges had been received by Respondent-Employer. Thus, the circumstances leading Kramer to come to Chicago on September 14 had not been any kind of concern about how Focht may have felt. Whatever Focht’s subjective state, Kramer had come to Chicago to ascertain what involvement Focht had with a lawyer and the Board.

Secondly, Kramer admitted that Focht had said September 14 that he (Focht) “was working with someone’s lawyer in conjunction with the National Labor Relations Board.” It had been after Focht had made that remark that Kramer admittedly had said “the best course of action” would be to place Focht “on paid leave of absence.” To be sure, according to Kramer,

Focht added that he had felt “humiliated” at his earlier “demotion and, as a result, could “hardly stand being in the plant,” before Kramer had mentioned placing Focht on paid leave. Yet, Focht’s feelings have not been shown to have been the actual reason for Kramer’s decision to place Focht on paid leave. That those remarks by Focht were no more than a convenient hook for Kramer’s suggestion, which effectively removed Focht from Respondent-Employer’s Chicago facility, is shown by the third basis.

After September 14 Focht was left on paid leave until October 28 without, so far as the evidence shows, any effort being made by Kramer, or by any other official of Respondent-Employer, to ascertain the results of Focht’s “soul searching” about how he might “best serve the company in the future.” That interval is slightly more than 6 weeks. Such a prolonged interval of seeming unconcern about the thinking of an employee placed on leave supposedly to conduct that thinking, on its face, is strong evidence of actual lack of true concern about that employee’s “soul searching.” Rather, that relatively long interval tends to show that, having gotten Focht out of the Chicago facility, Kramer was satisfied to simply leave Focht on the shelf until some plausible legitimately-motivated action could be determined. In fact, as discussed below, when he again confronted Focht on October 28, Kramer had already determined what action to take concerning Focht, regardless of what conclusions the latter might have reached as a result of that “soul searching.”

In fact, Kramer never did claim that he had much cared what conclusions had been reached by Focht after September 14. Instead, he testified that he had wanted to implement his spring decision, described in subsection D above, to transfer or discharge Focht, in light of the hiring discrimination disclosed by OFCCP’s audit. Indeed, aside from allusions to the problem caused by Focht’s reaction to Kramer’s March layoff suggestion, described in that same subsection, and to reports of favoritism shown to certain Chicago personnel while Focht had been serving there as production manager, Kramer never testified that his October and November decisions regarding Focht had been motivated by any reason other than following through on that spring decision. Thus, it can hardly be maintained with any persuasion that Kramer had been concerned with whatever conclusions had emerged from Focht’s “soul searching” after being placed on leave with pay on September 14. Beyond that, there are several inherent problems with Kramer’s portrayal of the late October-early November actions as being no more than ultimate implementation of a spring decision to transfer Focht or, if he declined transfer, to fire Focht.

As described in subsection J above, OFCCP issued its final determination, accompanied by a proposed conciliation agreement, on August 7, almost 3 months before Focht was offered a last chance agreement on October 28. That creates an inherent timing problem for Kramer’s proffered defense. To evade that problem, Kramer claimed that he had no director of human resources from the time that John Christopher had left employment with Respondent-Employer prior to August 7 until Christopher resumed working for Respondent-Employer. But, that explanation is not so persuasive in the circumstances presented here, as might be the fact in other circumstances.

First, as pointed out in subsection J above, that explanation is objectively at odds with certain other facts. Respondent-Employer is a multistate, multimillion dollar operation. It seems inherently illogical that the vice-president of manufacturing would be left with no resource for preparing a last chance agreement other than a departed director of human resources. To the contrary, the absence of an incumbent in that position seemed to pose no problem for ultimate resolution and execution of the conciliation agreement with OFCCP. Nor did it seemingly pose any problem for Respondent-Employer in formulating and submitting responses to the unfair labor practice charges filed against it. Nor, most specifically, did it seemingly pose any problem when preparing the entirely new job description for the position of business manager, the position to which Focht then was appointed. If Respondent-Employer had been capable of doing all those things, even though no one occupied the position of director of human resources, it is difficult to believe that it lacked someone who could have formulated a last chance agreement for submission to Focht.

Second, everyone involved in the spring situation that arose from Focht's admissions of hiring discrimination—Kramer, John Christopher and Director of Equal Employment Opportunity and Business Ethics Delk—testified that the primary objective had been to get Focht out of the hiring process. That was effectively accomplished by the end of May, as described in subsection D above, when Focht was divested of the duties and powers of production manager. That accomplished, no evidence suggests a need to have taken any further action to eliminate Focht from the hiring role that got him and Respondent-Employer in trouble with OFCCP. After May Focht was in no position to repeat his earlier discrimination in hiring employees.

Third, it is accurate that after May Focht had been left in an unstructured and unexplained capacity. Had that continued until September 14 there might have been some basis for Kramer's assertions of a need to follow through further on his spring decision regarding Focht. But, Focht's "limbo" situation did not continue until September 14. As described in subsection J above, during August Respondent-Employer prepared a job description for an entirely new position, that of business manager, and Focht was appointed to that position with the knowledge of Kramer. In that capacity, Focht had no role in the hiring process. In fact, as Respondent-Employer acknowledged, Focht had no supervisory authority as business manager. The fact that Respondent-Employer had gone to the trouble of creating the business manager position, one which allowed it to take full advantage of Focht's expertise without having him involved in the supervisory process, and the further fact that Kramer knew that Focht was being appointed by Druke to that position, are strong indications that a final decision had been made by August regarding Focht's future with Respondent-Employer: he would be the business manager working at Respondent-Employer's northern region facilities in Chicago and Portage. Then, it came to light that Focht was working with "someone's lawyer," in the process having gone to the Board's regional office to support Florian's charges.

John Christopher resumed working as Respondent-Employer's director of human resources on October 12. He and Kramer each testified generally about ensuing conversa-

tions concerning Focht. For example, Christopher testified that, "Mr. Kramer and I had a lot of conversations about [Focht] when I got back," and, during them, that "some liability" with Focht's past performance "came into consideration." However, Christopher never claimed with any particularity that there had been mention, much less "consideration," of Focht's conduct while serving as business manager during those October 12 to 28 "conversations" with Kramer about Focht.

Kramer did testify generally that "part of the issue" for offering the last chance agreement to Focht had been the latter's hiring discrimination uncovered by the OFCCP audit. However, Kramer never claimed that any other "part of the issue" had been Focht's mis-performance as business manager. Instead, he identified only the above-mentioned issues of favoritism and the problem created by Focht's remarks during conversations leading to the March layoffs. Aside from those two additional subjects, there was no particularized testimony by Kramer, nor by John Christopher, about discussion of any other problems posed by Focht's performance other than the hiring discrimination.

For example, Christopher testified that Focht "had a history with [Respondent-Employer] of moving around fairly regularly," and that, "There were some difficulties at most of these locations," as demonstrated, claimed Christopher, in the below-quoted first paragraph of the last chance agreement offered Focht on October 28. Yet, Christopher never explained with specificity what those difficulties had been, and there is no particularized evidence concerning past "difficulties" purportedly posed by Focht at Respondent-Employer's facilities other than Chicago. Nor did Kramer supply such an explanation. Boyle complained about Focht's conduct. However, neither Kramer nor John Christopher claimed specifically that anything said by Boyle, nor by other Chicago personnel, had influenced the decision to confront Focht with a last chance agreement on October 28. To the contrary, testified Christopher, "Jack Focht was a good man as [sic] getting the strip to run through the line and making the coatings work. But Jack Focht also had some problems as a management person." Yet, as pointed out in subsection J above, by October 28 Focht had no longer been "a management person" for over 5 months.

Kramer and John Christopher met with Focht on October 28. The meeting began with Focht being asked if he had given thought to how he could best serve Respondent-Employer. Focht responded that he thought he could do so as a production manager or foreman, in some sort of supervisory position. Kramer said he agreed, but looked at Focht's situation somewhat differently. Kramer then read to Focht the entirety of the already-finalized two-page last chance agreement. Essentially, it consists of two parts: a description of Respondent-Employer's asserted evaluation of Focht's employment during the entirety of his employment by it and, secondly, the offer being made.

Putting last things first, the offer-portion of the agreement begins, "The fact that you have had problems at other Precoat facilities make the only employment opportunity available to you is at the Jackson Mississippi facility," as a "production foreman." Neither Christopher nor Kramer made any effort to square the offer of such a position with Christopher's above-

stated purported concern about Focht's supposed past "problems as a management person."

There were conditions enumerated in the agreement for Focht to work as a production foreman at Jackson. One was, "You will refrain from making disparaging remarks to *anyone* about the company, members of management, employees, suppliers and customers." Another was, "You will receive a performance appraisal every three (3) months for the first twelve (12) months at the Jackson facility and every six (6) months for the second twelve (12) months." Failure to meet any one of the stated conditions, the agreement warns, "will result in your termination for cause." Orally, Kramer offered that, in addition, Respondent-Employer would make every effort to locate employment for Focht's wife, Gail—then still working at the Chicago facility—in the Jackson area.

On their face, those conditions do not lend themselves to acceptance by a long-term employee of conceded high expertise and technical ability. But, it was not the conditions that led Focht to ultimately reject the last chance agreement. Rather, it was the content of the agreement's first paragraph which led him to bridle at signing it. That paragraph states:

Your long history with Precoat has been a mix of contributions in solving technical and production problems and disruption caused by your frequent choice to go your own way and ignore company policies and procedures. In the past, the company has considered your assets to outweigh your liabilities or at least balance them. On several occasions, the company has overlooked the disruption caused by your lack of management skill and disregard for policies with the faith and expectation that you could change. You were given several opportunities to make a fresh start at Northgate, Houston, Chicago and Portage. Unfortunately you did not take advantage of those opportunities and continued to conduct yourself in an unacceptable manner. Over the past year your liabilities have increased to the point that they seriously outweigh your assets. You have continued to single out specific employees for favor allowing unequal opportunities for training and advancement. You have openly disparaged the company and members of management. You have refused to cooperate with and interfered with other departments in resolving quality and customer issues. Most significantly, you have placed the Precoat and our parent company in jeopardy by your hiring practice of refusing to consider women for plant positions and your comments to representatives of the OFCCP. As a result, there is no longer a position for you at the Chicago plant.

John Christopher, who prepared the agreement, never testified with particularity where he had gotten the information recited in that paragraph, nor did Respondent-Employer provide particularized evidence to support many of that paragraph's assertions.

To the extent that some of what is said in it may be construed to refer to Boyle's and other Chicago personnel's complaints about Focht's conduct as business manager, it would be speculative to conclude that that conduct had been what was being referred to in the agreement's first paragraph. For, there is no evidence connecting those complaints by Boyle and Chicago

personnel to Christopher. That is, there is no particularized evidence that Christopher had become aware of those complaints, especially the ones submitted to Drufke on September 9, as of October 28.

Focht disputed those assertions in the agreement's first paragraph. On October 28 he told Kramer and Christopher that he felt that the first paragraph would prevent him from signing the agreement. To make an already long story short, Focht was given time to think about his decision. By handwritten letter to Kramer dated November 2, Focht gave notice that, "In response to your last chance agreement, I cannot accept the first paragraph of this letter [sic], therefore I cannot sign this agreement."

During a telephone conversation on November 3, according to Kramer's own letter of that same date, Kramer offered Focht the opportunity to "write a rebuttal" to that first paragraph which "would be put in your personnel file." However, there is no evidence that Kramer ever offered, nor ever expressed any willingness, to actually revise or rewrite the agreement's first paragraph. So far as the record discloses, to continue employment with Respondent-Employer, Focht had to sign the last chance agreement as written. He refused to do so; he was fired on November 3.

#### *N. Resolution of Florian's and White's Grievances*

Florian complained about a purported lack of communication by Steelworkers after September 1. Yet, the fact is that, in the immediate wake of that day's meetings, there was very little of import for Steelworkers to communicate. Respondent-Employer remained hitched to its termination decisions. However, Steelworkers did not simply surrender further efforts to resolve Florian's and White's grievances.

By letter to Boyle dated September 9, Langele requested, *inter alia*, that those two employees' grievances "be held in abeyance until I have a chance to further evaluate the Union's position on them." That was not an unusual request, testified Langele, and Respondent-Employer "never challenged my request." Thereafter he and Robinson met with Boyle. During that meeting Robinson mentioned the name of another employee who had been only suspended for having left the premises. That remark by Robinson suggests two points that should be made.

First, the fact that no one had ever been disciplined for driving on South Kilbourn Street between buildings while on the clock, prior to Boyle's arrival at Respondent-Employer's Chicago facility, is not a relevant analytical consideration. As set forth in subsections F and G above, nothing in the Act prevents employers from changing applications of work rules, to prohibit conduct tolerated previously. Boyle did specifically inform Respondent-Union's officers that he regarded work rule 11 to be violated by driving on South Kilbourn after having punched in and before punching out. So, any argument based upon past toleration of driving between buildings would simply not have been a good argument to advance to Respondent-Employer as of September.

Second, initially Langele asked for copies of the videotape showing White's August 6 drive on South Kilbourn, from the annex to the main building, to punch or clock out. Confronted

with Respondent-Employer's representation that, given White's admission of having done so, it did not intend to use the videotape in disputes resolution, Langele withdrew his request for it. He was faulted for that withdrawal, during cross-examination. But, it hardly can be maintained with the least persuasion that Steelworkers somehow violated a statutory duty of fair representation by ceasing to have interest in viewing a videotape of misconduct after the employee involved had admitted having engaged in that misconduct. That statutory duty does not extend to being a "lookey-loo" for no good reason.

Langele testified that, during the meeting with Boyle, he had "argued with the company that there were cases like this in the past that no one was terminated from," and "the other times that this grievance, that grievances were filed on this, the people the worst they received was a ten-day suspension." Robinson never contradicted that testimony by Langele. Regardless of the particular contractual provisions relied upon, that argument was the best that could be advanced on Florian's and White's behalf, given what they had done and the circumstances leading to each's on-the-clock trip on South Kilbourn from the annex to the main building. Indeed, those arguments by Langele were essentially the same as arguments advanced earlier on behalf of Florian and White—arguments which Florian and White each acknowledged had been satisfactory ones.

The fact is that when he had something significant or different to report to Florian and White, Langele was not reluctant to contact each of those discharged employees. For example, Langele arranged another meeting with Respondent-Employer for October 7. Both White and Florian acknowledged having received telephone calls from Langele to notify them of that meeting and to give them an opportunity to attend it. Admittedly, both White and Florian declined to do so, albeit for differing reasons. Florian's reasons merit further description.

According to him, when told by Langele about the October 7 meeting, he asked "why are we having another meeting?" adding, "I thought we would be in arbitration now, if that's what it was going to be." Maybe so, but Langele can hardly be faulted for attempting to settle Florian's and White's grievances, short of arbitration. When Langele responded that "[h]e was trying to get my job back," Florian testified that he retorted that he had "filed a complaint with the NLRB, that there was a conspiracy between the Company and the union to have me terminated," but Langele "did not want to discuss that, that he was calling me for my meeting here." Not surprisingly, given the above-described absence of any evidence whatsoever that there had been some sort of conspiracy between Respondents to have Florian fired.

"I informed him what had happened to Jim White at the September 1st meeting," testified Florian, and "I told him I fear for my safety, to come back to out that plant again because of what happened that day," and, "I asked him if I could get back to him in about an hour and a half, that I wanted to make a decision if I was going to attend the meeting basically." Fine, except that there is no evidence that Florian could have believed that Damon would be attending the October 7 meeting and, moreover, no evidence that Langele posed any threat to Florian's safety. In fact, Florian's position was not truly a consistent one. He seemingly was not afraid to return to work at Respondent-

Employer's Chicago facility; but he was afraid to go there for a grievance meeting.

Florian testified that he had called back to Langele and, "I told him that I was not going to attend this meeting." During this second conversation, testified Florian, Langele "told me that what he was trying to do was to get some sort of disciplinary suspension for me and get me off the streets," but Florian replied "that I had done nothing wrong," and wanted his job back with "all back pay" and, as well, "some kind of a letter or something from the company stating no wrongdoing on my part." To that, Florian testified, Langele responded, "if you don't give me this leverage to come in and negotiate this for you, I can't work too hard for you on this case." As related by Florian, it seems that Florian was attempting to portray Langele as making some sort of threat of unwillingness to represent Florian. And White jumped on a similar remark by Langele, converting it into a purported threat by Langele not to represent Florian.

During a meeting concerning the then-upcoming October 7 meeting, testified White, Langele said that he would be having another meeting with Respondent-Employer and "need[ed] something to negotiate with. Would the ten day suspension be fine . . . and we'll negotiate back pay at a later date," to which "I told him yes." According to White, Langele also said, "he made the same offer to Chester but Chester would not accept the ten days suspension because he doesn't think he's done anything wrong. So he's not really going to have a lot of ammunition and can't fight too hard for Chester."

Langele denied flatly having made those remarks attributed to him by Florian and White. There is no allegation that Langele had unlawfully threatened not to "work too hard for" Florian in attempting to resolve the latter's grievance. The fact is that Langele obviously did make efforts to resolve that grievance; he eventually reached the same settlement with Respondent-Employer for Florian that he achieved on behalf of White. Moreover, as any bargaining representative or attorney knows, settlement is facilitated by an employee's or client's willingness to accept something less than the full and complete remedy sought through arbitration or litigation. That seems to have been the most that Langele was attempting to communicate to Florian and White: that settling their grievances would be facilitated by their willingness to accept less than complete reinstatement, backpay and an apology letter.

In *Longshoremen ILA Local 1575 (Navieras, NFR, Inc.)*, 332 NLRB 1336 (2000), the Board pointed out that the Act does not require a statutory bargaining agent "to obtain ratification of any collective-bargaining agreement that it negotiates on behalf of employees it represents." (Citation omitted.) Ratification, of course, is one form of consent or agreement by represented employees. Likewise, there is no statutory obligation on the part of statutory bargaining agents to obtain grievants' consent or agreement to terms of settlement reached on their grievances. Bargaining agents' statutory authority to strike settlements exists no less for one than for the other. To be sure, grievance-processing, like contract negotiating, is subject to the statutory duty of fair representation. But that statutory duty is not so rigid that it obliges collective-bargaining agents to blindly do only whatever represented employees want their

bargaining agent to do. Such a situation would hardly promote the collective-bargaining process which Congress seeks to have promoted through the Act.

A final point needs to be made about Langele's above-mentioned conversation with Florian. Florian testified eventually that he had asked for a third-party witness to attend the October 7 meeting, but Langele refused to allow that. Langele testified that Florian had actually asked to have his attorney present at the October 7 meeting with Respondent-Employer and that, "I told him that's not our policy." Whichever, there is no evidence that Steelworkers has a policy of allowing third-party witnesses or grievants' attorneys to attend disputes resolution meetings with employers short of arbitration, particularly meetings intended to attempt compromise negotiations. Thus, Langele's response to whichever request Florian had made was consistent, so far as the record discloses, with Steelworkers' policy and there is no allegation that such a policy violated the Act.

By letter to Florian dated October 5, Langele gave notice that Steelworkers was "going to proceed with the meeting on October 7th," and urged Florian to attend: "without your testimony and cooperation in the grievance procedure, you are putting the union at a severe disadvantage." Of course, that latter remark is consistent with a bargaining agent's feeling that disputes resolution would be better promoted with participation by grievants, and tends further to refute Florian's and White's claims that Langele had said that he would make less than a full effort to achieve settlement for Florian without the latter's cooperation.

That Florian was attempting to distort what he had been told by Langele during their telephone conversation is further evidenced by Florian's reaction when shown Langele's October 5 letter. "I don't remember getting this letter," claimed Florian, and "I could be wrong, but I believe [now is] the first time I've ever viewed this letter." As pointed out above, the letter's wording tends to undermine Florian's account of what Langele had supposedly said about being able to represent Florian without the latter's cooperation. Apparently, Florian appreciated that fact and made an effort to avoid having to concede that he might have been told something other than what he was claiming had been said by Langele during their telephone conversation. As it turned out, eventually Florian did concede that, "I remember now" having received Langele's October 5 letter.

Langele and Robinson met with Respondent-Employer on October 7. Langele argued that the discharge penalty was disproportionate to the offense and that no one had ever before been terminated for violation of work rule 11. Eventually, he prevailed on those arguments. On November 4, an agreement was signed by Druke and Langele. It provided that the discharges would be "converted to a disciplinary suspension," that White and Florian "shall be reinstated and shall return to work during the week of November 9, 1998 to their regular shift and to their regular job classification," and that the parties would "proceed to arbitration to resolve the question of back pay (if any) and length of suspension."

Respondent-Employer sent offers of reinstatement to Florian and White, pursuant to that settlement agreement. White accepted and returned to work for Respondent-Employer on November 13. In contrast, Florian rejected the reinstatement offer.

He did so, he testified, "Because I was told to take a disciplinary suspension and admit that I had done something wrong, which I did not, sir." Actually, he wanted a little more. According to a letter dated November 11 sent to Druke, Florian sought reinstatement; not to have to "report to, be supervised or managed by, or otherwise be held accountable to Jim Boyle, Robert Moore, Rich Damron, Manny Escobedo or Ed Morales"; "full back-pay"; and, "a full retraction of [the] claim that [Florian] violated work rules 10 and 11. . . . placed in his personnel file."

Prior to having received that November 11 letter, Druke, as well as Langele and Pasnick, had spoken to Florian and had urged him to accept the offer. After receiving the November 11 letter, a seemingly offended Druke took a tougher line. In a response letter dated November 12, Druke pointed out that "the Union is the sole and exclusive entity authorized by law to represent its members." He stated that Respondent-Employer's reinstatement offer would have to "be accepted, if at all, no later than the close of business Monday, November 16, 1998," and that failure to accept would "result in loss of seniority and termination of employment"—in other words, would leave Florian in the position that he had been placed on August 10, when he had been terminated. Florian never showed up for work by close of business on November 16. By telegram dated November 17, he was notified that, "YOUR EMPLOYMENT HAS BEEN SEVERED." Even so, Steelworkers pursued Florian's, as well as White's, grievance to arbitration.

## II. DISCUSSION

Many years ago, in the course of describing a particularly acrimonious election, anchor Dan Rather mentioned a saying to the effect that if enough mud is thrown, some of it may stick. That appears to have been the attitude and approach of Focht, Florian, White, Rolfe and Phillips. But there is a corollary to Rather's saying: the mud-thrower better hope that none of the mud sticks to him/her. The applicability of that corollary to those five witnesses is illustrated by Section I's review of the testimony of each. That review reveals repeated internal contradictions, lack of corroboration by seemingly sympathetic and friendly other witnesses, lack of corroboration by other evidence and by objective considerations, significant inconsistencies with testimony by other seemingly sympathetic and friendly witnesses, and inconsistencies with admitted facts and with objective considerations. So frequently do those factors emerge from review of the evidence that, as an objective matter, there is no basis for placing any reliance on the testimony of Focht, Florian, White, Rolfe, and Phillips. To the contrary, those objective matters admit of no conclusion other than that each one of those five witnesses was advancing testimony lacking in candor, in an effort to buttress cases against Respondents and to undermine Respondents' positions, rather than attempting to recreate events and conversations as they had actually occurred. Indeed, that was the impression that I formed as each one of them was testifying. Therefore, there is no basis for crediting the testimony given by Focht, Florian, White, Rolfe and Phillips.

True, there were other witnesses whose testimony did not always appear to have been completely candid, particularly

Boyle, Kramer, John Christopher, Damron, and Crylen. However, other portions of the testimony of each was uncontested, corroborated by other credible evidence and corroborated by objective considerations.

It is the General Counsel who bears the threshold burden of showing that unlawful action was taken by a respondent. "The burden of establishing every element of a violation under the Act is on the General Counsel." *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973). Beyond that, a "defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Maple Grove Health Care Center*, 330 NLRB 775, 777 fn. 14 (2000), describing the holding in *Merillat Industries*, 307 NLRB 1301 (1992). Indeed, even advancing sometimes unreliable defense testimony is not necessarily dispositive of the ultimate issue of motivation for allegedly unlawful action. See, *Multi-Ad Services*, 331 NLRB 1226, 1240 (2000), and cases cited therein.

As an objective matter, there is no credible evidence showing that Damron would have likely feared replacement by Florian as unit chairperson, whether the latter had been able to run during 1997, nor were he to actually choose to run in 2000. As set forth in Section I.B., supra, it had not been any conduct by Damron that had led to declarations that Florian, Phillips, and Crylen were not eligible to run for unit office during 1997. Rather, each had been declared ineligible for having failed to satisfy a candidacy-requirement imposed by Respondent-Union's international body. Consequently, while Florian's failed candidacy-effort is supposed to have been the trigger for Respondent-Union's alleged attempts to cause, and eventual purported causation of, his suspension and termination, the credible and objective evidence does not support even a weak inference that such a trigger had ever existed.

Beyond that, there is no credible showing that Boyle likely would have been amenable to any overtures by Respondent-Union, particularly by Damron, to have Florian fired. No credible or objective evidence shows that Boyle would have anything to gain by Damron's retention as unit chairperson. To the contrary, Damron had protested Boyle's addition of two work rules, as described in Section I.F., supra, and had complained to Abbott about Respondent-Employer's recall of probationary employees on August 10, as described in Section I.K., supra. Hardly the actions of a union officer who was being cozy with an employer's plant manager. And hardly actions that would have particularly endeared Damron to Boyle. Furthermore, there is no credible or objective evidence that Boyle would have anything to gain by discharging Florian, so that Florian would be unable to run for unit chairperson during 2000. Certainly, so far as the evidence shows, by August Florian never had given any indication to Boyle that he (Florian) might be an even tougher union official to deal with, than Damron had already demonstrated.

In sum, the very premise for the allegations of unlawful motivation regarding Florian is completely lacking in the objective evidence. Moreover, that premise was not advanced by the unreliable testimony provided in an effort to attempt to support it. To the contrary, what objective and credible evidence shows is that Respondent-Employer had tolerated for years employees driving on South Kilbourn Street between buildings, after hav-

ing punched in and before punching out; that Boyle was appointed plant manager to straighten out poor performance at the Chicago facility and one measure that he always had implemented to accomplish that objective had been strict enforcement of work rules; that Boyle gave notice that he would no longer tolerate driving on South Kilbourn between buildings after having punched in and before punching out; that officers of both Respondents had given specific notice to Florian that such driving between buildings would no longer be tolerated; that Florian chose to ignore those warnings and to continue driving from the main building to the annex after punching in and, also, to continue driving from the annex to the main building to punch out; that he was caught doing so on a second occasion by Moore; that he was suspended by Moore for having done that; and, that Boyle, consistent with his approach of strictly enforcing work rules, then discharged Florian.

A preponderance of the credible evidence shows that Florian would have been suspended and discharged, even had he not tried to run for unit office during 1997 and even had he not expressed interest in, or intention to, try to run during 2000. There is no credible evidence that any officer of Respondent-Union caused Respondent-Employer to suspend or discharge Florian. A preponderance of the credible evidence does not support the complaint's allegations of unlawful motivation for Florian's suspension or termination.

It follows from those conclusions that a preponderance of the credible evidence does not establish that the motivation for White's suspension and discharge had been to conceal unlawful motivation for having suspended and discharged Florian. There is no credible evidence of the latter, as concluded above, and, accordingly, that premise collapses as support for allegations of unlawful motivation regarding White. Instead, a preponderance of the credible evidence establishes that White had known that he should not be driving from the annex to the main building to punch or clock out; that he chose to do so on August 6, perhaps to test whether he would be treated as had been Florian; that Moore discovered that White had done that on August 6; and, that White was treated as had been Florian: he was suspended and, later, discharged for having done what Florian had done. So far as the credible evidence shows, White's suspension and discharge amounted to no more than Respondent-Employer's consistent treatment of two employees who chose to violate the same work rule.

Inasmuch as a preponderance of the credible evidence does not establish that Respondent-Union had attempted to cause, nor actually caused, Florian to be suspended and discharged, the principal theory underlying its alleged failure to have fairly represented Florian and White collapses. Nor does a preponderance of the credible evidence establish that Respondent-Union had unlawfully failed to fairly represent Florian and White in some other fashion. There is no credible evidence of unlawful threats, other statements or conduct by Damron, nor by any other official of Respondent-Union, such that it could be concluded that Respondent-Union somehow restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act. Both Respondent-Union and, then, Steelworkers made seemingly every effort that plausibly could have been made on behalf of employees who had chosen to place

themselves in the situations that Florian and White had each placed himself. In the end, Steelworkers did negotiate a compromise that would have restored Florian and White to employment with Respondent-Employer. White accepted and returned to work; the ever-distrustful Florian rejected it, thereby losing any prospect of restored employment with Respondent-Employer. That is an unfortunate result, but neither with regard to Florian nor White does a preponderance of the credible evidence establish that Respondent-Union had failed in its statutory duty to fairly represent either one of them.

Nor can it be said that Respondent-Union failed to fairly represent Rolfe in connection with recall by Respondent-Employer. Any such allegation, and any remedy for such an allegation, runs into two insurmountable facts. First, there is no evidence whatsoever that Respondent-Employer had any light-duty work available at its Chicago facility from spring through fall. Second, Rolfe was restricted by his doctor to light-duty assignment during that entire period. There simply is no evidence showing that Rolfe had been qualified to perform any work that was available at that facility. And Rolfe had been told that by Mahoney.

Beyond that, there is virtually no credible evidence that Respondent-Union actually knew, nor reasonably could have suspected, by September 1 that Rolfe had somehow come into "affiliation" with Florian. Even if either could somehow be inferred as of September 1, virtually all of Rolfe's contacts on and after that date had been with officers of Steelworkers, not of Respondent-Union. There is no credible evidence that Steelworkers' officers had been aware of any "affiliation" between Rolfe and Florian, nor that either Langele or Pasnick had suspected as much. Even were there evidence sufficient to supply an inference of knowledge or, at least, suspicion by one or both of those officers, there is no evidence that Langele, Pasnick or any other Steelworkers' officer had harbored any animosity toward Florian or much cared if he had or intended to run for unit chairperson of Respondent-Union. To the contrary, as concluded above, on and after September 1 Steelworkers had been attempting to process Florian's grievance fairly and, eventually, processed it to relatively successful resolution, though Florian chose to reject that resolution. In that context, it simply would not be reasonable to conclude that Respondent-Union had been refusing to fairly represent Rolfe based upon any "affiliation" between him and Florian. Therefore, a preponderance of the credible evidence does not support the allegation that Respondent-Union had failed to fairly represent Rolfe.

A very different situation is presented when assessing motivation for Focht having been placed on paid leave on September 14, having been offered a last chance agreement on October 28, and having been discharged on November 3 for rejecting the transfer offered by that agreement. No evidence contradicts, and there is no basis for disputing, Kramer's testimony that he had intended during the spring to remove Focht from further involvement in the hiring process, upon learning of Focht's discrimination against female job-applicants. Compelling evidence corroborates that testimony. The May memoranda left Focht with the production manager's title, but with no hiring or other supervisory powers. As a result of those memoranda Focht ceased to be a statutory supervisory and

became an employee within the meaning of Section 2(3) of the Act, albeit not one included in the bargaining unit represented by Respondent-Union. With the arrival of Moore at Chicago, Focht lost even the title which had been left to him by the end of May.

In addition, there is no basis for disputing Kramer's testimony that, as of spring, he also had intended to remove Focht from the Chicago facility, by offering him a transfer to the Respondent-Employer's Jackson, Mississippi, facility and, should Focht decline that offer, to discharge Focht. After all, it was hardly illogical to transfer Focht from the facility where he had engaged in discriminatory hiring. But, at that point Kramer did not implement that portion of his overall decision regarding Focht. Relying upon advice of John Christopher, to take no such action until OFCCP issued a final determination, Kramer did not then transfer Focht, but left him to continue working in an undefined capacity at Chicago while awaiting OFCCP's final determination. Even so, Focht was left at Chicago without any further ability to engage in the hiring process there, thereby eliminating any possibility that he might take some future action which would lead to further adverse conclusions by OFCCP.

Kramer's testimony implodes, however, in connection with his asserted motivation for events occurring after August 7, when OFCCP did issue its final determination. Seemingly, that event cleared the way for Kramer to implement his preexisting decision to offer Focht transfer or termination. But, Kramer did not do that in the wake of OFCCP's final determination. His very failure to have done so at that point, of itself, is a relatively strong indication that, with Focht removed from the Chicago hiring process by August 7, Kramer had abandoned his original transfer-or-termination decision and, instead, had decided upon a different course of action with respect to Focht.

As set forth in Section I.J, *supra*, Kramer claimed that, from August until October 12, he had lacked any resource-person to provide counsel for preparing a last chance agreement, a type of document which Kramer had never prepared. To be sure, by August 7 John Christopher no longer was employed by Respondent-Employer as director of human resources and no one had been appointed to replace him. But, viewed from an objective position, those three factors do not truly support Kramer's testimony that he had been handcuffed in taking any action regarding Focht during August because of the absence of a director of human resources.

First, Respondent-Employer is a multistate, multimillion dollar entity. That very fact renders virtually incredible that its vice president of manufacturing would have been totally unable to locate some source capable of advising about, and even drafting, the type of last chance agreement which Kramer supposedly then contemplated presenting to Focht.

Second, even after John Christopher had left employment with it, Respondent-Employer had continued working with OFCCP and eventually reached agreement on satisfactory conciliation agreement terms. So far as the evidence shows, Respondent-Employer was as unfamiliar with negotiating conciliation agreements with OFCCP, as Kramer was in formulating terms for a last chance agreement. Yet, terms were reached for an acceptable conciliation agreement. Moreover, when

confronted with Florian's and White's unfair labor practice charges, Respondent-Employer was able to locate someone experienced to draft and submit an initial response on September 11 to the Board's regional office. The absence of a director of human resources may have somewhat hobbled those efforts. But, that absence of a director of human resources did not prevent Respondent-Employer from handling those matters. It seems inconceivable that Kramer could not have, likewise, located some source-person to draft a last chance agreement to present to Focht, had that truly remained Kramer's intention during August.

The third objective factor is particularly compelling with specific regard to Focht. During August Respondent-Employer presented him with a job description for the newly-created position of business manager. Now, it is undisputed that Respondent-Employer had never had a business manager prior to August. Nor, so far as the record discloses, did it have an already-prepared job description for that position. There is some indication that Drufke had prepared the job description for that newly-created position. But, there really is no direct evidence—"competent evidence which, if believed, would prove the existence of a fact at issue without inference or presumption." (Citation omitted.) *Zaban v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1456 (11th Cir. 1997); see also, *Woodson v. Scott Paper Co.*, 109 F.3d 913, 930 (3rd Cir. 1997)—that Drufke had done so or, if he had, that Drufke had done so without any aid or counsel from someone experienced in preparing descriptions for newly-created jobs.

The totality of those three objective considerations—that, despite the absence of a director of human resources, Respondent-Employer was able to reach agreement for an acceptable conciliation agreement, was able to prepare a job description for the newly-created position of business manager, and was able to submit an initial response to unfair labor practice charges—is a sound basis for inferring that Respondent-Employer could have located someone to prepare a last chance agreement to present to Focht, had that still been Kramer's intention by August 7. Failure to have then done that is a strong indication that Kramer no longer had intended to offer Focht the option of transfer or discharge.

The fact that Focht, instead, was offered the newly-created position of business manager during August is rather convincing evidence refuting any testimony by Kramer that, as of August 7 and immediately afterward, he still had intended to transfer or terminate Focht. It is undisputed that Kramer had known that Focht was being offered the position of northern region business manager. Kramer never explained why he would have countenanced offering that position to Focht if, indeed, Kramer still had intended to transfer Focht to Jackson or fire him, should he decline that transfer-offer. Surely it would have been a waste of time and resources to go to the bother of creating an entirely new position, and then offering it to Focht, had Kramer truly still been intending to offer Focht a transfer to Jackson and discharge Focht if he refused to accept transfer there. Moreover, there is no evidence that Respondent-Employer offered the position of business manager to anyone else, following the events of September through November. Those facts provide strong objective support for a conclusion that,

during August, Respondent-Employer had actually made a decision to continue employing Focht in its northern region, but in a position—business manager—where he would have no hiring or other supervisory power, thereby removing the possibility of repetition of conduct which led to hiring problems with the government.

There is no basis in the credible evidence for concluding that Focht had not created problems for Boyle and other Chicago personnel during his brief stint as business manager. However, as pointed out in Section I.M., supra, there is no reliable evidence that either Kramer—the official who made the September 14 and post-September 14 decisions concerning Focht—nor John Christopher—who counseled Kramer regarding the October and November actions—had been made aware of those problems before Focht had been discharged on November 3. Certainly neither one of them made any particularized references to Focht's conduct as business manager. Kramer never testified with specificity that he had decided to place Focht on paid leave, offer Focht a last chance agreement or discharge Focht, because of Focht's performance, or misperformance, as business manager. Indeed, had either Kramer or John Christopher known about the complaints concerning Focht's performance as business manager as of October 28, it seems doubtful, given my impression of both officials as non-sense individuals, that either Kramer or Christopher would have even considered continuing employing Focht at any of Respondent-Employer's facilities.

Kramer admitted that he had not intended to come to the Chicago facility on September 14. He did so only because of what he had been told during his telephone conversation with Drufke. What did Drufke tell Kramer during that conversation? Well, Boyle admitted that, before that telephone conversation, Focht had disclosed to Drufke that he (Focht) "went to the NLRB," as described in Section I.M., su

pra. Drufke danced around that disclosure, when he testified about what Focht had said. Yet, Drufke was willing to admit that Focht had acknowledged that he was "working with Chester's attorneys." Even had that been all that Drufke had said to Kramer, it surely would have put the latter on notice that Focht might also be involved with the Board. After all, by then Florian's charge had been on file for almost a month and Respondent-Employer was then on the lip of filing its initial response to the charge, as well as to that of White. Against that background, likely involvement in the charges' investigation would naturally have been perceived as one aspect of "working with Chester's lawyers."

As pointed out in Section I.C., supra, timing is a significant indicium when evaluating motivation for allegedly unlawful action. Not only can it "lend support to a Board inference of unfair labor practices," (citation omitted), *NLRB v. Tennessee Packers, Inc.*, 390 F.2d 782, 784 (6th Cir. 1968), but, "Timing alone may suggest anti-union animus as a motivating factor in an employer's action." (Citation omitted.) *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Of course, the motivation issue posed with regard to Focht is not "anti-union animus." Even so, there seems no reason in logic to believe that the United States Court of Appeals for the Seventh Circuit, nor for any other circuit, would reach a contrary conclusion where

the allegedly unlawful motive is “fill[ing] charges or giv[ing] testimony,” within the meaning of Section 8(a)(4) of the Act. Upon receiving Drukke’s telephone message, Kramer admittedly changed his plans and said that he would be at the Chicago facility on the next workday. In fact, he did arrive there on September 14. No other reason for so abrupt a change in plans was advanced by Kramer. Therefore, there is a strong basis for inferring that Kramer made his decision to come to Chicago on September 14 for no reason other than his acquisition of knowledge, or his suspicion, that Focht had become involved with the Board, as one integral aspect of working with Florian’s attorney.

There on that date, as described in Section I. M., *supra*, Kramer admittedly confirmed, during the meeting conducted, that Focht in fact was working with “someone’s attorney in conjunction with the National Labor Relations Board.” Kramer ended the meeting by putting Focht on paid leave, thereby removing Focht altogether from access to the Chicago facility, as well as from daily access to employees working there, and to ones working in Portage. From the sequence of events, as recited by Kramer, it is impossible to escape a conclusion that the sole reason that Kramer had placed Focht on paid leave had been the latter’s acknowledgment that he was working with Florian’s “attorney in conjunction with the National Labor Relations Board.”

In fact, as set forth in subsection I. M., *supra*, Kramer acknowledged that Focht had complained during the meeting about Respondent-Employer’s “treatment of Mr. Florian.” Of course, by the time of that September 14 meeting, both White and Rolfe also had filed unfair labor practice charges against Respondent-Employer. But, existence of those added charges hardly advance Respondent-Employer’s situation. Even if Kramer might have inferred that it was White’s or Rolfe’s attorney with whom Focht acknowledged to be working “in conjunction with the National Labor Relations Board,” that merely means that Kramer could have believed that Focht was working with a different employee’s attorney “in conjunction with the . . . Board.” In either event, Kramer learned directly from Focht on September 14 that, indeed, Focht had begun doing that. Moreover, since Focht complained only about Respondent-Employer’s treatment of Florian, it seems natural for Kramer to have concluded that, in fact, it was Florian’s attorney with whom Focht was working “in conjunction with the National Labor Relations Board.”

In an apparent effort to escape a conclusion that working with the Board had been one reason for placing Focht on paid leave, Kramer portrayed that action as having occurred only after Focht remarked that he felt “humiliated” as having been divested of production manager’s supervisory powers and, further, was hardly able to “stand being in the plant.” In other words, that Kramer had placed Focht on paid leave not because of any involvement with “someone’s attorney” and the Board, but rather to accommodate Focht’s asserted feelings of distress at having to continue working in the Chicago plant. Yet, objective evidence tends to negate any conclusion that it had only been those distress-remarks by Focht that had led Kramer to place Focht on paid leave at the end of the September 14 meeting. Instead, objective evidence shows no more than that

Kramer had seized upon those remarks as a vehicle for getting Focht out of the Chicago facility, by placing him on paid leave.

As set forth in Section I. M., *supra*, Kramer testified that Focht’s feelings, stated during the September 14 meeting, had led him to place Focht on paid leave, during which Focht was to “do some soul searching and determine what you think how you can best serve the company in the future.” Had that truly been Kramer’s lone motivation, presumably in due course Kramer would again have contacted Focht, to ascertain the latter’s proposed solutions formulated as a result of that “soul searching.” But, that never happened. Instead, Kramer left Focht cooling his heels on paid leave for slightly more than 5 weeks. Kramer never claimed that he made any effort during that period to determine any conclusions that Focht might have reached.

To be sure, when Kramer did ultimately meet again with Focht, Kramer began their meeting by asking a prefatory question about Focht’s conclusions. That is all it was, however: merely prefatory. For, admittedly, before that meeting Kramer had already decided to offer a last chance agreement to Focht and to fire Focht if he rejected that agreement’s offer of transfer to Jackson. Kramer never contended that anything said by Focht during the October 28 meeting would alter that course, transfer or discharge, which Kramer had already decided to follow before the October 28 meeting even began. There is no other evidence from which it can be inferred that Kramer would have pursued some different or modified course, had Focht made some suggestion which might have caught Kramer’s attention. So far as the evidence shows, Kramer intended to pursue the transfer-or-discharge offer, regardless of anything that Focht might say during the October 28 meeting. In light of those considerations, Kramer’s prefatory question to Focht, about the latter’s conclusions, amounted to no more than an extension of the pretext upon which Kramer had seized during the September 14 meeting as the purported reason for having placed Focht on paid leave that day.

It should not escape notice that Focht’s September 14 statement, about involvement with the Board, would not be the first occasion during 1998 when Focht had caused grief for Respondent-Employer as a result of remarks to a government agency. Only a few months earlier his statements to OFCCP had saddled Respondent-Employer with a final determination of unlawful hiring practices and with a monetary remedy. True, Focht’s remarks to OFCCP had involved Focht’s own conduct. Still, Respondent-Employer bore the brunt of remedying those unlawful hiring practices. Now, during September, Focht was acknowledging involvement with a different government agency. Kramer, who had been fully aware of what occurred during OFCCP’s audit, could hardly overlook the possibility that Focht would again be making statements which might lead to additional remedial obligations being imposed on Respondent-Employer. That hardly was a palatable prospect for Kramer to contemplate. Such a prospect, coupled with the timing of placing Focht on paid leave in connection with his disclosure of involvement with the Board and with the absence of any other credible legitimate reason for having placed Focht on paid leave on September 14, support the conclusion that Kramer’s actual reason for having placed Focht on paid leave

had been the latter's disclosure of involvement with an "attorney in conjunction with the National Labor Relations Board."

One bootstrap argument needs to be addressed in connection with the preceding paragraph's conclusion. Kramer's concern with Focht becoming involved with the Board, that argument proceeds, should be regarded as evidence that Focht had something to disclose to the Board which would show unlawful motivation for the suspensions and discharges of Florian and White, just as his disclosures to OFCCP auditors had shown unlawful hiring. Such an argument in the context of Focht being placed on paid leave, however, represents no more than pillars of sand leaning against each other for support.

As concluded above, as well as in subsections of Section I, *supra*, the preponderance of credible evidence does not establish that Respondent-Employer had been motivated by any proscription imposed by the Act when it suspended and terminated either Florian or White. By September Kramer surely appreciated that fact. Still, he had to be concerned about what Focht might tell the Board, in light of Focht's expression of "humiliation" because of loss of his supervisory powers and, by September, title of production manager. Obviously, even the purest of motive can be concluded to have been adulterated, if someone is willing to fabricate testimony and to distort remarks which had been made. Consequently, the fact that Kramer had retaliated against Focht, for the latter's disclosure that he was working with "someone's attorney in conjunction with the National Labor Relations Board," does not, standing alone, advance any argument that earlier disciplinary action had been unlawfully motivated. At best, the motivation for Kramer's actions directed toward Focht constitutes no more than an illustration of the principle that "a piece of fruit may well be bruised without being rotten to the core." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984). That one official took action for unlawful motivation does not require a conclusion that other officials had earlier done so.

None of what has been said in the immediately preceding paragraph, of course, should be construed as some sort of license for statutory employers to engage in discrimination merely because of some sort of belief, no matter how well-founded, that someone employed *may* be giving false testimony to the Board in an affidavit. To allow such speculation to suffice as a basis for discrimination would undermine the policies underlying Section 8(a)(4) of the Act. See, e.g., *Condea Vista Co.*, 332 NLRB 1275 fn. 1 (2000). In fact, Kramer never claimed that his decisions concerning Focht had been motivated by suspicion that the latter had been making false statements to the Board, in the course of working with "someone's attorney." So, Respondent-Employer cannot now validly defend its September 14 through November 3 actions directed against Focht on the basis of some sort of suspicion about the truthfulness of Focht's statements to the Board's regional office investigator.

In fact, a preponderance of the credible evidence establishes that a motive for each of Kramer's actions against Focht had been the latter's disclosure that he had become involved with the Board, in the course of working with "someone's attorney." By September, Focht had been removed from Respondent-Employer's hiring process and no longer possessed any supervisory authority, thereby erasing any further concern that he

might commit improprieties in the course of hiring or exercising any other supervisory powers. By September, Focht had been recently installed in a newly-created position that left Respondent-Employer able to take advantage of his acknowledged technical expertise, while avoiding further problems in hiring or other exercise of supervisory authority by Focht. Despite his spring tentative decisions, Kramer appeared satisfied with Focht's situation until learning of Focht's involvement with the Board, as Boyle admitted that Focht had said on September 11. That led Kramer to make an unscheduled trip to the Chicago facility where he confirmed from Focht that the latter was, indeed, involved "with the National Labor Relations Board," in the course of working with "someone's attorney." Before that meeting ended, Kramer placed Focht on paid leave.

Kramer said at that time that the paid leave was intended to allow time for Focht to do some "soul searching" regarding his future with Respondent-Employer. But, Kramer made no effort whatsoever to determine what conclusions Focht might have reached. Rather, Kramer left Focht on paid leave for little more than 5 weeks—a period sufficient to allow some hiatus to develop between Focht's admissions about involvement with the Board and ultimate action by Respondent-Employer concerning Focht's future—after which Kramer presented Focht with a last chance agreement, containing a battery of unsupported accusations regarding Focht's employment history with Respondent-Employer. Absence of evidentiary support for those accusations and Respondent-Employer's failure to explain with particularity its reasons for having included each one in the last chance agreement, coupled with the indicia underlying its decision to place Focht on paid leave 5 weeks earlier, as well as with his relatively-recent appointment to a new-created position, collectively support a conclusion, as an objective matter, that the agreement had been offered to Focht as a vehicle for removing him from the Chicago facility because of his involvement with the Board and, beyond that, with some expectation that he would reject the agreement's transfer-offer and, in so doing, afford Respondent-Employer with a means for firing Focht. That, of course, is what happened.

The factors enumerated in the immediately preceding paragraph lend support to my conclusion, formed as they were testifying, that neither Kramer nor John Christopher were being candid when attempting to describe motivation for offering a last chance agreement to Focht and, then, firing him when he rejected its offer. Therefore, I conclude that a preponderance of the credible evidence does establish that Focht had been placed on paid leave on September 14, offered the last chance agreement on October 28, and discharged on November 3 because Kramer discovered that Focht—a statutory employee—had become involved with the Board, in the course of working with "someone's attorney," and had decided to retaliate against Focht for having engaged in that statutorily-protected conduct, in violation of Sections 8(a)(4) and (1) of the Act. That leaves for consideration the remedy to be ordered for having engaged in those unfair labor practices.

In addition to cease and desist orders, backpay and reinstatement are ordinarily ordered as remedies for discriminatory conduct. Those remedies are intended "to vindicate the law against one who has broken it." *Lipman Bros., Inc.*, 164 NLRB

850, 853 (1967). See more recently, *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir. 1989). To deny either one in the ordinary situation would be to “subvert the protection of [Section] 7 of the Act,” where “discriminatory discharges” have occurred. *NLRB v. International Van Lines*, 409 U.S. 48, 53 (1972). Indeed, reinstatement is a particularly important remedy to order in situations where, as here, an employer’s discriminatory motivation is one proscribed by Section 8(a)(4) of the Act. To allow conduct motivated by that proscription to be left unremedied by reinstatement would naturally compromise a statutory prohibition aimed at effective administration of the Act. See, e.g., *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966). Nonetheless, effective administration of the Act involves more than ensuring maximum freedom for access to the Board.

The ordinary remedies of backpay and reinstatement will be withheld whenever a discriminatee has given testimony so false that it rises to the level of “deliberate and malicious conduct,” *Service Garage, Inc.*, 256 NLRB 931 (1981), because such conduct undermines the Board’s ability to effectively achieve and administer the totality of the Act’s objectives. See, *Owens Illinois*, 290 NLRB 1193 (1988). That is precisely the situation presented by Focht. He was a generally untrustworthy witness. That is not merely a subjectively-based impression. Analysis of his sometimes internally-contradictory, other times uncorroborated, and not-infrequently contradicted testimony, described in various subsections of Section I, *supra*, leaves no room for disputing that Focht gave testimony totally lacking in effort to be candid, both when testifying during the hearing and, as well, in his prehearing affidavit given during the underlying investigation. Indeed, because of those false statements made during the investigation, it is difficult to assess the extent to which the General Counsel would have pursued the complaint’s other allegations had Focht not provided those statements during the investigation. Obviously, supplying false statements during the investigative phase of the Board’s proceedings, and thereby leading the General Counsel to make allegations not based in whole or in part on credible evidence, is hardly a course which promotes effective administration of the Act.

Focht’s lack of candor was not confined to what he said during this proceeding. Even before the charges had been filed, he had acted upon his dislike for Damron by aiding Florian in his effort to supplant Damron as unit chairperson. In the process, then-Production Manager Focht supplied Florian—and, at least, Phillips, as well—with records some of which should only have been provided to a statutory bargaining agent. In so doing, Focht engaged in prohibited direct dealing with represented employees, as described in Section I.C., *supra*. That is hardly conduct which promotes effective administration of the Act. Nor is that objective promoted by a production manager’s false statements to an employee that the unit chairman has been attempting to persuade the employer to fire that employee. Yet, that was Damron had been doing while serving as production manager, a position that would naturally lead an employee to believe that such adverse statements about the unit chairman had basis in fact.

Focht did not confine his remarks to ones made to Florian. During the same period as he was saying to Florian that his

(Florian’s) discharge was being sought by Damron, Focht also was telling Damron, during the December 1997 labor-management meeting described in Section I.C., *supra*, that Florian was extracting money and monetary equivalents from commercial truckdrivers. In doing so, Focht apparently was attempting to “conflict this” situation of mutual dislike which Florian and Damron harbored for each other. It hardly promotes effective administration of the Act when someone seeks to poison the relationship between an employee and an agent of that employee’s statutory bargaining agent.

Of course, those events had occurred while Focht was production manager and he no longer occupied that position by the time he went to the Board’s regional office on August 31. He had become business manager by then, a nonsupervisory position, and it would be to that position that any reinstatement order would be directed. Yet, as also described in Section I.C., *supra*, even after ceasing to possess supervisory powers, Focht continued to take actions and make statements which naturally caused “conflict” between Florian and Damron. For example, Focht granted Florian’s request for a day off on one Saturday. By the time of doing so, Focht no longer possessed authority to take such action. But, when Florian then was denied that day off, as a result of Damron’s intervention on behalf of employees being denied days off because of past favoritism shown by Focht to Florian, the situation was left with Florian believing that Damron had improperly caused the initially granted day off to be rescinded. And Focht seems to have been satisfied to allow that “conflict” to remain uncorrected. For there is no evidence that Focht had made the least effort to inform Florian that he (Focht) had lacked authority to grant a day off to anybody, nor to inform Florian of the true reason for Damron’s objection.

Beyond that, as set forth in Section I.H., *supra*, when Florian had been suspended, and had come upstairs to consult with Focht about that suspension on August 4, Focht admittedly had told Florian that “he got set up,” and during an ensuing telephone conversation he ultimately admitted, having told Florian that, “I felt he was a [sic] setup by Mr. Boyle and Mr. Damron.” Given the earlier false remarks made to him while Focht had been production manager, and the likely special knowledge that Focht would seemingly acquire while having served in that position, it would have been natural for Florian to conclude during August that, in fact, there was truth to Focht’s statements. In turn, it would have been logical for Florian to conclude, based upon Focht’s ongoing false statements about Damron, that Respondent-Union did not intend to represent him and, from that, to distrust anything said to him by most officials of Respondent-Union and, as well, by Steelworkers’ officials. True, Florian had not liked Damron. However, there is no basis for inferring that dislike would have blossomed into distrust had Florian not been supplied with Focht’s false statements concerning Damron.

Obviously, those remarks by Focht, and the distrust which they bred, left Florian unable to accurately assess the situation in connection with the grievance filed on his behalf. That is, he distrusted what his bargaining agent and its international officers were saying to him which, in turn, left him unreceptive to proposed alternative course of action which they were attempt-

ing to pursue in an effort to get his job back. In short, Focht's ongoing false statements contributed to, perhaps caused, distrust between an employee and his bargaining agent, thereby frustrating that bargaining agent's ability to represent that employee. That also is a result inconsistent with effective administration of the Act.

One other point should not be overlooked. It is undisputed that when Moore first had warned Florian during mid-July to cease driving on South Kilbourn Street between buildings while on the clock, as described in Section I. G., *supra*, Florian had retorted that he was "going to have to talk to Jack Focht about it," or to "check with Jack Focht." There is no evidence showing that Florian had not done so. However, given the overall sequence of events, especially Florian's postsuspension prompt trip to where Focht was working at the time, it seems a fair inference that Florian had "check[ed] with Jack Focht" about what he had been told by Moore.

Neither Florian nor Focht testified about what had been said between them, in the wake of Moore's mid-July warning to Florian. Yet, Florian continued thereafter to drive on South Kilbourn between buildings while on the clock, until caught again by Moore on August 3. By mid-July Focht had admittedly become embittered at losing his authority as production manager and, of course, by then it had been Moore—the same official who had warned Florian about driving between buildings—who occupied the production manager position. From the totality of these considerations, it is a fair inference that Focht had told Florian to simply disregard whatever Moore had warned—to continue doing as he had been doing which, obviously, had been the course that Florian then followed. That is hardly a situation which is consistent with effective administration of the Act's overall purposes, especially when the employee involved then was discharged for the very conduct which he had been warned not to repeat. There is a substantial basis for inferring that Florian was discharged as a result of following Focht's advice.

There is no basis for concluding that, were he to be reinstated, Focht would cease engaging in such disruptive activities—ones which impaired relations between unit members and their statutory bargaining agent, ones which inherently disrupted the ability of that statutory bargaining agent and those employees' employer to bargain successfully for resolutions of grievances, and ones which disrupted relations between employee and employer—which undermine effective operation and administration of the Act. To the contrary, from his attitude while testifying, there is every basis for concluding that, if reinstated, Focht would locate other "conflict[s]" that he could create for unit employees, Respondent-Union and Respondent-Employer. In fact, though Kramer had been unaware of them when making his decisions pertaining to Focht, so far as the evidence shows, Focht's undisputed misconduct and interference with operations while serving as business manager, are further evidence of his willingness to continue engaging in improper and disruptive conduct, should he be reinstated. In sum, it does not promote the policies of the Act to order reinstatement for someone who has taken so many actions, with so many consequences, that undermine the objectives and policies of the Act.

Nor does an award of backpay to Focht promote the objectives and policies of the Act. His words and conduct effectively led to that employee's suspension and termination. They also led that employee to so distrust his statutory bargaining agent, and its international body, that those labor organizations were prevented from effectively representing that employee. As a result, that employee has lost his job. Indeed, Focht's words and conduct directly and indirectly caused a general disruption of relations between a statutory bargaining agent and other employees represented by that bargaining agent, as shown by the attitudes of Phillips and Rolfe. Beyond that, as pointed out above the General Counsel relied upon Focht's affidavit statements for some of the evidence presented during the hearing in the instant proceeding, certainly for the testimony elicited from Focht. No one can say with absolute assurance what litigation course would have been followed, had Focht's false statements not been available when deciding to issue complaint and progress through hearing. Nevertheless, it is fair to conclude that this proceeding would not have been so prolonged, had those false statements not been made during the investigation.

In fact, there may have been no proceeding at all, at least on behalf of Florian, had Focht not made false statements that caused Florian's dislike of unit officers to blossom into distrust. Absent that distrust, Florian may well have assessed more dispassionately the statements being made by Respondent-Union and Steelworkers—may well have accepted the ultimate compromise reached and returned to employment with Respondent-Employer, leaving the amount of backpay to be determined during arbitration. Given the cost to the Board of this proceeding, the cost to Florian of relying upon what had been said to him, and the costs to both Respondents of having to participate in proceedings in which they might not otherwise have been forced to participate to defend themselves, it cannot be said that awarding backpay to Focht would promote any objective or policy contemplated by the Act.

Eliminating reinstatement and backpay remedies does not somehow allow Respondent-Employer to escape the consequences of its unlawfully motivated actions toward Focht. It remains subject to a cease and desist order. That order will remain as background should Respondent-Employer again engage in conduct which violates Section 8(a)(4) of the Act. That is not an inconsiderable consequence. Indeed, were reinstatement and backpay to be ordered, but were Focht to reject reinstatement and not be entitled to any backpay due to interim employment, the cease and desist order would be the one remaining remedy left—the situation would be no different than results from withholding those remedies because of Focht's "deliberate and malicious conduct, *Service Garage*, *supra*, which undermined effective administration of the Act and the ability of the Board to achieve the Act's objectives.

As pointed out above, in a different setting the United States Court of Appeals for the Seventh Circuit stated that "there must be room in the law for a right of an employer somewhere, sometime, at some stage, to free itself of continuing" employee misconduct. *NLRB v. Eldorado Mfg. Co.*, 660 F.2d 1207, 1214 (7th Cir. 1981). No differing approach is warranted in connection with the Board's evaluation of its remedial power. Parallel

logic dictates a like conclusion where a discriminatee's actions, and likely future actions, are contrary to the objectives and policies of the Act. This situation presents the place, the time and the stage for withholding reinstatement and backpay as remedies.

#### CONCLUSIONS OF LAW

Precoat Metals has committed unfair labor practices affecting commerce by placing on paid leave of absence, by offering a last chance agreement to, and by discharging Jack Focht for having spoken with, and given an affidavit to, an agent of the National Labor Relations Board, in violation of Sections 8(a)(4) and (1) of the Act. However, it has not violated the Act in any other manner alleged in the Consolidated Complaint, as amended.

#### REMEDY

Having concluded that Precoat Metals has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended<sup>23</sup>

#### ORDER

Precoat Metals, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Placing on paid leave of absence, offering a last chance agreement to, discharging, or otherwise discriminating against Jack Focht, or any other employees and supervisors, for having filed charges or given testimony, including in the form of an affidavit, under the National Labor Relations Act.

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

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

(a) Within 14 days after service by the Region, post at its Chicago, Illinois place of business copies of the attached notice marked "Appendix."<sup>24</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by its duly authorized representative shall be posted by Precoat Metals 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 it to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these pro-

ceedings, Precoat Metals has gone out of business, or closed the Chicago facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at that facility at any time since March 14, 1998.

(b) 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 steps that it has taken to comply.

IT IS FURTHER ORDERED that the Consolidated Complaint as amended be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein and, further, that Cases 13-CA-37256, 13-CA-37310, 13-CB-15838, 13-CB-15860 and 13-CB-15868 be, and hereby are, severed and dismissed in their entirety.

Dated: Washington, D.C. January 31, 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 place on paid leave of absence, offer a last chance agreement to, discharge or otherwise discriminate against Jack Focht, or any other employee or supervisor, for having filed charges or given testimony, including in the form of an affidavit, under the National Labor Relations Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of your rights guaranteed by the National Labor Relations Act.

PRECOAT METALS

<sup>23</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.

<sup>24</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."